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CHEVRON v. NRDC: A THIRTIETH ANNIVERSARY COMMEMORATION

ARTICLE

COMMENTS

THIRTY YEARS OF *CHEVRON v. NRDC* AND THE ADMINISTRATIVE LAW REVIEW: A LETTER FROM THE EXECUTIVE BOARD

467 U.S. 837. The citation alone conjures the cadence of a certain two-step analysis for most law students, and certainly any scholar of administrative law. The impact, relevance, and continued controversy of *Chevron USA Inc. v. Natural Resources Defense Council* cannot be understated, yet it is oft misunderstood. No matter an attorney's take on the doctrine, and regardless of its future impact, the case has deeply altered—and in many instances dictated—the power of our regulatory state. That is why the 2013–2014 *Administrative Law Review* (*ALR*) Executive Board set out to unpack the evolution of the case from its inception in June 1984 to the present, thirty years later, using our journal's coverage as a lens. We discovered consistent shifts in *Chevron* scholarship; the research unveiled a transformation in the case's meaning that largely followed the contours of regulatory practice in the United States. In the three decades since *Chevron* became the guide for the judiciary's analysis of agency action, the *ALR* has documented three subtle, unsurprising, and yet profound *Chevron* generations: confusion, progeny, and reincarnation.

CHEVRON'S INITIAL IMPACT

Although greeted with criticism when it was initially released, scholars did not begin a full analysis or commentary on *Chevron* until years after it was published. At first, *Chevron* seemed to be just another case that had muddied the waters in a stream of judicial review decisions—that is, until subsequent case law solidified *Chevron's* reign over judicial review of administrative law. It became clear years after *Chevron* that lower courts needed a concrete standard for analysis of agency action, but that *Chevron* did not necessarily produce consistent results. However, in the context of the *ALR*, the resulting confusion seemed like a continuation of themes already existing in traditional deference analysis.

Indeed, administrative law before *Chevron* and since has not been a

"monolithic age of judicial deference" as some scholars suggested.[1] As Professor Ann Woolhandler noted in a 1991 *ALR* article, early administrative law decisions demonstrated a frequent vacillation between deference to the agency and de novo judicial review. She aptly noted that, "one cannot conclude that there is one ideal and elegant allocation of power between court and agency where administrative law will necessarily have to rest."[2] Decades later, these words are no less true. Early coverage of *Chevron* made clear that when speculating on the future of administrative law, one should keep in mind that the past does not serve as a particularly reliable guide. What is in vogue today as the "correct" allocation of power between the courts and agencies may, very likely, invert in the future.

Unsurprisingly, within the first decade after *Chevron*'s release, the *ALR* chronicled various conflicting critiques and proposals for adjusting the case. Keith Werhan argued in 1992 that the Neoclassical model and its flagship, *Chevron*, was a failed experiment.[3] Werhan advocated a return to the traditional model embodied in *National Labor Relations Board v. Hearst Publications, Inc.*[4] and the Administrative Procedure Act (APA).[5] He criticized *Chevron* for removing the courts' role as guardians of agency action,[6] a viewpoint vehemently contrasted by future scholars who saw *Chevron* as a backdoor mechanism for greater judicial power. Also in 1992, the *ALR* published an empirical study of the consequences of *Chevron* in the D.C. Circuit which found that: (1) the Circuit affirmed more often using its own formulation rather than the Supreme Court's two-step test in *Chevron*; and (2) although the relationship between the D.C. Circuit and the Supreme Court was described as contentious before *Chevron*, the D.C. Circuit applied *Chevron* in 74% of its relevant cases.[7]

Perhaps the most prescient criticism of *Chevron* in its early days was in an *ALR* article by then-Judge Stephen Breyer, who predicted that the simplicity of *Chevron* was untenable in the complex world of administrative

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1. Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 199 (1991).

2. *Id.* at 245.

3. Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567 (1992).

4. 322 U.S. 111 (1944).

5. Werhan, *supra* note 3.

6. *Id.* at 624.

7. John F. Belcaster, *The D.C. Circuit's Use of the* Chevron *Test: Constructing a Positive Theory of Judicial Obedience and Disobedience*, 44 ADMIN. L. REV. 745, 759 (1992). This first finding of the empirical study is particularly interesting (or ironic), given that *Chevron*'s solidification as a seminal doctrine is largely attributed to the D.C. Circuit. *See* Merrill, *infra* note 27.

law. He noted that, "to read *Chevron* as laying down a blanket rule, applicable to all agency interpretations of law, such as 'always defer to the agency when the statute is silent,' would be seriously overbroad, counterproductive and sometimes senseless."[8] His criticism and outlook of course became the multi-factor Step Zero in *United States v. Mead Corp.*[9] more than a decade later. *Mead* and other cases following *Chevron* led the Supreme Court to adjust, and chip away at, the case's "blanket rule." As the case's progeny developed, scholars also began to more outwardly revere or despise *Chevron* in academic fora.

CHEVRON'S PROGENY

As courts around the country grappled with *Chevron*, and as the simple two-step test inevitably collided with complexity of the administrative state, the Supreme Court tweaked the case, and then tweaked it back again. Criticism from within the Court and academia mounted as this took place, and most scholarship directly criticized *Chevron* in the second decade of the *ALR*'s coverage. In the early 2000s, scholars began to plunge into the high-level, introspective analytical questions of what *Chevron* really meant for administrative law and the courts.

In this period, Professor Richard J. Pierce Jr. assessed the palliative potential of *Chevron*, while also recognizing that its power to lubricate the gears of agency rulemaking had been somewhat overstated.[10] Another scholar, and certainly the most vocal, Justice Antonin Scalia, fervently dissented in *Mead*, arguing for a return to a "pure" *Chevron* analysis.[11] A 2002 *ALR* article by Professor Cooley Howarth Jr. described Justice Scalia's insight in *Mead*. Professor Howarth remarked that the Court's failure to define "interpretation" led to two troubling consequences: (1) a court may provide for deference where it is inappropriate (for example, where congressional intent can be understood through the interpretation itself); and (2) vagueness around the term "interpretation" undermined the imperative that agencies, not courts, are trusted with regulatory-statute implementation.[12]

Professor Howarth was one of many who sharply criticized *Mead*.

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8. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986).

9. 533 U.S. 218 (2001).

10. *See generally* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

11. *Mead*, 533 U.S. at 239–61 (Scalia, J., dissenting).

12. Cooley L. Howarth Jr., United States v. Mead Corp.*: More Pieces for the* Chevron/Skidmore *Deference Puzzle*, 54 ADMIN. L. REV. 699, 701 (2002).

Professor William S. Jordan critiqued *Mead* and *Christensen v. Harris County*[13] in 2002 for unduly confusing the judicial schemata for determining the appropriate deference due to agencies.[14] Shortly thereafter, Professor William R. Andersen criticized *Chevron* and its progeny for creating a doctrine draped in unpredictability and subjected to manipulation by parties in each case. He suggested, instead, that § 706 of the APA be amended to abolish *Chevron* and institute standards lending toward more predictability in judicial determination.[15] This era of criticism and evolving case law might have signaled a permanent shift in deference analysis, but the coverage during *Chevron*'s third decade suggests otherwise.

REINCARNATION, OR PERHAPS NEVER GONE

Chevron entered its third decade as the most crucial precedent in administrative law, perhaps simply because of strikingly contradictory Supreme Court decisions which continually led academia to question the case's relevance; by odd circumstance, this criticism seems to have kept the doctrine alive. *ALR*'s coverage of *Chevron* in this period shows sharply divergent views on the case's value. Despite, or perhaps because of, the contradictory opinions in scholarship, *Chevron* unquestionably maintained its role as administrative law's seminal case.

The *ALR's* coverage during the third decade shows an underlying agreement among authors that modern *Chevron* is a considerably different doctrine than what was originally proposed. From there, however, the commentary diverges. Some works celebrated a predicted demise of *Chevron*, arguing that as a doctrine it was both confusing and no longer applied by the courts.[16] Yet the majority of authors praised *Chevron* for its lasting effect, either in its original or evolving form. Professor Abigail R. Moncrieff argued in 2008 that the basic assumptions underlying *Chevron* are correct, and suggested reverting to an earlier incantation of *Chevron* where the court plays a "refereeing" role.[17] Unlike the general trajectory of

13. 529 U.S. 576 (2000).

14. William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer is* Chevron *Step Two, Not* Christensen *or* Mead, 54 ADMIN. L. REV. 719 (2002).

15. *See* William R. Andersen, *Against* Chevron*—A Modest Proposal*, 56 ADMIN. L. REV. 957, 972 (2004).

16. *See* Linda Jellum, Chevron*'s Demise: A Survey of Chevron From Infancy to Senescence*, 59 ADMIN. L. REV. 725, 728 (2007) (suggesting, almost twenty-five years after *Chevron* was decided, that the Court has ultimately rejected the foundational theory of *Chevron* and has consequently reformulated *Chevron* in such a way that has hastened its demise).

17. 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.

scholarly work on *Chevron* at this point, Professor Moncrieff accepted *Chevron* as a legitimate rubric of judicial review of agency decisions. She highlighted *Chevron*'s assumptions as flawed, but accepted them as valid nonetheless.[18] Her article criticized the Court's then-current view of *Chevron*, and harkened back to a stronger, clearer articulation for the doctrine.[19]

The evolution and permanence of *Chevron* is at the heart of recent scholarship. In 2007, for example, Professor Daniel J. Gifford claimed that *Chevron* remained crucial and was merely evolving, becoming better tailored to the needs of federal courts and the decisions they review.[20] Professor Elizabeth V. Foote praised the modification of *Chevron*, which she characterized as reincarnating a more APA-centric form of review, "more attuned to the actual legal function of public administration" rather than the "judge-made *Chevron* canons."[21] In contrast, Gregory M. Dickinson condemned the lacuna that has gone unfilled despite the Court's extensive efforts to recalibrate *Chevron*. The void Dickinson pointed to concerned the tension between the presumption against preemption on one hand and *Chevron* deference on the other. Dickinson expressed his concern for agency aggrandizement at the expense of state sovereignty in 2011, before the Court decided *City of Arlington v. FCC*.[22] However, the *Arlington* Court's decision in 2013 confirmed Dickerson's concern.[23]

Another group of scholars, practitioners, and jurists, most prominently including Justice Scalia, neither celebrated *Chevron*'s purported demise nor championed its "evolution," but instead inveighed against what they saw as the unnecessary muddling of an efficient and sensible rule. Recent *Chevron* scholarship probes the role of the courts and the use of *Chevron* as a form of judicial power. Many modern scholars conclude that contrary to the view that *Chevron* mandated deference to the executive, it has in fact given the judiciary additional power to determine the legitimacy of agency

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593, 597 (2008).

18. *Id.* at 608–10.

19. *Id.* at 642–44.

20. *See* Daniel J. Gifford, *The Emerging Outlines of a Revised* Chevron *Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 833 (2007) (arguing the *Chevron* doctrine was unclear at conception and suggesting that the more current iteration of *Chevron* deference that has evolved over the years is a better one for both the judiciary and the agency decisions).

21. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why it Matters*, 59 ADMIN. L. REV. 673, 674 (2007).

22. 133 S. Ct. 1863 (2013).

23. Gregory M. Dickinson, *Calibrating* Chevron *for Preemption*, 63 ADMIN. L. REV. 667, 672–75 (2011).

rulemaking. An empirical overview by Professor Pierce published by the *ALR* in 2011, concluded that the doctrine chosen by the courts was not determinative of outcome, and that courts deferred to agency action 70% of the time regardless.[24] Randolph J. May noted the role of the courts when applying *Chevron* could influence political accountability in a way that Congress was unable, for example through oversight hearings and the confirmation process.[25] Even with widely varied expressions of *Chevron* in case law since its inception, and more recent suggestions diluting the case's initial standard and intention, the *ALR*'s coverage consistently demonstrates that the case's influence remains, at least for now, resilient, important, and continually evolving.

THE 30TH ANNIVERSARY AND BEYOND

The works that follow were chosen with *Chevron*'s history in the *ALR* and its inevitable future role in mind. The aim is not just to look back, but to also highlight how the doctrine's controversial impact might affect our lives and work moving forward. The first piece comes from Justice Antonin Scalia. Justice Scalia's opinions serve as a touchstone for administrative law practitioners, scholars, agency actors, and students. The piece below adds to this groundwork, providing previously unpublished remarks the Justice gave at American University Washington College of Law in 2009, at an *ALR* event commemorating *Chevron*'s 25th anniversary. The remarks offer a still relevant and prolific foreshadowing of what has become the *Chevron* doctrine's current state in administrative law.

The second piece in the commemorative section is from Professor Thomas W. Merrill, and is reprinted from ADMINISTRATIVE LAW STORIES.[26] Professor Merrill's piece provides a retrospective on the

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24. Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011) ("[T]he studies suggest that a court's choice of which doctrine to apply in reviewing an agency action is not an important determinant of outcomes in the Supreme Court or the circuit courts. The ranges of affirmance rates by doctrine are as follows: *Chevron*, 60% to 81.3%; *Skidmore*, 55.1% to 73.5%; *State Farm*, 64%; substantial evidence, 64% to 71.2%; and de novo, 66%.").

25. Randolph J. May, *Defining Deference Down, Again: Independent Agencies,* Chevron *Deference, and* Fox, 62 ADMIN. L. REV. 433, 447 (2010) (stating that *Chevron* can spark a wider discussion regarding what types of agencies and what types of actions by agencies ought to be afforded more or less deference, for example changes in policy by independent agencies).

26. Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark in* ADMINISTRATIVE LAW STORIES 399 (Peter Strauss ed., 2006); Thomas W. Merrill, *Sometimes Great Cases are Made, Not Born: The Story of* Chevron *in* STATUTORY INTERPRETATION STORIES (William N. Eskridge, Jr., et al. eds., Foundation Press 2011); Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 NW. U. L. REV. 551 (2012).

interesting idiosyncrasies in *Chevron*'s development. The piece offers useful context and insight to the foundation of the doctrine, particularly for anticipating the case's role in jurisprudence to come.

The third and final article is by Frederick Liu and focuses on the future of *Chevron.* The piece discusses the inevitable contortions Mr. Liu sees in *Chevron*'s future, and offers a succinct and insightful standard for applying the case moving forward. Together, this scholarship highlights the seemingly simple background—yet immense effect—of a case that irrevocably changed administrative law and regulatory practice in this country.

The *ALR* Executive Board has extensively studied this doctrine, as traced by our journal, and the lessons are far-reaching. We, and the *ALR* staff at large, will join the ranks of practitioners in our administrative state—in public service and in representing regulated entities—and so we *must* understand how regulators interact with the judiciary, our representatives, and the public. As emerging attorneys in various fields heavily impacted by administrative law, we understand the importance of clarity and continuity in the deference framework. We have been intrigued, but also discouraged by looking back at *Chevron*'s impact, and its role as a signal of the confusion in our regulatory structure. Perhaps now more than ever, the impact of regulation is omnipresent in our lives, and uncertainty can be destructive and wasteful. But we believe in process. Our goal is to contribute to a field that faces difficult legal questions, convenient or not; one that maximizes the efficiency, but also the expertise, of our civil servants. We are entering the legal field trusting that the ebb and flow of political emphasis on regulation will always prioritize productivity. We also trust that our government will continue to support the administrative process that sets our legal system apart.

Before beginning this project we knew the vital presence the regulatory state has in our country, and the example it sets across the world. We understand also that *ALR*'s coverage of *Chevron*, and the trends discussed here, involve just a sliver of the case's breadth overall, and indeed just a portion of the journal's own record. Yet this commemorative project has helped us understand not only the impact of *Chevron* and other powerful legal mechanisms in administrative law, but it has also given us a better grasp of the challenges that lie ahead for practitioners. Above all, this project, and indeed our capstone year focused intensively on administrative law, has inspired us to keep working—to continue to stabilize and make more perfect our administrative state. We truly hope that it does the same for our readers.

– The 2013–2014 Administrative Law Review Executive Board

REMARKS BY THE HONORABLE ANTONIN SCALIA FOR THE 25TH ANNIVERSARY OF *CHEVRON V. NRDC*

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW
APRIL 2009

JUSTICE SCALIA: Twenty years ago I was invited to give a talk similar to this at another law school[1] on the occasion of *Chevron*'s[2] fifth anniversary. At the time it was already clear that *Chevron* was a watershed decision. Still in its infancy, the Court's opinion had already been cited hundreds of times by the lower courts. With the passage of time that number has grown into the thousands. Of course *Chevron* did not break entirely new ground. Courts had long deferred to agency determinations, including determinations concerning the law, and in my view the same theory underlies both the pre- and the post-*Chevron* regimes, namely the theory that courts must defer to agency decisions because and to the extent that Congress has delegated law-making authority to administrative agencies.[3]

In the rest of this talk, I will speak of the "delegation" of lawmaking authority because that's the standard terminology. But of course you all know that Congress cannot delegate any legislative authority. So, when you talk of an "unconstitutional" delegation of legislative authority you don't mean, "Oh, this is an unconstitutional delegation," as opposed to a constitutional delegation. There is no such thing as a constitutional delegation. It would be more accurate to refer to a "conferral" of lawmaking authority upon an agency—and to say that there are constitutional limits on how much lawmaking authority can be conferred, rather than limits on how much lawmaking authority can be delegated. So I'll use the word delegation now and then, but bear in mind that I wish the law professors would get another word.

As I was saying, the same theory underlies both pre- and post-*Chevron* deferral cases, namely that Congress has delegated law-making authority to the agencies. *Chevron*'s innovation, as I saw it two decades ago, was the

1. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989).

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

3. *See* Scalia, *supra* note 1, at 512–13 (quoting S. DOC. NO. 8, 77th Cong., 1st Sess. 90–91 (1941)).

adoption of a blanket default rule, which presumed that statutory ambiguity constituted a conferral of delegation from the Congress. Pre-*Chevron*, the question whether there was agency discretion was answered on a statute-by-statute basis, or indeed on a case-by-case basis, resting on various factors that courts deemed relevant as evidence of congressional conferral of authority.[4] *Chevron*, as I said at the time—this is five years later—"replaced this statute-by-statute evaluation . . . with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant."[5]

This presumption was, I conceded, like all presumptions, imperfect, but it was no worse than the proxies courts had long used as evidence of congressional so-called delegation, and in any event the existence of genuine congressional intent regarding delegation is largely a fiction. And so I believed it best to adopt a straightforward default rule that courts could easily administer and that Congress, if it wished, could legislate around. I concluded my remarks with the following prediction, which I tempered with the standard caveats that go with predicting the future: "I tend to think, however, that in the long run *Chevron* will endure and be given its full scope—not so much because it represents a rule that is easier to follow and thus easier to predict (though that is true enough), but because it more accurately reflects the reality of government, and thus more adequately serves [government's] needs."[6]

Eight years ago my Court proved that prediction wrong, when in its decision *United States v. Mead Corp.*[7] the Court returned in large part to the case-by-case, statute-by-statute mode of analysis that preceded the decision in *Chevron*, with all the harmful side effects that generally attend that mode of analysis. I made a series of predictions at the time the Court took this wrong turn—in my dissent in the case[8]—and now, with some water having gone under the bridge, it may be time to reflect on those predictions. While my prediction about *Chevron*'s endurance may have been optimistic, I believe I can safely say that my predictions about the harmful effects of *Mead* were if anything not pessimistic enough.

In *Mead*, the Court considered whether certain tariff classification

4. *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("The weight of . . . a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, the consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

5. Scalia, *supra* note 1, at 516.

6. *Id.* at 521.

7. 533 U.S. 218 (2001).

8. *Id.* at 245–50 (Scalia, J., dissenting).

decisions made by the United States Customs Service were entitled to *Chevron* deference.[9] The Court answered no, holding that *Chevron* deference is only warranted "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."[10] How would we know when Congress had so delegated? The formality of the administrative procedure used was one such way, the Court said; but formality, the Court also said, was not a necessary condition.[11] The predictions I made in my dissent have, to the extent they can be tested, either come to pass or have been averted only by further wrong turns, or further elaborations at least, in our administrative law jurisprudence.

I first predicted that the Court's decision would create a perverse incentive for agencies to adopt bare-bones regulations, because acting by regulation showed that you were acting pursuant to congressional delegation.[12] The agency could, with the benefit of substantial judicial deference, later interpret or clarify those regulations, by adjudication or even by simple agency pronouncement, without any bothersome procedural formality.[13] The initial regulation having been adopted via notice-and-comment would earn *Chevron* deference, and the subsequent agency clarification would earn the so-called *Auer*[14] deference, which we accord to an agency's interpretation of its own regulations.[15] Thus would an agency receive deference through evasion of the very procedural formalities that *Mead* sought to impose.

Well, it's hard to confirm or to refute this particular prediction. I really don't know if agency rules have in fact become less detailed and more ambiguous since the Court's decision in *Mead*. I'm not even sure how one would measure that or how one would control for the various other factors that undoubtedly bear upon a regulation's clarity. But that may not matter, because in any event the Court has in at least one instance refused to defer to an agency interpretation of its own regulation because the regulation did not give "specificity to a statutory scheme," but rather did "little more than

9. *Id.* at 221.
10. *Id.*at 226–27.
11. *Id.* at 230–31.
12. *Id.* at 246 (Scalia, J., dissenting).
13. *Id.*
14. Auer v. Robbins, 519 U.S. 452 (1997).
15. *Id.* at 461 (an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation'") (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

restate the terms of the statute itself."[16] A new administrative law doctrine, the so called anti-parroting principle—first discovered in the Court's 2006 decision in *Gonzales v. Oregon*[17]—limits agencies' ability to take advantage of *Mead*'s loophole. To that extent I suppose the doctrine is useful, but I had never heard of it before and you are now going to have to decide case-by-case whether an agency is parroting or not. But the perverse incentive for ambiguous agency rulemaking remains, and time may tell whether agencies get wise to this gimmick.

I next predicted in *Mead* that the Court's decision would lead to the ossification of our statutory law because, and I quote, "Where *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion."[18] That is one reason we elect a President every four years, because there's a lot of play in the joints of all of the statutes. And under *Chevron*, when an agency must be deferred to by the Court and the Court does not itself define what the statute says, the agency remains free in a new administration to change its mind about what the statute means—which is precisely what happened, with respect to the "bubble concept," in *Chevron*.[19]

With *Chevron*'s scope more limited however, more statutory ambiguities would be resolved by the courts, and agency discretion would be similarly constrained or simply pre-empted—as in the case where the Court just happens to reach the question before the agency does. Well, that problem was also "fixed," when four years later in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[20] the Court held that—and this was a staggering revelation to me—even where a court had resolved a statutory ambiguity and thereby determined the meaning of the statute, an agency could still decide to the contrary, so long as the court's decision did not rest on the determination that the statute was unambiguous to begin with.[21] As I stated at the time, that decision cured one of *Mead*'s infirmities only by inventing yet another breathtaking novelty, judicial decision subject to

16. Gonzales v. Oregon, 546 U.S. 243, 244 (2006).

17. 546 U.S. 243 (2006).

18. United States v. Mead Corp., 533 U.S. 218, 247 (Scalia, J., dissenting).

19. *Chevron*, 467 U.S. at 841.

20. 545 U.S. 967 (2005).

21. *Id.* at 982 ("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.").

reversal by executive officials.[22] In my view, the cure is worse than the disease, but it has at the very least rendered one of my *Mead* predictions moot.

My third *Mead* prediction was an easy one. I anticipated that the lower courts and the agencies and litigants who appear before them would not know what to make of the Court's new approach.[23] The Court had given virtually no guidance as to which types of agency actions would henceforth merit *Chevron* deference. Notice-and-comment rulemaking and formal adjudication appeared to be safe harbors, but outside of those rather narrow confines deference would depend on a host of factors. And since the whole *Chevron* game is (now) about divining congressional intent, the field was potentially cast wide open.

Well, you can take that prediction to the bank. Lower courts are indeed utterly confused as to what triggers *Chevron* deference. Take, for example, a set of cases from the courts of appeals dealing with informal policy statements issued by the Department of Housing and Urban Development. Two courts of appeals, reviewing the policy statements, determined that they warranted *Chevron* deference.[24] A third said they did not.[25] All three courts, of course, noted that the statements were not the product of notice-and-comment rulemaking, but *Mead* declared that that was not a necessary condition, though it was a sufficient one.[26] And having been given some running room, it is not surprising that the courts would reach different results. The two courts granting *Chevron* deference noted that the agency had the authority to promulgate rules carrying the force of law—although they didn't make this determination by rule they had rulemaking authority.[27] The agency had published the policy statement in the Federal Register, and, per the agency's own declaration, its policy statements constitute rules and regulations of the agency.

The court denying *Chevron* deference considered largely the same factors. It too noted that the statement was not a product of notice-and-comment rulemaking. Sure, the agency treated this statement as the equivalent of a

22. *Id.* at 1016 (Scalia, J., dissenting).

23. *Mead Corp.*, 533 U.S. at 245–46 (Scalia, J., dissenting).

24. Kruse v. Wells Fargo Home Mortg., Inc., 383 F.3d 49, 61 (2d Cir. 2004); Schuetz v. Banc One Mortg. Corp., 292 F.3d 1004, 1012 (9th Cir. 2002).

25. Krzalic v. Republic Title Co., 314 F.3d 875, 881 (7th Cir. 2002); *see also* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 296 n.* (2009) (Scalia, J., concurring) (noting the above circuit split).

26. *Compare Kruse*, 383 F.3d at 61, *and Schuetz*, 292 F.3d at 1012, *and* Krzalic, 314 F.3d at 881, *with Mead Corp.*, 533 U.S. at 230–31 (2001).

27. *See Kruse*, 383 F.3d at 59–60; *Schuetz*, 292 F.3d at 1012.

rule or regulation, but the process by which the rule was created was not the deliberative public process that generally attends rulemaking. Sure, the statement was published in the Federal Register,[28] but as the court of appeals phrased it, it was "a simple announcement" that "[o]ne fine day . . . simply appeared in the Federal Register."[29] (I don't know what it is that appears in the Federal Register but does not appear one fine day.) And sure, the agency has some expertise, but the agency's discussion of the contested issues in the policy statement was perfunctory, and it failed to provide an explanation of the factors that justified its interpretation of the statute.[30]

So what do we have? We know some formality is needed, but we don't know how much. Some expertise, but how much? Some public participation, but how much? So, some courts look at a policy statement and see a document that the agency treats as a rule or regulation that is published in the Federal Register and that is promulgated by an expert agency. Other courts see in the same thing a document that was produced without public involvement, without the formality of notice-and-comment rulemaking, and without sufficient explanation to invoke the agency's expertise. Since under *Mead* the universe of relevant factors is wide open, and the quantum of each factor needed to trigger *Chevron* deference is unknown, it would be hard to say which of these decisions is right and which is wrong. Surely a decision that cannot give guidance to lower courts is not very helpful.

A parallel set of cases involving informal adjudication establishes the same point. In a recent decision,[31] the D.C. Circuit gave *Chevron* deference to a decision by the Secretary of the Department of Veterans Affairs regarding the scope of certain exclusions to VA employees' collective bargaining rights.[32] Despite the lack of formality attached to the agency's adjudicative procedure, the Court of Appeals found that *Chevron* deference was owed because the statute delegated to the Secretary the authority to "decide" disputes regarding these statutory exemptions,[33] and the agency was acting within the scope of that precise delegated authority.[34] That is

28. Real Estate Settlement Procedures Act Statement of Policy 2001-1, 66 Fed. Reg. 53,052, 53,057 (Oct. 18, 2001) [hereinafter HUD Policy Statement].

29. *Krzalic*, 314 F.3d at 881.

30. *See* HUD Policy Statement, *supra* note 28.

31. Am. Fed'n of Gov't Emps., AFL-CIO, Local 446 v. Nicholson, 475 F.3d 341 (D.C. Cir. 2007).

32. *Id.* at 354.

33. *Id.* at 355.

34. *Id.*

certainly the *Mead* test, but how we know it is satisfied is unclear. Was it within the scope of the delegated authority?

In contrast, the Ninth Circuit reviewing the same type of agency action withheld *Chevron* deference.[35] The Court of Appeals characterized the Secretary's decision (it was technically the Under Secretary who had been delegated the authority by the Secretary) as "an opinion letter and not . . . the result of a formal proceeding."[36] Focusing on the agency's lack of formality rather than on the statutory text that authorized the agency to "decide" this very question (which is what the D.C. Circuit did) the Ninth Circuit held that the agency's decision was entitled only to a lesser form of deference, though in that case the agency prevailed anyway.[37] So here we have the other side of the coin. The court stopped at the informality of the procedure without considering whether the statute might have delegated the authority to the agency to proceed in precisely that informal fashion.

Given the emerging mess in the courts of appeals, one might have hoped that the Court in subsequent decisions would have clarified matters, but it seems headed in just the other direction. In *Barnhart v. Walton*,[38] just one year after *Mead*, the Court added to the grab bag of factors that trigger *Chevron* deference, and I quote, "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."[39] All of those factors were identified as relevant in the *Chevron* inquiry. Throw those in with the factors discussed in *Mead* and we are left with what I have described as "th'ol' totality of the circumstances test."[40] Which is of course no test at all.

To make things worse, at least one of my colleagues on the Court has suggested that "the existence of a formal rulemaking proceeding is neither a necessary *nor* a sufficient condition for according *Chevron* deference to an agency's interpretation of a statute."[41] So even the so-called *Mead* safe harbors of notice-and-comment rulemaking and formal adjudication may not be so safe at all. And indeed there are at least a few cases in the courts

35. Am. Fed'n of Gov't Emps., AFL-CIO Local 2152 v. Principi, 464 F.3d 1049 (9th Cir. 2006).

36. *Id.* at 1057.

37. *Id.* at 1059–60.

38. 535 U.S. 212 (2002).

39. *Id.* at 222.

40. *Mead Corp.*, 533 U.S. at 241 (2001) (Scalia, J., dissenting).

41. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (emphasis added).

of appeals where *Chevron* deference has not been afforded to agency decisions promulgated in the course of notice-and-comment rulemaking.

Perhaps the best evidence of the mess left by *Mead* is the sheer reluctance of courts to engage the question at all. The phenomenon is so pervasive that it has earned its own name—in a law review article it is called "*Chevron* avoidance."[42] Lower courts have repeatedly noted their preference for avoiding the muck of *Mead*. The Second Circuit in a recent decision observed rather coolly that "we have at times simply avoided the question of whether an agency's interpretation is entitled [to] *Chevron* or some lesser degree of deference."[43] A recent decision from the First Circuit made the same point rather more colorfully.[44] After noting the confusion in the courts of appeals the panel, seemingly exhausted, remarked as follows: "This is an interesting legal conundrum, but the task of a federal appellate court is to resolve particular cases and controversies, not merely to satisfy intellectual curiosity (whether its own curiosity or that of others). In the last analysis, we agree with the district court that the level of deference is not determinative here; whether viewed through the prism of *Chevron* or the less forgiving prism of *Skidmore*, the [agency's] interpretation . . . withstands scrutiny."[45] *Chevron* avoidance.

Perhaps this suggests that the whole exercise is not worth the candle. If there is little practical difference between *Skidmore* and *Chevron* deference then why fret over whether and when *Chevron* applies? Of course this argument cuts both ways. If the question is easily ducked perhaps it is not as much of a burden on the lower courts as I suppose. Conversely, if there is little practical difference—and this is the course I would propose—why create a complex totality of the circumstances standard for determining when deference is triggered? If it matters so little let's just have an easily administrable rule and be done with it.

And of course, even if courts can dodge the bullet, litigants cannot. They must go through the effort of explaining why *Chevron* deference is or is not merited. They cannot take the chance that the level of deference will not matter. And so they are forced to expend resources arguing a preliminary question whose answer cannot be predicted and whose impact may be slight.

There is a further reason why the Court's case-by-case approach in *Mead* is not worth the candle. *Mead* of course implicates the age-old debate

42. *E.g.*, Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1464 (2005).

43. *Kruse*, 383 F.3d at 58 n.8.

44. Doe v. Leavitt, 552 F.3d 75 (1st Cir. 2009).

45. *Id.* at 80.

between rules and standards. It is assumed that flexible standards are more accurate but less administrable, whereas rules are more administrable but less precise, less accurate. And our choice is simply one of two imperfect approaches. But I'm not certain that is the case here. As I've argued previously, judicial deference to agency decisionmaking is a function of congressional delegation of authority to an agency. I have also argued previously that, generally speaking, statutory ambiguity is a product not of consensus on the part of Congress, but rather of congressional omission. That is, usually it is the case that where there is a statutory ambiguity or a silence, Congress simply failed to consider the matter altogether. You don't really think that where it's ambiguous Congress said, "Let's leave it ambiguous and leave it up to the agency." That may happen sometimes, but surely not as a general rule.

The inference of congressional delegation is thus a legal fiction. If that is true then it makes no sense to ask which approach, *Chevron*'s or *Mead*'s, more closely or accurately predicts a congressional intent that probably does not exist. There simply is no congressional intent to discern, there is only a legal fiction to construct. If courts are inventing congressional intent rather than discerning it, then there is no right answer, and if there is no right answer we might as well have a clear answer. Put somewhat differently, *Mead* produces all the costs and none of the benefits of a flexible standard, while a clear consistent rule would achieve the opposite. And since our deference regime rests upon a default assumption that is subject to legislative alteration, it's no big deal. If Congress does not like the default rule it can act to override it. This is thus not simply another battlefield in the ongoing debate between rules versus standards. It is an area where a flexible standard simply serves no purpose and makes no sense.

So, I told you so. *Mead* has proven as troublesome as I predicted. It has befuddled the courts of appeals and left them ducking for cover. It has led the Supreme Court to invent new and, at least in one case, highly questionable doctrines to cure other of its predicted effects. And it hasn't even been a decade yet. Would that my earlier prediction had come true, and we all could have avoided the trouble.

THE STORY OF *CHEVRON*: THE MAKING OF AN ACCIDENTAL LANDMARK

THOMAS W. MERRILL*

Chevron U.S.A. Inc. v. NRDC *is one of the most famous cases in administrative law, but it was not regarded that way when it was decided. To the justices who heard the case,* Chevron *was a controversy about the validity of the "bubble" concept under the Clean Air Act, not about the standard of review of agency interpretations of statutes. Drawing on Justice Blackmun's papers, Professor Merrill shows that the Court was initially closely divided, but Justice Stevens' opinion won them over, with no one paying much attention to his innovations in the formulation of the standard of review or his invocation of Presidential oversight as a reason to regard agencies as more appropriate interpreters than courts.* Chevron *was almost instantly seized upon as a major decision by the D.C. Circuit, however, and after establishing itself as a leading case there, it migrated back to the Supreme Court, where it eventually came to be regarded as a landmark decision by the Court that rendered it. The Story of* Chevron *raises interesting questions about the role of accidents and self-interested promotion in the making of great cases, as well as about how judicial mutations have shaped the development of administrative law.***

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* Charles Evans Hughes Professor, Columbia Law School. This Article originally appeared as a chapter in ADMINISTRATIVE LAW STORIES (Peter L. Strauss ed., Foundation Press 2006), and is reprinted with the permission of Foundation Press, which is gratefully acknowledged. I have taken the liberty of modifying the text to incorporate some minor revisions and more up-to-date information found in Thomas W. Merrill, *The Story of* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*: Sometimes Great Cases Are Made Not Born*, which appears as a chapter in STATUTORY INTERPRETATION STORIES (William N. Eskridge, Jr., et al. eds., Foundation Press 2011), and Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 NW. U. L. REV. 551 (2012). Many thanks to Brad Lipton and Daniel Boyle for research assistance.

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INTRODUCTION

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.[1] is the Supreme Court's leading statement about the division of authority between agencies and courts in interpreting statutes. The two-step framework announced by *Chevron* for resolving such questions has taken the legal world by storm. In its relatively brief life span, *Chevron* has been cited in 11,760 judicial decisions and 2,130 administrative decisions.[2] It continues to accumulate judicial citations at the rate of about 1000 per year. It is eclipsed only by decisions like *Erie Railroad Co. v. Tompkins*[3] (14,663 decisions) and *Bell Atlantic Corp. v. Twombly*[4] (47,339 decisions). The company it keeps confirms its status as a leading decision prescribing the standard of review across a wide range of cases that come before the courts.

Chevron's significance goes far beyond its utility as a statement of the standard of review, however. This is revealed by its frequency of citation in law review articles. *Chevron* has been cited by 8,009 articles included in the Westlaw database.[5] The fascination academics have for *Chevron* means it has now been cited far more than *Erie* (5,052), a decision Bruce Ackerman once described as the "Pole Star" for an entire generation of legal scholarship.[6] Indeed, *Chevron*'s frequency of citation in law review articles

1. 467 U.S. 837 (1984). Although the West Reporter system, law reviews, and casebooks routinely get it wrong, the correct form of citation of the decision, following the official *U.S. Reports*, has no commas in the petitioner's name.

2. This and all following citation counts are based on Westlaw searches conducted on July 28, 2011.

3. 304 U.S. 64 (1938).

4. 550 U.S. 544 (2007).

5. *Chevron* has also been cited in 30 American Law Reports articles, 58 Westlaw journals, and over 3,600 miscellaneous other pieces of legal authority including digests, practice guides, circulars, and practitioner's handbooks.

6. BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 272 n.4 (1977).

puts it in roughly the same league as *Marbury v. Madison*[7] (8,492), which is perhaps appropriate given that *Chevron* has been called the "counter-*Marbury*" for the administrative state.[8]

As suggested by its frequent appearance in law reviews, *Chevron* is also a controversial decision. The opinion marks a significant shift in the justification for giving deference to agency interpretations of law. Before *Chevron*, deference was justified largely on pragmatic grounds; after *Chevron*, deference has been justified largely in terms of implied delegations of authority from Congress. This shift in the theoretical underpinnings of the deference doctrine has made *Chevron* a magnet for commentators, with the result that "the *Chevron* doctrine" has been debated, analyzed, and measured in countless articles.

Legal revolutions are rare, and the general proposition for which *Chevron* stands—that courts should accept reasonable agency interpretations of statutes they are charged with administering—was not in and of itself revolutionary. The Court had said something similar in previous decisions.[9] What was new was the way Justice John Paul Stevens creatively packaged this proposition in his opinion for a unanimous but short-handed Court of six justices. The *Chevron* opinion contains four significant innovations relative to previous judicial discussion.

First, the Court laid down a new two-step framework for reviewing agency statutory interpretations. At what was quickly dubbed "step one," courts, using "traditional tools of statutory construction," ask whether Congress had a "specific intention" with respect to the issue at hand.[10] "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."[11] But if no clear congressional intent can be discerned, then the court, at "step two," determines whether the agency's interpretation was a "permissible construction of the statute."[12] The court should not ask whether the agency construction is the one "the court would have reached if the question initially had arisen in a judicial proceeding;" it is enough to show that "reasonable" interpreter might adopt the construction.[13]

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7. 5 U.S. (1 Cranch) 137 (1803).

8. Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006).

9. *See, e.g.*, NLRB v. Hearst Publ'ns, 322 U.S. 111, 131 (1944).

10. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9, 845 (1984).

11. *Id.* at 842–43.

12. *Id.* at 843.

13. *Id.* at 843 n.11, 844.

This two-step framework seems innocuous enough, but in fact contained subtle but significant departures from prior law. That law had been something of a hodge-podge, but the conventional wisdom was that it required courts to assess agency interpretations against multiple contextual factors, such as whether the agency interpretation was longstanding, consistently held, contemporaneous with the enactment of the statute, thoroughly considered, or involved a technical subject as to which the agency had expertise.[14] The two-step formula provided no logical place for courts to consider these contextual factors.[15]

The two-step formula also implied that deference to the agency interpretation was all-or-nothing. If the court decided the matter at step one, the agency would get no deference (although the court might uphold the agency if it agreed that its interpretation was the one intended by Congress); if the court decided the matter at step two, the agency would get maximal deference. In contrast, the prior approach had seemed to suggest that any particular agency interpretation would get more or less deference along a sliding-scale, depending on how it stacked up against the traditional factors.

Second, *Chevron* departed from previous law by suggesting that Congress has delegated authority to agencies to function as the primary interpreters of statutes they administer. Sometimes, the Court noted, Congress expressly delegates authority to agencies to define specific statutory provisions by regulation. In these circumstances, the Court observed, agency regulations are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[16] The opinion then immediately noted that delegations can be implicit rather than explicit, and seemed to suggest that the same consequences would follow. By equating explicit and implicit delegations to agencies to fill in statutory gaps, the Court seemed to say that anytime Congress charges an agency with administration of a statute and leaves an ambiguity in the statute, it has impliedly delegated primary authority to the agency to interpret the statute. This vastly expanded the sphere of delegated agency lawmaking.

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14. *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134 (1944). *See generally* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 (1985); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972–75 (1992).

15. Indeed, it appears *Chevron* has had a marked effect in reducing consideration of these factors by reviewing courts. *See* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 46 (1998) (reporting that in 1995 and 1996, only 5% of the courts of appeals decisions that applied *Chevron* considered the traditional contextual factors).

16. 467 U.S. at 844.

Third, *Chevron* broke new ground by invoking democratic theory as a reason for deferring to agency interpretations of statutes. In an unusual passage near the end of the opinion, the Court explained that judges "are not part of either political branch" and hence "have no constituency."[17] Agencies, while "not directly accountable to the people," are subject to the general oversight and supervision of the president, who is elected by all the people. Hence, it is fitting that agencies, rather than courts, resolve "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."[18] The new emphasis on democratic theory reinforced the presumption of delegated interpretational authority, and seemed to offer a universal reason to prefer agency interpretations to judicial ones.

Fourth, *Chevron* introduced the theme of comparative institutional choice into statutory interpretation. Prior to *Chevron*, it was universally assumed that it is the province of the courts to "say what the law is," including pronouncing on the meaning of statutes.[19] After *Chevron*, courts and commentators gradually came to realize that other institutions (such as administrative agencies) may have a comparative advantage as interpreters, at least in some circumstances. This in turn introduced a meta-question into the theory and practice of statutory interpretation, namely determining the "preferred interpreter" before engaging in the process of interpretation. The full implications of this new perspective have yet to be fully assimilated, but it may ultimately revolutionize the process of statutory interpretation.[20]

Most landmark decisions are born great—they are understood to be of special significance from the moment they are decided. But *Chevron* was little noticed when it was decided, and came to be regarded as a landmark case only some years later. This may be the most interesting aspect of the *Chevron* story—how a decision that was considered routine by those who made it came to be regarded as one of potentially transformative significance. Before we get to that part of the story, however, we need to understand what *Chevron* did decide, and why.

I. THE BUBBLE CONTROVERSY

When it was briefed and argued, no one thought *Chevron* presented any

17. *Id.* at 866.

18. *Id.* at 865–66.

19. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

20. For an example of this perspective, see ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

question about the court-agency relationship in resolving questions of interpretation. Instead, all understood the case to be about the "bubble concept," a catchy phrase for a particular way of interpreting the term "stationary source" under the Clean Air Act.[21] One cannot understand how Justice Stevens was able to obtain unanimous support for his provocative opinion, or why that opinion came to have such compelling power for lower court judges, without some sense of the controversy over the bubble.

Three different programs established by the Clean Air Act require that stationary sources of air pollution, like power plants and smelters, adopt strict technology-based limitations on emissions. Each program kicks in when firms either construct "new" stationary sources, or "modify" existing stationary sources. The programs impose much less demanding limitations on existing stationary sources. Yet each of the programs contains a critical ambiguity about the meaning of "source": it is unclear whether this word refers to each *apparatus* that emits pollution within a plant, or whether it refers to the *entire plant.*

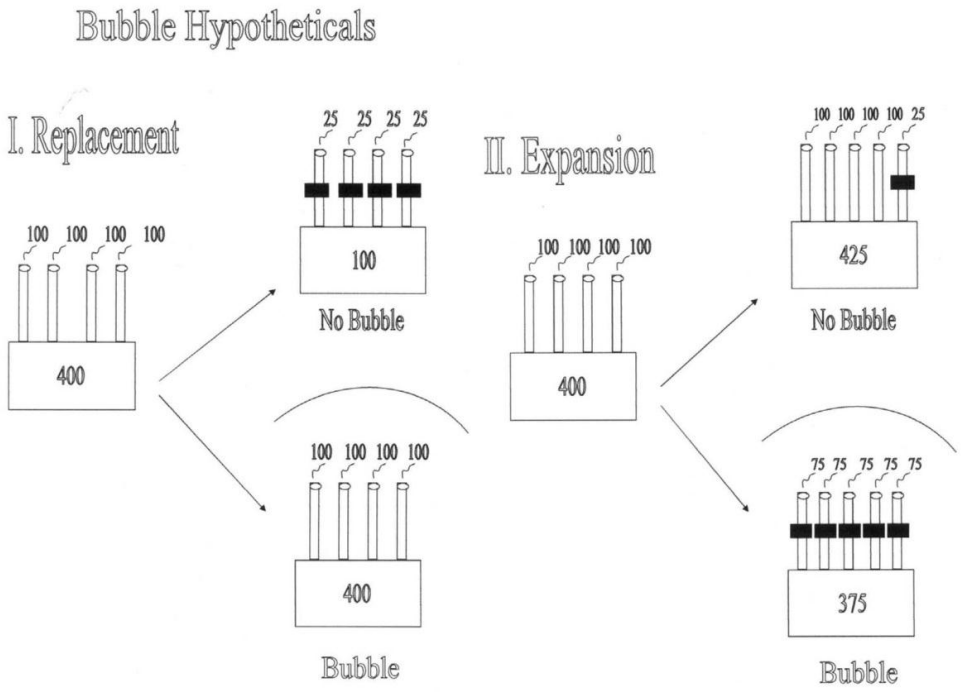
Under the apparatus definition, if a plant installs a new apparatus like a boiler with a smoke stack, this would be new source. Hence the new boiler would have to comply with tough technology-based controls. The plant-wide definition, in contrast, in effect puts an imaginary bubble over an entire industrial complex and looks at changes in the amount of pollution coming out of a hole at the top. Under this bubble definition, if a firm adds a new boiler with a smoke stack, but makes offsetting changes in other parts of the operation such that the net effect is to reduce or hold pollution levels unchanged, the addition of the new boiler would be neither a new source nor a modification of a source. Hence the change could be ignored for regulatory purposes.

The bubble concept was controversial from the time it was first proposed in the early 1970s. Environmentalists generally opposed the bubble because they saw it as locking in the environmental status quo. Suppose a plant consists of four apparatuses, each of which emits 100 tons of pollution per year, for total emissions of 400 tons. A new apparatus subject to new-source controls would emit only 25 tons of pollution. Under the bubble concept, the plant could continue to rebuild itself indefinitely, replacing each uncontrolled apparatus with a new uncontrolled apparatus as the old

21. 42 U.S.C. §§ 7401–7671q. I will follow convention in citing to the section numbers of the Act as they appear in the Statutes at Large. Thus, Clean Air Act (CAA) § 111(a)(3), the definition of "stationary source" under Section 111 of the Act, corresponds to 42 U.S.C. § 7411(a)(3) in the United States Code.

one wore out. Each replacement would result in no net addition of pollution from the plant, and so the tough technology-based standards would never be triggered. After a while, the plant would consist of nothing but new apparatuses, and yet it would still be emitting 400 tons of pollution, rather than the 100 tons it would emit if each apparatus had been regulated. The objectives of the new source provisions would be evaded, and no further progress would be made in cleaning up the air, as the accompanying graphic illustrates.

Industry representatives and economists countered with a different example. Suppose, as before, a plant with four apparatuses, each emitting 100 tons in an unregulated state. Now suppose that the plant wants to expand output by adding a fifth apparatus. Under the narrow single-apparatus definition of source, the new apparatus would be subject to controls, and would emit 25 tons. So the plant would now emit a total of 425 tons. Under the bubble policy, however, the plant could escape technology-based controls if it could somehow hold total emissions from the plant to 400 tons or less. Suppose it could do this relatively cheaply by retrofitting the existing apparatuses with a device that reduces emissions from 100 to 75 tons and by installing the device on the new apparatus. The result would be to reduce total emissions from the plant from 400 (4 x 100) to 375 tons (5 x 75). Application of the bubble in this example could save the plant considerable money *and* would also result in a better outcome for the environment—375 tons of pollution per year versus 425 tons of pollution, again illustrated graphically.



As with other attempts to resolve policy disputes by hypothetical example, the outcome depends on the assumptions built into the example. The case for the single-apparatus definition turns on the assumption that there is a sharp discontinuity between old equipment and new equipment. Old equipment is highly polluting, too costly to retrofit, and will inevitably be replaced by new equipment because of technological obsolescence. Thus, the best policy is hang tough and insist that technology-based standards apply to each apparatus, because over the long run this will do the most to improve air quality. The case for the bubble concept rests on the assumption that there is more of a continuous function between the costs and benefits of retrofitting existing equipment versus installing new equipment. Sometimes retrofitting old equipment might yield more environmental benefits at lower costs than scrapping old equipment and replacing it with new. Thus, the best policy is to give firms general pollution-reduction goals combined with considerable flexibility in determining how to go about meeting those goals.

II. BLOWING BUBBLES IN THE D.C. CIRCUIT

The Environmental Protection Agency's (EPA's) first encounter with the bubble debate came in connection with the administration of the New Source Performance Standards (NSPS) established by Section 111 of the Clean Air Act of 1970. The NSPS applied to "new sources," which were defined as "any stationary source, the construction or modification of which" begins after a NSPS for that category of sources is published.[22] "Stationary source" was defined in turn as "any building, structure, facility, or installation which emits or may emit any air pollutant."[23] "Modification," for its part, was strictly defined to mean any change in a source "which increases the amount of any air pollutant emitted by such source."[24] EPA's initial regulations simply repeated the statutory definitions without clarifying whether "source" means apparatus or an entire plant.[25]

In 1975, after a vigorous lobbying campaign by the nonferrous smelting industry, EPA endorsed a modest form of the bubble concept under Section 111.[26] EPA decided that "facility" means a single apparatus, and "source" means either a single apparatus *or* a complex of apparatuses. Consistent with this "dual definition" of stationary source, EPA amended its regulations to define "source" to mean any "building, structure, facility, or installation" which "contains any one *or combination of*" facilities.[27] This definition implicitly *rejected* the bubble, which requires that "source" mean the entire plant. The agency nevertheless went on to endorse a qualified form of the bubble in a separate provision of the regulations dealing with the meaning of "modification." Here, EPA provided that no modification would be deemed to occur when an "existing facility undergoes a physical or operational change" and the owner demonstrates that the "total emission rate of any pollutant has not increased from all facilities within the stationary source."[28]

On cross petitions for review by ASARCO (a firm in the nonferrous smelting industry) and the Sierra Club, a divided D.C. Circuit panel rejected the bubble concept "in toto."[29] The majority opinion was written

22. CAA § 111(a)(2).
23. *Id.* § 111(a)(3).
24. *Id.* § 111(a)(4).
25. *See* Standards of Performance for New Stationary Sources, 36 Fed. Reg. 24,875, 24,977 (Dec. 23, 1971).
26. Standards of Performance for New Stationary Sources, 40 Fed. Reg. 58,416 (Dec. 16, 1975).
27. *Id.* at 58,418 (amending 40 C.F.R. § 60.2) (emphasis added).
28. *Id.* at 58,419 (adding 40 C.F.R. § 60.14).
29. ASARCO Inc. v. EPA, 578 F.2d 319, 325 (D.C. Cir. 1978).

by Judge J. Skelly Wright,[30] a staunch liberal who was prone to see industry capture of administrative agencies in many of the regulatory controversies that came before him.[31] Wright's opinion portrayed the controversy as one in which EPA had caved in to industry by adopting a position "contrary to both the language and the basic purpose of the Act."[32]

As to the language of the Act, Judge Wright agreed with the Sierra Club that the "plain meaning" of "source" could not be defined to mean both "facility" and "combination of facilities" (although this was not the feature of the regulation that permitted the bubble—that was the definition of "modification"). With respect to the purposes of the Act, Judge Wright thought that the bubble would allow operators to evade their duty to install pollution control systems based on best available technology, as long as they could devise some way to keep total emissions from an entire plant from increasing. As he vividly put it, "[t]reating whole plants as single sources would grant the operators of existing plants permanent easements against federal new source standards and the worst polluters would get the largest easements."[33] Thus, the bubble was incompatible with the central purpose of Section 111, which Judge Wright said was to enhance air quality. Neither ASARCO nor the EPA petitioned for *certiorari*, so the bubble was dead for purposes of Section 111.

The 1977 Amendments to the Clean Air Act added two additional new source provisions to the Act. These provisions were applicable depending on whether air quality in a particular region is better than or worse than required by the National Ambient Air Quality Standards (NAAQS) established under the 1970 Act. New Part C, called Prevention of Significant Deterioration (PSD), was designed to impose limits on the ability of states to allow clean air to deteriorate downward toward the NAAQS level. New Part D, called Plan Requirements for Nonattainment Areas (nonattainment program or NAP), was designed to prod states to bring dirty air areas into compliance with the NAAQS. Each of these new Parts included, among its regulatory instruments, new source review

30. Judge Harold Leventhal joined Judge Wright's opinion but wrote a separate concurrence. Judge George MacKinnon wrote a dissenting and concurring opinion.

31. *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1065–66 (1997) (citing judicial and extra-judicial writings of Judge Wright exhibiting preoccupation with agency capture).

32. *ASARCO*, 578 F.2d at 328; *see also id.* at 329 (stating that EPA had supported the qualified bubble "by examples drawn from circumstances peculiar to the nonferrous smelting industry" which was an improper basis for regulations "setting standards for all industries").

33. *Id.* at 329 n.40.

provisions requiring states to adopt technology-based standards for certain new and modified sources. Neither of the new provisions made any further attempt to define "facility" or "source,"[34] nor was there any cross reference in either Part to the definition of "stationary source" in Section 111. Both Parts, however, expressly incorporated the definition of "modification" set forth in Section 111.[35]

The 1977 Amendments were enacted after EPA had adopted the qualified bubble under Section 111, but before that policy had been struck down by *ASARCO*. When EPA issued regulations implementing the new PSD program,[36] it adopted for that program virtually the same qualified bubble concept that had been invalidated by *ASARCO*.[37] The agency reasoned that Congress, in adopting the 1977 amendments, had been made aware of the definition of "modification" EPA had adopted under Section 111. Thus, when Congress directed that "modification" have the same meaning for PSD purposes as under Section 111, it implicitly ratified EPA's qualified bubble under PSD.[38]

The PSD regulations were challenged in the D.C. Circuit in *Alabama Power Co. v. Costle*,[39] a massive judicial review proceeding that entailed dozens of issues besides the legality of the bubble policy. The panel issued a *per curium* opinion summarizing its conclusions in June 1979, and issued its final opinion in April 1980. The final opinion was divided up by the three judges who heard the matter,[40] each judge writing a separate section. The challenge to the bubble was assigned to Judge Malcolm Wilkey, one of the court's more conservative and pro-business members.

Judge Wilkey concluded that the statutory definition of "stationary source" in Section 111 ("any building, structure, facility, or installation") was the meaning Congress intended EPA to apply under the PSD provisions.[41] Accordingly, to the extent EPA had sought to expand the definition of major stationary source to include other terms (including "combination thereof"), it was invalid under *ASARCO*. Similarly, since

34. CAA § 302(j).

35. *Id.* § 169(2)(C) (PSD); *id.* § 171(4) (NAP). The incorporation of the definition of "modification" in the PSD program was added by a subsequent technical corrections amendment. *See* Pub. L. No. 95-190, § 14(a)(54), 91 Stat. 1393, 1402 (1977). It is codified as a parenthetical in CAA § 169(2)(C) (definition of "construction").

36. 1977 Clean Air Act; Prevention of Significant Air Quality Deterioration, 43 Fed. Reg. 26,380 (June 19, 1978).

37. *Id.* at 26,394.

38. *Id.* at 26,403.

39. 636 F.2d 323 (D.C. Cir. 1980).

40. The panel consisted of Judges Leventhal, Robinson, and Wilkey.

41. *Id.* at 395–96.

Congress had specifically incorporated by reference the definition of "modification" under Section 111, EPA's freedom to define that term was also limited by *ASARCO*.

Judge Wilkey recognized that these rulings might impose regulatory burdens on industry and EPA. He sought to soften the blow by indicating that EPA had broad discretion to define the component terms of the statutory definition of "source" (building, structure, facility, or installation) in different ways in order to advance the purposes of different new source programs.[42] In particular, Judge Wilkey noted that the occasions for review of modifications would be reduced because the bubble definition of source would be used for these purposes.[43]

Judge Wilkey spent little time considering the text of the statute in reaching the conclusion that the bubble was a permissible definition of "source" in the context of the PSD program. Instead, the focus was on policy. He made two principal points. First, in the dynamic American economy, "alterations of almost any plant occur continuously." To apply the definition of "modification" to any individual apparatus would result in burdensome and repetitious PSD review of many "routine alterations of a plant."[44] Second, the PSD program was designed to prevent deterioration of air quality, not enhancement of air quality. Thus, any definition other than the bubble "would be unreasonable and contrary to the expressed purposes of the PSD provisions of the Act."[45] Whereas Judge Wright had implied that the bubble was unlawful in any form under Section 111, the Wilkey opinion seemed to say that the bubble concept was required under the PSD program.

The third leg of the new source review stool was the nonattainment program, also added by the 1977 amendments. Here, EPA engaged in a series of zigzag efforts to clarify whether the bubble should apply. In a Notice of Proposed Rulemaking issued in response to the June 1979 *per curiam* order in *Alabama Power*,[46] EPA proposed a qualified bubble definition of source that could be used by states in full compliance with Part D requirements, while laggard states would have to use the apparatus definition.[47] After the D.C. Circuit's full opinion in *Alabama Power* issued,[48]

42. *Id.* at 397.
43. *Id.* at 400.
44. *Id.* at 401.
45. *Id.*
46. The *Alabama Power* panel released an order with a summary of its ruling in June 1979, but released its full opinion only in December, which was then further revised in April 1980.
47. Requirements for Preparation, Adoption, and Submittal of State Implementation

EPA determined that the bubble had to be prohibited for all purposes under the Part D program. The circuit court had ruled that the bubble was inappropriate under programs designed to improve air quality, and the nonattainment program was designed to improve air quality.[49]

The election of Ronald Reagan as President in 1980 marked a major shift in executive branch policy toward environmental and safety regulation. The philosophy of deregulation, emphasizing the use of markets and market-imitating mechanisms rather than centralized regulatory controls, got its start earlier, as applied to traditional transportation and infrastructural industries like airlines, trucking, railroads, telephones and utilities.[50] The Reagan Administration broke new ground by extending this philosophy to environmental and safety regulation. Consistent with this new direction in policy, EPA announced that it had decided to reconsider issues related to the definition of "source" under the nonattainment and PSD new source review programs, as part of "a Government-wide reexamination of regulatory burdens and complexities that is now in progress."[51] The upshot was that the agency decided to permit the states, at their election, to adopt an *unqualified* bubble definition of source for both PSD and nonattainment purposes.[52] The change was justified on the ground that allowing the states to choose the bubble definition would give them "much greater flexibility in developing their nonattainment . . . programs."[53]

The new 1981 regulations were challenged in the D.C. Circuit by three environmental groups, led by the Natural Resources Defense Council. The case was assigned to a panel composed of Judges Abner Mikva, Ruth Bader Ginsburg, and William Jameson (a visiting senior district judge from Montana). Judges Mikva and Ginsburg were both relatively liberal Carter appointees. Judge Mikva would later resign to serve as White House

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Plans, 44 Fed. Reg. 51,924, 51,934 (Sept. 5, 1979).

48. Requirements for Preparation, Adoption, and Submittal of State Implementation Plans, 45 Fed. Reg. 52,676 (Aug. 7, 1980).

49. *Id.* at 52,746.

50. For general background, see Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998).

51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 46 Fed. Reg. 16,280, 16,281 (Mar. 12, 1981). EPA did not propose to revisit the definition of "source" under the NSPS, apparently on the ground that this would contravene the judgment in *ASARCO*.

52. Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50,766 (Oct. 14, 1981).

53. *Id.* at 50,767.

Counsel to President Clinton, and Judge Ginsburg would later be appointed to the Supreme Court by Clinton.

The decision was unanimous to vacate EPA's regulations. Judge Ginsburg's opinion for the court, stripped of details about the statutory and regulatory background, reduced to a syllogism.[54] *Alabama Power* and *ASARCO* "establish as the law of this Circuit a bright line test for determining the propriety of EPA's resort to a bubble concept."[55] This test provided that the bubble "is mandatory for Clean Air Act programs designed merely to maintain existing air quality," but is inappropriate "in programs enacted to improve the quality of the ambient air."[56] "The nonattainment program's *raison d'être* is to ameliorate the air's quality in nonattainment areas sufficiently to achieve expeditious compliance with the NAAQS."[57] Ergo the bubble could not lawfully be used under the nonattainment program.

Judge Ginsburg made no attempt to determine whether the bubble concept could be squared with the statutory meaning of "stationary source," and she agreed with EPA that the legislative history was "at best contradictory."[58] The opinion also gave short shrift to EPA's judgment that application of the bubble, at least in the context of the nonattainment program, would not interfere with efforts to achieve further improvements in air quality. This was dismissed with the observations that it was inconsistent with the agency's view a year earlier, and the agency had not cited "any study, survey, or support" for its new position.[59] Ordinarily, this would be an appropriate judicial response to a change in agency policy.[60] Here, however, EPA's previous position had been justified largely on the ground that it was required by the D.C. Circuit's decisions in *ASARCO* and *Alabama Power*. The demand for consistency in this context amounted to privileging policy judgments previously reached by the D.C. Circuit.

Still, it is ironic in retrospect that Judge Ginsburg's opinion was the one to be singled out for further review by the Supreme Court. Of the three

54. Natural Res. Def. Council v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982).

55. *Id.* at 726.

56. *Id.*

57. *Id.* at 726–27.

58. *Id.* at 727 n.39. Indeed, the opinion "express[ed] no view on the decision we would reach if the line drawn in *Alabama Power* and *ASARCO* did not control our judgment." *Id.* at 720 n.7.

59. *Id.* at 727 n.41.

60. Courts frequently respond to agency deviations from prior policy by requiring an explanation or new evidence in support of the change, a requirement sometimes called the "swerve doctrine." *See, e.g.*, Shaw's Supermarkets, Inc. v. NLRB, 884 F.2d 34 (1st Cir. 1989).

D.C. Circuit decisions dealing with the bubble controversy, the Ginsburg opinion is the most restrained, in the sense of attempting to resolve the issue through a good faith reading of existing legal authorities (in this case, circuit precedent). The result reached—invalidation of the bubble in dirty air areas—was no doubt one that was congenial to Judge Ginsburg and her relatively liberal colleagues. But one does not get the impression that Ginsburg was actively manipulating the arguments to reach this result. In contrast, both Judge Wright's opinion in *ASARCO* and Judge Wilkey's opinion in *Alabama Power* reflected transparent attempts to reach ends consistent with the author's views of appropriate policy. The bubble controversy suggests that D.C. Circuit judges were prone to substitute their own preferences for those of EPA. But the most flagrant practitioners of this activism were not directly implicated in the case that eventually went before the Supreme Court.

III. AN INAUSPICIOUS DEBUT

In tracking the progress of *Chevron* in the Supreme Court there are a number of sources to draw upon. The petitioning papers and merits briefs are available, as is the transcript of oral argument. Robert Percival has previously reported on information gleaned from Justice Thurgood Marshall's and Justice Harry Blackmun's papers.[61] Blackmun's papers in particular shed significant new information on the Court's internal deliberations. Unlike Marshall, who did not participate in either the argument or decision in *Chevron*, Blackmun was involved from beginning to end. More importantly, Blackmun was probably the most meticulous note-taker among the justices during the time he sat on the Court.

After the D.C. Circuit denied petitions for rehearing *en banc*, Chevron U.S.A. Inc. filed a petition for *certiorari* in December 1982, thereby securing its name on the caption of the decision. The American Iron and Steel Institute, an industry trade association, filed a separate petition in January 1983. The Solicitor General, who controls litigation by the executive branch (including EPA) in the Supreme Court, took considerably longer to decide what to do. A critical factor no doubt was the large controversy then brewing in Washington about how reviewing courts should respond to the Administration's aggressive new deregulation initiative.[62] The Supreme

61. Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 ENVTL. L. REP. 10,637, 10,642–43 (2005); Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 13 ENVTL. L. REP. 10,606, 10,613 (1993).

62. For scholarship reflecting the controversy, see Cass Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177 and Merrick B. Garland, *Deregulation and Judicial*

Court had pending before it *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,[63] in which the Reagan Administration, citing costs and uncertain benefits, had rescinded a mandatory automobile passive restraints rule adopted by the Carter Administration. The order had been set aside by the D.C. Circuit because the agency had failed to consider alternatives to rescission. In the Supreme Court, the Reagan Administration was arguing that courts should give greater deference to agencies when they deregulate than when they regulate, and that under the more lenient standard, the air bag rescission should be upheld.

The bubble controversy presented another example of an Administration deregulation initiative invalidated by the D.C. Circuit. No doubt the proponents of deregulation within the Administration pressed the Solicitor General to seek further review in *Chevron* in order to press ahead in the campaign for deregulation. This advocacy may have tipped the balance in favor of filing a government petition in *Chevron*, even though there was no circuit conflict and the decision below simply followed two previous decisions of the D.C. Circuit, neither of which the government had seen fit to challenge.

For whatever reasons, the Solicitor General did not file the petition on behalf of EPA until March 1983. Given the lateness of the government's filing, *State Farm* was decided before the Court could act on the petitions in *Chevron.* As it turned out, *State Farm* rejected the Administration's appeal for greater deference to deregulation orders, and affirmed the D.C. Circuit's decision invalidating rescission of the passive restraints rule, providing a significant setback to the Administration's deregulation campaign. It is hard to say how this outcome influenced *Chevron*, which was then briefed and argued the following term. The setback in *State Farm* may have tempered some of the arguments that the Solicitor General and the other petitioners advanced in support of reversal. It is also possible—although there is no direct evidence for this—that it may have caused some of the justices to tilt more toward the government in *Chevron*, if only to avoid the impression that the Court was taking sides in the deregulation debate.

In all events, there is nothing in the three petitions suggesting that the parties were asking the Court to reconsider basic questions of court-agency relations. The focus was on the practical significance of the bubble concept, the confusion produced by the three D.C. Circuit decisions, and the claim that the D.C. Circuit had overstepped established bounds of judicial review. For example, the Solicitor General's petition for *certiorari*

Review, 98 HARV. L. REV. 505 (1985).

63. 463 U.S. 29 (1983).

said, "[t]he decision of the court of appeals is contrary to well established limits upon the scope of judicial review of administrative action," citing previous decisions deferring to "reasonable" interpretations by the Administrator of the Clean Air Act.[64]

Similarly, there is nothing in the merits briefs to suggest that the case was seen as a vehicle for a major statement about statutory interpretation. The Solicitor General's brief was prepared under the supervision of Paul Bator, who had just arrived from Harvard Law School as the first "political" Deputy Solicitor General.[65] The Bator brief advanced two themes that appear to have influenced Justice Stevens. First, the brief hammered on the idea that the 1977 Amendments had not one purpose—improving air quality in dirty air areas—but two purposes: improving air quality *and* accommodating further economic growth in dirty air areas. This "two purposes" idea was to become the linchpin of Justice Stevens' argument that Congress had left the definition of source to be resolved by the agency in light of these somewhat conflicting objectives.[66] Second, the Bator brief planted the idea that "implied delegations" to agencies to fill gaps in statutes should be treated no differently than express delegations of gap-filling authority. This idea, which was quite novel in the context of determining the standard of review of agency legal determinations, was presented by the brief as a faithful representation of existing law.[67] Justice Stevens took the bait and offered a similar depiction of the law in his *Chevron* opinion. In other respects, however, Justice Stevens largely ignored the government's brief.[68]

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64. Petition for *Certiorari*, Adm'r, Envtl. Prot. Agency v. Natural Res. Def. Council, Inc., 1982 LEXIS U.S. Briefs 1591 at *30 (Mar. 25, 1983).

65. For more on the background of the Bator appointment, see CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 28–30 (1991).

66. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 851–53 (1984).

67. Both the Bator brief and Justice Stevens quoted the following line from *Morton v. Ruiz*, 415 U.S. 199, 231 (1974): "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." This statement, however, was addressed to agency authority to issue regulations, not the deference owed to agency interpretations of statutes. In the context of determining the deference owed to agency interpretations, the Court had previously applied the arbitrary and capricious standard only in cases in which Congress had *explicitly* delegated authority to the agency to define a statutory term or prescribe a method of executing a statutory provision. *See, e.g.*, United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982); Batterton v. Francis, 432 U.S. 416, 424–26 (1977).

68. For example, one of the major themes of the government's presentation was

The brief filed by respondent NRDC may have been more significant, given what it did *not* say. NRDC's position in the D.C. Circuit had been a strong one. Circuit precedent—*ASARCO* and *Alabama Power*—made the legality of the bubble turn on whether the Clean Air Act program in question was designed to enhance or maintain air quality, and the nonattainment program was designed to enhance air quality. But when the case moved up the judicial hierarchy to the Supreme Court, the bottom fell out from under NRDC's position. The Supreme Court was not bound by *ASARCO* or *Alabama Power*, and would consider the legality of the bubble in terms of the primary statutory sources—the language and legislative history of the Clean Air Act. To make matters more difficult, EPA's 1981 regulations avoided the internal inconsistency in the regulatory definition of "source" that Judge Wright had exploited in *ASARCO*. Accordingly, the only argument left to NRDC was that the statutory term "source" must always mean apparatus, and can never mean plant. Its brief gamely attempted to support this claim through a laborious reconstruction of the legislative history of the new source programs, interwoven with the administrative history of the bubble. But NRDC made no attempt to defend the court of appeals' decision—usually a telltale sign of weakness.

The most striking aspect of the briefs is the absence of any direct antecedent for the two passages for which *Chevron* is most famous, namely the "two-step" approach to review questions of law, and the justification of deference to agencies in terms of their relationship to the president. Justice Stevens apparently came up with these innovations on his own.

Nor does the transcript of oral argument reveal much of significance. Justices Thurgood Marshall and William Rehnquist were both absent from the bench because of health problems. Bator argued for the petitioners; David Doniger, a seasoned environmental lawyer, for the respondents. The questioning was dominated by Justices White, Stevens, and Brennan, and was directed more toward Bator than Doniger. Justice Blackmun's notes taken at argument suggest that the colloquy left little impression on him. He observed at the end of Doniger's presentation: "Few questions—no one wishes to venture out."

Two days after the argument, on March 2, 1984, the justices assembled

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federalism. EPA's regulations, the Bator brief repeatedly stressed, simply gave states the choice whether to adopt the narrow ("apparatus") definition of "source" or the broad ("bubble") definition in their implementation plans. In contrast, said the brief, the respondents and the D.C. Circuit wanted to put the states in a federal straitjacket. Justice Stevens barely touched on federalism in his opinion, however, and instead developed a powerful separation of powers theme that was not foreshadowed in the government's presentation.

to conference about the case. We learn the following from Justice Blackmun's notes. Although the decision would ultimately be unanimous, the vote at conference was 4-3 to reverse the D.C. Circuit's decision. Justices White, Blackmun, Stevens and Powell voted to reverse. Chief Justice Burger and Justices Brennan and O'Connor voted to affirm. This unusual lineup is confirmed by the fact that Justice White assigned the opinion to Justice Stevens.[69] White would have the power of assignment only if he were the most senior Justice in the majority at conference, which would require that both Burger and Brennan be in dissent. Blackmun's notes further reveal that each of the justices voting to reverse was tentative or doubtful about this disposition. Blackmun put a "?" after the "–" sign beside the name of each of the justices voting to reverse, presumably indicating that each of these justices expressed some hesitancy about his vote.

As best I can make out from Blackmun's notes, the conference discussion went something like this.[70] Chief Justice Burger started things off with a speech about how the D.C. Circuit was going "pretty far" in environmental cases, and the Supreme Court was going to have "to settle" this. He suggested the way to do so was by affirming. Blackmun expressed his puzzlement with this reasoning by putting "??" next to the Chief Justice's proposed disposition. Burger's comments, as recorded by Blackmun, suggest that the Chief Justice had only the most tenuous grasp of the issues in the case.

Justice Brennan spoke next. Blackmun's notes suggest that Brennan was much more on top of things, and did his best to convince the conference to affirm. He gave a crisp summation of the bill of indictment against the bubble, consistent with the views expressed by his friend, Judge Wright, in *ASARCO*. The dual definition of source was troublesome because it allowed EPA to "have it both ways"; the result might not be "what Congress intended"; the bubble would grant a plant a "perpetual" right to "pollute at achieved level"; EPA had changed directions and hence was not entitled to much deference.

The discussion then turned to Justice White. Blackmun's notes indicate White started out by saying he was "very shaky" but inclined to reverse. He indicated that he had been persuaded by *Alabama Power*. Blackmun's notes do not elaborate on what White meant by this. On its face, the

69. *See infra* for a discussion of the evidence for this.

70. I clerked for Justice Blackmun in the 1978–79 term but cannot claim any expertise in deciphering his notes about conference, since he ordinarily provided his clerks with an oral summary of the conference and did not share the notes themselves.

comment is puzzling, since Judge Ginsburg writing for the D.C. Circuit had relied on *Alabama Power* in holding the bubble unlawful in the context of the nonattainment program. Perhaps White was referring to Judge Wilkey's more general discussion in *Alabama Power* about the definition of "source," and to his conclusion that the language was broad enough to allow EPA to define source differently under different programs, but this is speculation. In any event, after White spoke, Blackmun's notes indicate that Chief Justice Burger interjected: "& I might join;" in other words, Burger might join an opinion to reverse.

With Marshall absent, the next speaker was Justice Powell. Although Blackmun also marked Powell down as voting to reverse with a question mark, Powell's comments seemed to follow fairly consistently the line taken in the industry briefs. He said the statute was "complicated" and deference was due to an agency "redetermination" of its policy. He too cited *Alabama Power* as supporting reversal, without recorded elaboration. Powell also observed that the states have primary responsibility for the nonattainment program. "On policy," he said, the decision below would pose a problem for "economic growth" and serve as a "disincentive" (presumably he meant to plant modernization). Justice Rehnquist ordinarily would go next, but in his absence the next speaker was Justice Blackmun himself. Blackmun naturally did not take notes about his own comments, but his notes on the case written shortly before the conference reveal that he had had trouble making up his mind. Although he marked "–" at the bottom of his notes, meaning reverse, one can clearly see beneath this mark that he had originally written and later erased "+?"—suggesting that his initial disposition was to affirm, although he had doubts about this. There is no way to tell from the notes when Blackmun erased the "+?" and wrote "–" over the top, although presumably it was sometime after his initial preparation for the argument and before he spoke at conference. Blackmun's law clerk had written a bench memo urging affirmance, and possibly this influenced the Justice's initial response, but he must have changed his mind while giving the matter further consideration.

After Blackmun came Justice Stevens. Blackmun's notes record the following interesting remarks. Stevens began by saying he was "not at rest." Ideally, he observed, the definition of source ought to be the same throughout the statute. In a mild rebuke to Justices White and Powell, Stevens said he was not sure that *Alabama Power* was completely controlling. The agency interpretation, however, was a "permissible reading" of the statute. The House Report (by which he presumably meant the House Conference Report) was "confusing!" He concluded: "When I am so confused, I go with the agency."

Justice O'Connor, the newest Member of the Court, spoke last. Her remarks betray a certain lack of sophistication. After voting to affirm the lower court, she nevertheless indicated that the "bubble made sense as a concept." The stumbling block for her seemed to be that the legislative history provided no support for the EPA position. She concluded: "Industry is suffering" and said the matter was "very painful for me."

What is one to make of this? Perhaps the most obvious point is that there is nothing in the conference notes to suggest that the justices regarded *Chevron* as a watershed case about the standard of judicial review. The case presented nothing more than a puzzle about the legality of the bubble concept. It is also interesting to note that the justices were quite focused on what the legislative history did or did not say, and seemed quite conscious of the lower court opinions. In contrast, Justice Blackmun's notes record no comment from any justice about the specific language of the statute. *Chevron* was decided at a time when the Court's statutory interpretation opinions were devoted primarily to a search for legislative intentions as revealed by legislative history. The conference notes suggest that the justices thought about statutory interpretation questions the same way in their deliberations.

What we did not know before, and is potentially significant in explaining what happened, is that the conference vote was closely divided (4–3) and that the justices, with the possible exception of Justice Brennan, all expressed uncertainty or ambivalence about the proper outcome. This meant that the assignment to write the majority opinion was an especially challenging one. In order to hold a majority, the opinion writer would have to unravel the legal complexities about the bubble concept in a persuasive way, and would have to devise some way of framing the issue that the doubters would find compelling.

One especially valuable document in the Blackmun papers is something he called his "Opinion Log Sheet" which he kept for each argued case. It is from this document that we learn Justice White, the senior justice voting with the majority, assigned the opinion to Justice Stevens. The assignment came on March 2, 1984, the same day as the conference, suggesting that White may have acted quickly to assert his prerogative, perhaps to forestall any attempt by the Chief Justice to assign the case (on the ground that he had changed his mind and had decided to join the majority to reverse).[71]

Justice Stevens' took over three months to prepare his opinion. This was

71. Stories abound that Chief Justice Burger would occasionally switch his vote after conference in order to control assignment of the majority opinion. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 64–66, 171 (1979).

not an unusually long period of time, but in the context of a case argued at the end of February, it meant that the draft opinion was not circulated until June 11, only about three weeks before the justices were scheduled to adjourn for the year. By this time in the annual opinion-writing cycle, the justices were immersed in a frenzy of effort to get the last, most difficult decisions out the door.[72] In effect, the other justices were given virtually no time to consider drafting concurring or dissenting opinions, or even to suggest modifications to the Stevens' draft.

The official paper trail of memos following circulation of the draft reveals the following. Justices Marshall and Rehnquist responded with memos on June 12 confirming that they should be shown as taking no part in the decision in the case. Justice White, the assigning Justice, responded the next day with a memo designed to give the Stevens' effort a boost: "Please join me in your very good opinion in this case." On the 14th, Stevens circulated a revised draft. Justice O'Connor then circulated a memo indicating that after the argument, she had inherited a remainder interest in trust in one of the companies in the case, and she was therefore recusing herself. The Court was down to a bare quorum of six participating justices. That same day, Justice Brennan circulated a memo stating tersely: "Please join me." He offered no explanation for his change of position from conference, where he had voted decisively to affirm. Then, on June 18, Justice Blackmun, the Chief Justice, and Justice Powell joined in quick succession. The only comment beyond the perfunctory was from the Chief Justice, who declared with typical sangfroid: "With others, I am now persuaded you have the correct answer to this case." Another Stevens draft, with further minor changes, was circulated on June 19. The decision was released June 25.

This record of correspondence as preserved in the Blackmun papers strongly suggests that no justice made any recommendations for modifications in the Stevens opinion. Certainly, no recommendations were made by formal memorandum addressed to the whole conference. It is conceivable that informal suggestions were made, either by private memo or via law clerks. But if any such suggestions were made, they had only the most modest impact. The draft opinion circulated on June 14 indicates that it differs from the original draft only in terms of minor stylistic changes and one new footnote.[73] And the June 14 draft is virtually identical to the

72. *Chevron* was part of an avalanche of opinions handed down at the end of the 1983 term—a total of 39 decisions from June 25 (when *Chevron* was released) to July 5 (when the term finally ended). A fair number of these cases had been sitting on the docket longer than *Chevron*.

73. The new footnote is number 22 in the opinion. It simply reports that the dispute in

opinion as released on June 25. If any justice harbored reservations about Stevens' effort, those reservations were obviously suppressed in light of all the other tasks that had to be completed to get to the end of the term.

Of the three preliminary drafts circulated by Justice Stevens, only the draft of June 14, which was the one reviewed by Justice Blackmun, is preserved in his papers. As was his custom, Justice Blackmun marked in pencil throughout the draft, indicating by small circles what he regarded as errors in spelling, grammar, and citation style. There are three arguably more revealing marginal comments.

In the margin opposite footnote 34, Justice Blackmun has written "footnotes!" The opinion is more than ordinarily loaded down with footnotes, and the remark may reflect a sense of tedium in having to forge through these complex materials. In the margin opposite the concluding sentence of the section of the opinion devoted to legislative history, Justice Blackmun has written "yes." That sentence reads: "We conclude that it was the Court of Appeals, rather than the Congress or any of the decisionmakers who were authorized by Congress to administer this legislation, that was primarily responsible for the 1980 position taken by the agency."[74] It is possible this may have been the point in reading when Justice Blackmun became fully convinced by Stevens' argument.[75] And on the first page of the opinion, in the top left hand corner, Justice Blackmun has written simply: "Whew!" In context, it is safe to say that this was an expression of admiration for Justice Stevens' handiwork, and perhaps also a sense of relief that the opinion handled the complicated issue in a way that absolved Justice Blackmun of any further engagement with the matter.

"Whew!" may in fact provide the best clue as to how the Court came to render such an emphatic and unanimous opinion in *Chevron*. Given that he thought he had precarious support, Justice Stevens presumably worked especially hard to produce a persuasive opinion. The result is impressive in its craftsmanship. The opinion frames the standard of review in a bold new way designed to maximize the strengths and minimize the weaknesses of the disposition for which Stevens was arguing. It meticulously dissects the statutory and legislative history arguments. It ends on a high note designed to carry the reader away with a paean to democracy and judicial restraint. Circulated to his colleagues in the midst of the end-of-term crunch, this

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the case concerns the meaning of the term "major stationary source," not the term "proposed source." *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 849 n.22 (1984).

74. *Chevron*, 467 U.S. at 864.

75. Justice Blackmun recorded no reaction to the passages in the next section of the opinion about the illegitimacy of judges resolving contested policy questions.

over-achieving opinion more than carried the day—it swept the field.

IV. THE CONSTRUCTION OF A LANDMARK

There is no evidence that Justice Stevens understood his handiwork in *Chevron* as announcing fundamental changes in the law of judicial review. Both before and after *Chevron* was decided, Justice Stevens authored opinions that analyzed agency interpretations using the traditional factors approach that pre-dated *Chevron*, and that many believe were superseded by *Chevron*.[76] In later years, when asked about his most famous opinion, Justice Stevens would respond that he regarded it as simply a restatement of existing law, nothing more or less.[77]

The most striking evidence that Justice Stevens had no desire to modify the status quo is provided by the remarkable *Cardozo-Fonseca* episode that occurred less than three years after *Chevron* was decided.[78] *Cardozo-Fonseca* was an immigration case, in which the Justice Department sought *Chevron* deference for its interpretation of the legal requirements for establishing asylum in the United States. Writing for the Court, Justice Stevens stated that no deference was appropriate, because the issue was a "pure question of statutory construction for the courts to decide."[79] The discussion strongly implied that *Chevron*-style deference was limited to questions of "law-application," with "pure questions of law" being reserved for independent judicial determination. There was support for such a distinction in pre-*Chevron* case law.[80] But the distinction is in apparent conflict with *Chevron*, which drew no such dichotomy, and the issue in *Chevron* itself should probably be regarded as a pure question of law—whether "source" should be defined as apparatus or plant. That Stevens would seek to deflate his *Chevron* opinion in this manner strongly suggests that he had no design to change the multi-faceted approach to judicial review of questions of law. Certainly he had no intention to restrict his own

76. *See* Conn. Dep't of Income Maint. v. Heckler, 471 U.S. 524 (1985) (Stevens, J.); Aluminum Co. of Am. v. Cent. Lincoln People's Util. Dist., 467 U.S. 380, 402–03 n.3 (1984) (Stevens, J., dissenting).

77. Justice Stevens is a graduate of Northwestern Law School, where I formerly served as the John Paul Stevens Professor of Law. In that capacity, I was occasionally invited to attend public events at which Justice Stevens agreed to speak when he came to Chicago. I recall at least two occasions when someone in the question-and-answer session after the speech asked him a version of the "what did you intend when you wrote *Chevron*?" question. The answer was always that he regarded it simply as a restatement of established law.

78. *See* INS v. Cardozo-Fonseca, 480 U.S. 421 (1987).

79. *Id.* at 446.

80. *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 428–430 (3d ed. 2004).

discretion in future cases to call upon aspects of the traditional approach that were downplayed in *Chevron*.[81]

Nor is there any evidence that Justice Stevens' colleagues on the Court perceived *Chevron* as some kind of watershed decision, either when it was decided or for some time afterwards. We have already seen that the opinion generated no substantive comment from any member of the Court when it was circulated in June of 1984. Further evidence that the justices regarded *Chevron* as just another case is provided by the next term's decisions. Although there were 19 argued cases in the next term that presented some kind of question about whether the Court should defer to an agency interpretation of statutory law, *Chevron* was cited in only one of those cases.[82] Based on its initial trajectory as a precedent in the Supreme Court, *Chevron* seemed destined to obscurity.

But *Chevron* was not to be relegated to obscurity, quite the contrary. We can trace the ascendancy of the *Chevron* "two-step" approach to judicial review in the Supreme Court's own body of decisional law. Beginning with the 1985–86 term, *Chevron* began to appear with increasing frequency in the Court's opinions. Six cases applied the *Chevron* framework in 1985–86, two the next term, and five the term following that.[83] By the end of the 1980s, the percentage of deference cases in the Supreme Court adopting the *Chevron* framework had risen to around 40%; by the early 1990s it was up to around 60%.[84] Soon the Court began to debate, in the course of resolving particular stationary questions, whether the *Chevron* approach should apply or not. Thus, questions arose as to whether *Chevron* applies to pure questions of law, whether *Chevron* applies to legal issues that arise in judicial rather than administrative proceedings, and whether *Chevron* trumps statutory interpretation precedents established in previous court cases.[85] Eventually, the Court was granting *certiorari* and devoting entire cases to questions about the scope of "the *Chevron* doctrine," such as whether it

81. Many years later, in *Negusie v. Holder*, 129 S. Ct. 1159 (2009), Justice Stevens authored a concurring opinion in which he again took the position that *Chevron* does not apply to pure questions of law.

82. Chem. Mfrs. Ass'n v. Natural Res. Def. Council, 470 U.S. 116 (1985). For overall data on the 1984 Term, *see* Merrill, *supra* note 14, at 1038–39.

83. Merrill, *supra* note 14, at 1036–38.

84. *See* data presented in Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L. Q. 351, 359–60 (1994).

85. *See* Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) (judicial proceedings); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) (judicial precedent); INS v. Cardozo-Fonseca, 480 U.S. 421 (1987) (pure questions of law). For an overview of these and other issues about the scope of *Chevron* that have arisen, see Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001).

applies to interpretations announced in agency adjudications or opinion letters.[86]

How did *Chevron*, after such an inauspicious beginning, acquire this status as a core precedent of administrative law? Two explanations seem most plausible. The first focuses on the D.C. Circuit, and posits that *Chevron* became a leading case initially in the D.C. Circuit, and then migrated back to the Supreme Court along with personnel who had previously served in the D.C. Circuit. The second focuses on the role of the Executive Branch, and posits that Justice Department lawyers, perceiving the advantages of *Chevron*'s expanded rule of deference to administrative interpretations, became persistent and eventually successful proselytizers for use of the *Chevron* standard in reviewing agency interpretations of law.

The role of the D.C. Circuit in establishing *Chevron* as a landmark has been suggested by others,[87] and is broadly consistent with much of the data about *Chevron*'s rise from obscurity. The D.C. Circuit is the court that hears the highest percentage of cases involving judicial review of agency action. Many of these cases involve disputes over whether to defer to agency interpretations of law. If the D.C. Circuit were to adopt *Chevron*'s "two-step" formula as the dominant standard for judicial review of questions of law, it could then have been transplanted back to the Supreme Court by employees of the D.C. Circuit who were promoted to service on the Supreme Court. The most prominent of these promoted employees, of course, was Antonin Scalia, who was a judge on the D.C. Circuit when *Chevron* was handed down in 1984, and was elevated by President Reagan to the Supreme Court in 1986, where he promptly became the Court's foremost champion of *Chevron*. In addition, a disproportionately large number of Supreme Court law clerks serve as clerks to D.C. Circuit judges before they go on to clerk for justices on the Supreme Court. They too would be familiar with *Chevron*, and would be expected to turn to its two-step formula in drafting opinions for Supreme Court justices dealing with judicial review of questions of law.

Some evidence tending to support this reverse-migration hypothesis is provided by the previously mentioned *Cardozo-Fonseca* episode. The case was decided in Justice Scalia's first year on the Supreme Court, and the junior Justice took it upon himself to write a concurring opinion chastising Justice Stevens for his "eagerness to refashion important principles of administrative law in a case in which such questions are completely

86. *See* United States v. Mead Corp., 533 U.S. 218 (2001) (opinion letters); INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) (agency adjudication).

87. *See* LAWSON, *supra* note 80, at 449.

unnecessary to the decision and have not been fully briefed by the parties."[88] Justice Scalia objected to Justice Stevens' suggestion that *Chevron* concerned only questions of law application, observing that *Chevron* "has been an extremely important and frequently cited opinion, not only in this Court but in the Courts of Appeals."[89] In effect, the newly arrived Justice from the D.C. Circuit was telling his colleagues that *Chevron* was already entrenched in the practice of judicial review in the D.C. Circuit, and major revisions could be destabilizing.

In order to shed further light on the reverse-migration hypothesis, I examined all decisions of the D.C. Circuit citing to *Chevron* during the first three years after the decision was handed down. The survey provides further evidence confirming the broad outlines of the hypothesis. The D.C. Circuit picked up on the *Chevron* two-step framework for reviewing agency determinations of law very quickly. One early decision, *Rettig v. Pension Benefit Guaranty Corp.*,[90] provided an elaborate paraphrase of the two-step idea, in effect adopting it as the law of the Circuit. In all, the D.C. Circuit handed down 23 decisions citing to *Chevron* in the first year after the decision was announced. This grew to 40 in the second year, and 64 in the third year after the decision was announced. This is a disproportionately large percentage of *Chevron* citations relative to other courts of appeal.[91] By the end of the second year, *Chevron* was already regarded as boilerplate doctrine in the Circuit. One finds statements from this period describing *Chevron* as the "now familiar framework," the "familiar two-step framework," the "familiar dictates," or the standard that applies "as always" in reviewing agency interpretations.[92]

There has occasionally been speculation that *Chevron* was embraced with particular fervor by the newly-appointed Reagan judges on the D.C.

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88. *Cardozo-Fonseca*, 480 U.S. at 455 (Scalia, J., concurring in the judgment). There is irony in this accusation, given that *Chevron*, the "important principle of administrative law," was itself less than three years old and had been "established" in a decision in which the issues it dealt with had also not been briefed by the parties.

89. *Id.* at 454.

90. 744 F.2d 133, 150–51 (D.C. Cir. 1984).

91. The D.C. Circuit citations represent about 40% of all citations to *Chevron* at the court of appeals level during the first three years. Today, by contrast, D.C. Circuit citations to *Chevron* have fallen to about 17% of all court of appeals citations.

92. *See* Natural Res. Def. Council v. Thomas, 805 F.2d 410, 420 (D.C. Cir. 1986) (Wald, C.J.) ("dictates"); Int'l Bhd. of Teamsters v. ICC, 801 F.2d 1423, 1426 (D.C. Cir. 1986) (Starr, J.) ("familiar two-step"); Transbrasil S.A. Linhas Aereas v. DOT, 791 F.2d 202, 205 (D.C. Cir. 1986) (Wald, C.J.) ("always"); Inv. Co. Inst. v. Conover, 790 F.2d 925, 932 (D.C. Cir. 1986) (Starr, J.) ("familiar framework").

Circuit.[93] One can tell a plausible story in support of this surmise. During these years, the D.C. Circuit was closely divided between Republican and Democratic appointees. The Democratic judges were likely somewhat hostile to the deregulatory initiatives of the Reagan Administration, and would seek some way to strike them down. In contrast, the newly-appointed Republican judges (who were gradually growing in number), would be eager to find some way to uphold these initiatives. Perhaps these Republican judges seized upon *Chevron* as the most effective weapon at hand for upholding controversial administrative decisions.

The data, however, provide no support for such a supposition during the first two years after *Chevron* was decided. The judge who cited *Chevron* most frequently during these years was Judge Patricia Wald, a Carter appointee. She was the author of *Rettig*, and is perhaps the judge most responsible for the rapid assimilation of the two-step framework in the D.C. Circuit. Judge Wald cited *Chevron* in 13 opinions in the first two years, easily outdistancing the top Republican citer, Judge Kenneth Starr, who cited the case in 8 opinions. Indeed, Democratic appointees out-cited *Chevron* relative to Republican appointees 38 to 21 in the first two years, and out-cited Republicans 62 to 53 over all three years.

There are some interesting variations in citation patterns among the judges in these early years, but they appear to have more to do with age and openness to new precedent than with politics. Thus, Judge Spottswood Robinson, the most senior Democratic appointee, made relatively little use of *Chevron*, citing it only once the first two years. He tended to stick to the traditional factors, and even after *Chevron* became established referred to it mostly in string citations. Similarly, Judge Mikva never showed much affinity for *Chevron.* Judges Wald and Harry Edwards, in contrast, who were younger and arguably more open to change, made greater use of *Chevron.* On the Republican side, Judge Starr, who was the youngest judge on the Circuit, was the most frequent user of *Chevron.* In contrast, Judge Robert Bork, who was more senior, made little reference to *Chevron* until the third year after it came down (he cited it in only two opinions the first two years). Interestingly, Judge Antonin Scalia, who was to become identified as *Chevron*'s champion after he was named to the Supreme Court, cited *Chevron*

93. For evidence that Democratic and Republican judges on the D.C. Circuit respond differently to cases in ways that match their party affiliation, see Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1106–09 (2001) (summarizing studies). Interestingly, one study finds less political influence in *Chevron* cases than in cases presenting procedural challenges to agency decisions. Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

in only three opinions while he sat on the D.C. Circuit.

In the third year of *Chevron*'s existence, the picture begins to change slightly, although this may be due to the fact that the Republican appointees, with their increasing numbers, were getting more of the opinion-writing assignments in major regulatory decisions. Republican appointees in 1986–87 used *Chevron* slightly more than Democratic appointees (32 to 25 citations in majority opinions). Judge Starr became the leading user of *Chevron* that year (11 citations), slightly eclipsing Judge Wald (9 citations). Judge Bork discovered *Chevron* (8 citations), as did Judge Laurence Silberman (6 citations). On the other side of the aisle, after *Cardozo-Fonseca* was decided late in the year, Judge Edwards mounted a short-lived campaign to limit *Chevron* to cases involving "law application."[94] So there is some evidence that *Chevron* was becoming more of a Republican-favored doctrine, and the Democrats were having second thoughts. But the evidence is at most suggestive on this point.[95]

I should add that there is little evidence, from these three years, that *Chevron* caused the judges of the D.C. Circuit to become more deferential toward administrative agencies.[96] In terms of cases citing *Chevron* in which there was a clear disposition affirming or reversing the agency, affirmances barely outnumbered reversals (64 to 52). If we look only at those cases that expressly frame the inquiry in terms of *Chevron*'s two-step formula, the ratio of affirmances to reversals improves slightly (30 to 20). Of course, all this

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94. *See* Int'l Union v. Brock, 816 F.2d 761, 764 (D.C. Cir. 1987) (Edwards, J.); Regular Common Carrier Conference v. United States, 820 F.2d 1323 (D.C. Cir. 1987) (Edwards, J.). Early the next term, Justice Scalia announced in another concurring opinion that *Cardozo-Fonseca*'s "law application" interpretation of *Chevron* had been abandoned by the Court (properly enough in his view). NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 133–34 (1987) (Scalia, J., concurring). The pure question of law/law application distinction quickly disappeared. *See* Merrill, *supra* note 14, at 986 n.74.

95. About this time, a number of Republican-appointed judges took to writing about *Chevron* in the law reviews. *See* Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511 (1989); Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990). Although this confirms that the D.C. Circuit judges attributed great significance to *Chevron*, it would be difficult to characterize these efforts as advocacy pieces. Judge Starr's article presented a carefully balanced view of *Chevron*, and Justice Scalia's article took pains to point out that the *Chevron* standard did not necessarily mean more deference to agencies.

96. In a widely cited study, Peter Schuck and Donald Elliott claimed that *Chevron* caused an increase in deference to agency policy decisions in the lower courts. *See* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L. J. 984 (1990). But their methodology did not single out for study cases that actually cited or relied on *Chevron*.

could be due to selection effects: judges are more likely to select a deference-promoting framework when they have decided to affirm (and need to justify this result) than when they have decided to reverse. Still, the D.C. Circuit took virtually no time at all to learn how to reverse agency interpretations at step one or step two of the *Chevron* framework.[97] The much-debated question whether *Chevron* has had any impact on the degree of deference judges actually give to agencies remains unresolved.

The second plausible explanation for *Chevron*'s rise to fame is aggressive promotion by the Executive Branch lawyers. *Chevron* was regarded as a godsend by Executive Branch lawyers charged with writing briefs defending agency interpretations of law. Not only did the two-step standard provide an effective organizing principle for busy brief-writers, the opinion seemed to say that deference was the default rule in any case where Congress has not spoken to the precise issue in controversy. Since this describes (or can be made to seem to describe) virtually every case, *Chevron* seemed to say that the government should nearly always win. *Chevron* may have meant little to the justices when it was decided, and it may have taken time for courts other than the D.C. Circuit to accept it as orthodoxy. But it was quickly seized on as a kind of mantra by lawyers in the Justice Department, who pushed relentlessly to capitalize on the perceived advantages the decision presented.[98]

Enthusiasm for *Chevron* among government lawyers is one thing; acceptance by courts is another. But here it is plausible to suppose that the Justice Department's role as the ultimate institutional litigant is relevant. The Department urged that *Chevron* serve as the relevant standard of review at nearly every turn, and the Department appeared in court much more frequently in cases raising questions about review of questions of law than any other category of litigant. It is not difficult to imagine that over time the Department's persistence would pay off, and courts would start to regard *Chevron* as the accepted standard.[99]

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97. *See, e.g.*, Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 156 (D.C. Cir. 1984) (Wald, C.J.) (reversing agency interpretation as unreasonable at step two of *Chevron*); FAIC Sec., Inc. v. United States, 768 F.2d 352 (D.C. Cir. 1985) (Scalia, J.) (reversing agency interpretation as contrary to statute at step one of *Chevron*).

98. From 1987 to 1990, I served as Deputy Solicitor General in the Justice Department, overseeing appeal authorization and Supreme Court litigation in civil cases. After only a few months on the job, I joked to friends that I was the Deputy Solicitor General for *Chevron*, since it seemed that virtually every request from the Civil Division for appeal authorization or for Supreme Court participation was based on the need to expand or defend the *Chevron* doctrine.

99. The classic study of the advantages of being an institutional litigant is Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW &

These two explanations for *Chevron*'s delayed investiture as a landmark decision—migration from the D.C. Circuit and executive advocacy—are by no means inconsistent. To the contrary, they are mutually supportive. The Justice Department's impact as an institutional litigant might well be the strongest in the D.C. Circuit, given the very high concentration of administrative law cases in that circuit. So executive advocacy may help explain why *Chevron* caught on first in the D.C. Circuit. Moreover, the Justice Department, through the Office of Solicitor General, is by far the most important institutional litigant in the Supreme Court. So executive advocacy may have played a reinforcing role in *Chevron*'s migration back to the Supreme Court. Perhaps most importantly, vigorous advocacy of executive branch prerogatives served the interests of both D.C. Circuit judges seeking promotion to the Supreme Court—such promotions being controlled by the White House—and Justice Department lawyers seeking victories in court. Both sets of aspirants had a stake in supporting an expansion of executive power, making *Chevron*'s rhetoric of implied delegations of executive authority congenial to both.

CONCLUSION

Chevron presents a striking instance of a case that became great not because of the inherent importance of the issue presented, but because the opinion happened to be written in such a way that key actors in the legal system later determined to make it a great case. *Chevron* became a landmark decision due to the cumulative effect of a series of fortuitous events, among them Justice White's assignment of the case to Justice Stevens, Justice Stevens' creative restatement of certain principles of judicial review of questions of law, the lack of scrutiny given the Stevens opinion by other justices, Judge Patricia Wald's quick embrace of the two-step formula in the D.C. Circuit, Justice Scalia's elevation to the Supreme Court from the D.C. Circuit two years later, and the Justice Department's unrelenting campaign to make *Chevron* the universal standard for judicial review of agency interpretations of law. Individually, each of these events is readily explicable; cumulatively, they would have to be described as an accident.

There is no evidence that *Chevron* has led to a greater rate of acceptance of agency interpretations of statutes by the Supreme Court.[100] The

SOC'Y REV. 95 (1974).

100. For the most recent and comprehensive review, see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L. J. 1083 (2008).

evidence of its effect on acceptance of agency views by lower courts is mixed.[101] Nevertheless, *Chevron*'s impact on the legal system has been profound. By separating out for judicial determination the question whether the statute has a clear or unambiguous meaning, and suppressing other contextual variables traditionally considered by courts in considering agency interpretations, the decision subtly but profoundly reinforced the movement toward textualism in statutory interpretation. By highlighting agency accountability to the president, and the judiciary's lack of democratic pedigree, the decision accelerated the movement toward "presidential administration."[102] Perhaps most importantly, the decision has led to a sustained discussion among judges and academics about the proper role of courts in the administrative state, and has ignited an awareness of questions of institutional choice that have long remained submerged. It is not overstating the matter to say that *Chevron* has become one of a handful of decisions—along with *Marbury v. Madison*, *Brown v. Board of Education*, and *Roe v. Wade*—that are the material for a continuing collective meditation about the role of the courts and indeed of the law itself in the governance of our society.

The wonder of it all is that the Court that rendered this decision had utterly no intention of producing such an opinion. Indeed, the Court did not even realize it had produced such an opinion until others pointed this out. *Chevron* reminds us that sometimes in the pressure of events a remarkable document emerges that becomes the focus of collective deliberation about matters of great importance. The author of such a document is as much the times in which it is rendered as the individual who strings the words together and puts them on paper.

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101. In addition to Kerr, *supra* note 15, Revesz, *supra* note 93, and Schuck & Elliott, *supra* note 96, see also Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 L. & CONTEMP. PROBS., 65 (Spring 1994); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767 (2008); Thomas J. Miles and Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006).

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

CHEVRON AS A DOCTRINE OF HARD CASES

FREDERICK LIU*

According to the conventional wisdom, the Chevron *doctrine rests on a presumption about congressional intent—a presumption that when a statute is ambiguous, Congress intended the gap to be filled by the agency charged with administering the statute. But the presumption is a mere fiction; when Congress enacts a statute, it generally has no view on who should resolve the ambiguities that later arise.*

This Article proposes a new theory of Chevron*, one that rests on a simple reality: no matter how determinate the law may seem, there will inevitably be hard cases—cases in which the law runs out before providing a solution. As legal positivism teaches, hard cases cannot be decided by merely applying existing law. When the law runs out, a case can be decided only by making new law to fill the gap. There are thus two distinct stages in deciding every hard case: applying the law and making it.*

This Article argues that these two stages correspond to Chevron*'s two steps. Step One is the ordinary, law-applying stage of any case of statutory interpretation. Step Two is the law-making stage, when a court is faced with a gap to fill. The presence of an agency construction, however, means that the court itself need not make law to fill that gap; instead, it may defer to the law-making of the agency—which, unlike the court, is accountable to the political branches. Viewed this way, deference emerges as an act of judicial self-restraint, grounded in the recognition that the law carries greater legitimacy when made by politically accountable agencies than by unelected judges.*

This positivist account of Chevron *elucidates the doctrine's familiar two-step inquiry, shedding light on longstanding questions about the doctrine's application. It also answers recurring objections to judicial deference more generally, including the claim that such deference conflicts with the Constitution. Finally, understanding* Chevron *as a doctrine of hard cases has important implications for the scope of* Chevron*'s domain.*

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INTRODUCTION

The most important doctrine of statutory construction in the modern administrative state rests today on a legal fiction. That doctrine, announced three decades ago by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, directs courts to defer to reasonable agency constructions of ambiguous statutes.[1] The conventional wisdom holds that the doctrine rests on a presumption about congressional intent—a presumption that when a statute is ambiguous, Congress intended the gap

1. 467 U.S. 837, 843–44 (1984).

to be filled by the agency charged with administering the statute.[2] On this view, shared by scholars and jurists alike from across the philosophical spectrum, courts are merely respecting Congress's wishes when they defer to agency constructions of law.[3]

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2. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013) ("*Chevron* is rooted in a background presumption of congressional intent . . . ."); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("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."); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996) (embracing the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows").

3. *See, e.g.*, Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990) ("The threshold issue for the court is always one of congressional intent: did Congress intend the agency's interpretation to bind the courts? The touchstone in every case is *whether Congress intended to delegate to the agency the power to interpret with the force of law in the particular format that was used*."); Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 670 (2000) ("The linchpin of the *Chevron* doctrine . . . is not realism or democratic theory, but rather a theory of delegation."); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372 (1986) (arguing that one justification for deference that "can reconcile apparent conflict in case law descriptions of a proper judicial attitude towards agency decisions of law . . . rests upon Congress' intent that courts give an agency['s] legal interpretations special weight, an intent that (where Congress is silent) courts may impute on the basis of various 'practical' circumstances"); William N. Eskridge, Jr., *Vetogates*, Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1463 (2008) ("[T]o the extent that *Chevron* demands special judicial deference to certain agency interpretations of law, the justification must be congressional delegation of lawmaking power . . . ."); Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2637 (2003) ("According to the consensus view, *Chevron* deference is consistent with *Marbury*, as long as Congress has delegated to agencies the power to make policy by interpreting ambiguous statutory language or filling gaps in regulatory laws."); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 623 (1996) ("[B]inding deference is the product of Congress's right to delegate legislative authority to administrative agencies."); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 872 (2001) ("[W]e think that the congressional-intent theory is the best of the three explanations for the legal foundation of *Chevron* deference."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 ("'The extent to which courts should defer to agency interpretations of law is ultimately a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue.'" (quoting Process Gas Consumers Grp. v. U.S. Dep't of Agric., 694 F.2d 778, 791 (D.C. Cir. 1982) (en banc) (internal quotation marks omitted))); Laurence H. Silberman, Chevron*—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990) (explaining that "Congress is presumed to delegate" to agencies the authority to resolve ambiguities in statutory meaning); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1449–50 (2011) ("[A] consensus has gradually

No one, however, believes the presumption reflects actual congressional intent.[4] The truth of the matter is that when Congress enacts a statute, it generally has no view on who should resolve the ambiguities that later arise.[5] Although Congress sometimes delegates authority to an agency "to define a statutory term or prescribe a method of executing a statutory provision,"[6] it usually has nothing to say about how statutory gaps should be filled. The presumption about congressional intent is but a legal fiction.[7]

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emerged that *Chevron* is grounded in a presumption (likely a legal fiction) about congressional intent."); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2076 (1990) ("*Chevron* is best defended as a sensible reconstruction of congressional instructions in light of the relevant institutional capacities . . . .").

4. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 198 (1998) ("[I]mplicit delegation theory lacks any solid basis in actual congressional intent."); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 470 (1989) ("*Chevron* offers no evidence to support its conclusion that silence or unclarity in a regulatory statute typically represents Congress's deliberate delegation of meaning-elaboration power to the agency."); Manning, *supra* note 3, at 623 ("[*Chevron*'s] categorical presumption cannot be explained in terms of actual or imputed congressional expectations about the allocation of law-interpreting authority between agencies and courts."); Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 348, 350 n.33 (2007) (reviewing ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006)) ("The *Chevron* canon . . . cannot plausibly be defended as an estimation of some preexisting legislative intent.").

5. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203 (2001) ("Congress so rarely discloses (or, perhaps, even has) a view on this subject as to make a search for legislative intent chimerical and a conclusion regarding that intent fraudulent in the mine run of cases."); Merrill & Hickman, *supra* note 3, at 871 ("The principal problem [with the congressional-intent theory] is the evidence supporting the presumption that Congress generally intends agencies to be the primary interpreters of statutory ambiguities is weak."); Scalia, *supra* note 3, at 517 ("In the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all.").

6. United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982) (internal quotation marks omitted); *see, e.g.*, Batterton v. Francis, 432 U.S. 416, 425 (1977) (concluding that Congress "expressly *delegated* to the Secretary [of Health, Education, and Welfare] the power to prescribe standards for determining what constitutes 'unemployment'" for purposes of eligibility for benefits under the Aid to Families with Dependent Children-Unemployed Fathers program).

7. *See* Barron & Kagan, *supra* note 5, at 212 ("Because Congress so rarely makes its intentions about deference clear, *Chevron* doctrine at most can rely on a fictionalized statement of legislative desire . . . ."); Bradley, *supra* note 3, at 671 ("The *Chevron* delegation presumption . . . has a fictional quality to it."); Breyer, *supra* note 3, at 370 ("For the most part courts have used 'legislative intent to delegate the law-interpreting function' as a kind of legal fiction."); Scalia, *supra* note 3, at 517 (acknowledging that the *Chevron* doctrine "represents merely a fictional, presumed intent, and operates principally as a background

The Supreme Court has nevertheless adhered to that fiction and developed a complex test for when the presumption should be honored. The point of the test, as the Court explained in *United States v. Mead*, is to determine whether "Congress delegated authority to the agency generally to make rules carrying the force of law."[8] But because actual congressional intent on that question is hard to come by, the test necessarily turns on the practical circumstances of each case and a court's own judgment of whether deference would make sense in light of them.[9]

While paying all this attention to what the presumption means for *Chevron*'s domain, the Court has said little, if anything, about what the presumption means for the doctrine's familiar two steps. The Court in *Chevron* did say, of course, that a court must inquire whether Congress has spoken directly to the statutory question at Step One, and if not, whether the answer furnished by the agency is reasonable at Step Two.[10] But that general description leaves many questions unanswered:

- What methods of statutory interpretation should courts use at Step One? *Chevron* directs courts to employ the "traditional tools of statutory construction,"[11] but what are those tools? Some of the Court's decisions look to legislative history;[12] others rely on only statutory text and structure.[13] One scholar has said that the "traditional tools" include reliance on statutory purpose;[14] another has argued that they do not.[15] Yet a third has suggested that they encompass "[c]onstitutionally inspired norms, along with many others that serve institutional or substantive goals."[16]
- Just how clear must a statute be for the inquiry to end at the first step?

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rule of law against which Congress can legislate"); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2592 n.58 (2006) (noting that, because "it is hard to tease out, from the existing legal materials, an authoritative legislative judgment" on "the question of deference to executive interpretations," "it is necessary . . . to speak in terms of legal fictions").

8. 533 U.S. 218, 226–27 (2001).

9. *See* Barron & Kagan, *supra* note 5, at 212; Breyer, *supra* note 3, at 370.

10. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

11. *Id.* at 843 n.9.

12. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 432–43 (1987); *Chevron*, 467 U.S. at 862–64.

13. *See, e.g.*, MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 225–29 (1994); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).

14. Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 76 (2008).

15. Anthony, *supra* note 3, at 18–19 & n.65.

16. Sunstein, *supra* note 3, at 2110.

Is it enough for the court to have a "firm conviction" about the statute's meaning?[17] Or should the court proceed to Step Two "so long as the text immediately at hand contains a surface-level gap or ambiguity"?[18] It has been said that "courts have not been consistent in the level of clarity that they require."[19]

- What does it mean for an agency construction to be "reasonable"? Some have suggested that Step Two is merely redundant of Step One,[20] while others have compared it with "hard look" review of agency decisionmaking under the Administrative Procedure Act (APA).[21]

Despite the near-consensus that *Chevron* rests on a presumption about congressional intent, these seemingly basic questions persist. A theory of *Chevron* based on a legal fiction has failed to resolve them.

This Article proposes a new theory of *Chevron*, one that rests on a simple reality: the law has limits. Although the law contains many answers, it does not provide a solution to every case. No matter how precise the law may seem, there will inevitably be "hard cases"—cases "in which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete."[22] Legal positivism teaches that hard cases cannot be decided by merely applying existing law. When the law runs out, the case can be decided only by making new law to fill the gap.[23] There are thus "two completely different stages" in deciding every hard case: applying the law and making it.[24]

This Article argues that these two stages correspond to *Chevron*'s two

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17. *Id.* at 2092.

18. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 215 (2006).

19. Note, *"How Clear Is Clear" in* Chevron*'s Step One?*, 118 HARV. L. REV. 1687, 1691 (2005) [hereinafter Note, *Step One*]; *see also* Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 94–95 (1994) (noting "deferential" and "active" approaches to Step One in the courts of appeals).

20. Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1261 (1997); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 599 (2009).

21. Gary S. Lawson, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377, 1378–79 (1997); Levin, *supra* note 20, at 1276; Seidenfeld, *supra* note 19, at 128–29; Silberman, *supra* note 3, at 827–28; Sunstein, *supra* note 3, at 2105.

22. H.L.A. HART, THE CONCEPT OF LAW 272 (2d ed. 1994); *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1977).

23. HART, *supra* note 22, at 272.

24. *Id.* at 273.

steps. Step One is the ordinary, law-applying stage of any case of statutory interpretation. The court must say what the law is and give effect to what the law says. But if the law runs out before yielding a solution, then the court is faced with a hard case, and it must proceed to Step Two, the law-making stage. The presence of an agency construction, however, means that judges need not engage in law-making of their own, as if they were legislators. They can instead defer to the law-making of the agency, which, unlike the court, is accountable to the political branches. Viewed this way, deference emerges as an act of judicial self-restraint, grounded in the recognition that the law carries greater legitimacy when made by politically accountable agencies than by unelected judges.

This positivist account of *Chevron* avoids relying on any fiction about congressional intent. By grounding deference in the reality of hard cases, it owns up to the fact that Congress hardly ever considers the issue of who should resolve statutory ambiguities. But that is not the only reason it is superior to the conventional wisdom. A hard-cases theory of *Chevron* also fills gaps in the application of the two-step inquiry itself. What tools should courts use at Step One? If the first step is simply the initial stage of any statutory interpretation case, then courts should employ whatever tools they would ordinarily use to apply the law. When is a statute "clear," so that the inquiry can end there? If *Chevron*'s two steps reflect the line between applying the law and making it, then a statute is clear when the law provides an answer before running out. When is an agency construction "reasonable," so that a court can uphold it? If Step Two is about law-making, then a "reasonable" construction is any construction the court itself could have imposed by making law on its own. Positivism provides a theory for answering these doctrinal questions, succeeding where the presumption about congressional intent fails.

But that is not all: positivism also answers recurring objections to judicial deference in general. These objections come in various forms. It has been said, for instance, that deference cannot be reconciled with the Judiciary's Article III duty to "say what the law is."[25] It has also been said that deference forces judges to adopt a mindset that is psychologically challenging,[26] and that differences between judicial and administrative methods of statutory construction render deference paradoxical.[27] But when *Chevron* is understood as a doctrine of hard cases, these objections lose

25. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see* sources cited *infra* note 223.

26. Breyer, *supra* note 3, at 379.

27. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 504 (2005).

force. *Chevron* can be squared with the Constitution because it mandates deference only at the point of law-making, when the court has already done all it can to "say what the law is." *Chevron* is psychologically manageable because it asks only that judges respect the most basic of distinctions, between applying the law and making it. And *Chevron* makes sense of the differences between judicial and administrative approaches to statutory construction because when a court defers, it does not make new law—only the agency does.

Finally, understanding *Chevron* as a doctrine of hard cases has important implications for *Chevron*'s domain. As noted above, the Court's current jurisprudence holds that the *Chevron* framework should not apply at all unless it appears that Congress has empowered the agency to speak with the "force of law." But if the purpose of *Chevron* is to keep judges from acting as legislators, then *Chevron* should apply in every hard case involving an agency construction. Understanding *Chevron* as a doctrine of hard cases thus entails a different approach to Step Zero. It also suggests a certain relationship between *Chevron* and other canons of statutory construction. Positivism contemplates three types of canons: for applying the law, for creating ambiguity, and for making the law. Only canons of the third type compete with *Chevron* deference, forcing the court to decide which should prevail. Faced with such a decision, the court should weigh the values served by the other canon against the value of deferring to a more legitimate (and occasionally more expert) law-maker in the agency. The balance of values could mean that *Chevron* should be displaced, as when the other canon is a clear statement rule. Or it could mean that *Chevron* should prevail, as when the other canon is the canon of constitutional avoidance.

To explain and defend *Chevron* as a doctrine of hard cases, this Article proceeds as follows. Part I provides an overview of the notion of hard cases, relying on the work of two of legal positivism's leading theorists, the English philosophers H.L.A. Hart and Joseph Raz. Through a number of hypothetical examples, Part I explains the process of deciding hard cases from a positivist perspective. Part II applies the lessons of legal positivism to the *Chevron* doctrine. It explains how understanding *Chevron* as a doctrine of hard cases not only offers insight into *Chevron*'s familiar two-step inquiry, but also solves longstanding puzzles about judicial deference more generally. Part III explores the implications of this theory of hard cases for *Chevron*'s domain. It considers when, if ever, the *Chevron* doctrine should not apply because of the type of agency action at issue or because of a competing canon of statutory construction.

I. LEGAL POSITIVISM AND THE NOTION OF HARD CASES

The question seems simple enough, and yet it has persisted for centuries: "What is law?"[28] Legal positivism offers one theory—that "the law is posited, is made law by the activities of human beings."[29] On this account, "what is law and what is not is a matter of social fact."[30] Positivism, as a general theory about the law,[31] cannot tell us how to resolve specific cases or controversies. But it can give us a framework for approaching them. This Part describes the theory's insights as they relate to the judicial process.

A. Identifying the Law

One of positivism's most important insights is that every legal system has a "rule of recognition"[32]—a "rule about rules"[33] that determines "which rules are, and which rules are not, part of the legal system."[34] In developed legal systems, the rule of recognition typically operates by identifying a characteristic that other rules must possess to be legally valid, such as "the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions."[35] When there are many such characteristics, the rule also provides "for their possible conflict by their arrangement in an order of superiority, as by the common subordination of custom or precedent to statute, the latter being a 'superior source' of law."[36] According to positivists, the content of the rule of recognition is a matter of social convention—not of morality or natural law.[37] Thus, "to state for a particular society what the criteria of law are, and the hierarchy in which these criteria stand to each other, is to describe the standards that recognized officials [in the society] accept."[38]

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28. HART, *supra* note 22, at 1.

29. JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 38 (1979).

30. *Id.* at 37.

31. *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 33 (5th ed. 2009).

32. HART, *supra* note 22, at 94 (explaining that a legal system consists in "a union of primary rules of obligation with . . . secondary rules," including a rule of recognition).

33. Scott J. Shapiro, *What Is the Rule of Recognition (and Does It Exist)?*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 235, 237 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

34. BIX, *supra* note 31, at 40.

35. HART, *supra* note 22, at 95.

36. *Id.*

37. *See* BIX, *supra* note 31, at 40–41.

38. Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 624 (1987); *see also* HART, *supra* note 22, at 116 (arguing that for a legal system to exist, "its

How a rule of recognition works can be illustrated by the following example. Suppose a dispute arises over whether vehicles are allowed in a park. Some citizens of the community believe they are; others believe they are not. Absent a rule of recognition, such disagreement will persist.[39] But if the community has a functioning legal system, then its rule of recognition will help identify which view the law regards as authoritative.[40] Suppose, for instance, the rule specifies enactment by the city council as the ultimate criterion of legal validity.[41] And suppose the council enacted an ordinance stating: "No vehicles in the park. Anyone found in possession of a vehicle in the park shall be guilty of a misdemeanor."[42] Such an ordinance, possessing the characteristic identified by the rule of recognition, would authoritatively settle whether vehicles are allowed in the park: they are not. A rule of recognition thus serves the essential purpose of remedying uncertainty about what in a society counts as law.[43]

B. Deciding Provided-For Cases

Positivists acknowledge that the rule of recognition alone will not settle every legal dispute.[44] That is because the law speaks in general terms, referring to "*classes* of person, and to *classes* of acts, things, and circumstances."[45] This makes it necessary to have a judicial process—a process for making "authoritative determinations"[46] regarding the

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rules of recognition specifying the criteria of legal validity . . . must be effectively accepted as common public standards of official behaviour by its officials").

39. *See* HART, *supra* note 22, at 92.

40. *See id.* at 94–95.

41. This example assumes that there are no superior sources of law. *Cf.* Greenawalt, *supra* note 38, at 625 (noting additional questions that might be asked about the validity of a local ordinance).

42. This hypothetical of a rule prohibiting vehicles in the park comes from Hart himself. *See* HART, *supra* note 22, at 126–29; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958). "It is the most famous hypothetical in the common law world." Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1109 (2008). And it may be familiar to law students who have taken a course on legislation. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 819 (3d ed. 2001) (using the example as an introductory problem); William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2041–43 (2006) (reviewing ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006)) (same).

43. *See* HART, *supra* note 22, at 94–95.

44. *See id.* at 93.

45. *Id.* at 124.

46. *Id.* at 96–97.

"particular acts, things, and circumstances" that qualify as "instances of the general classifications which the law makes."[47]

Which brings us to what, according to positivists, is the first stage of the judicial process: applying the law to a given set of facts. It is here that the judge can be said to exercise "neither Force nor Will, but merely judgment,"[48] for the task of applying the law consists of saying what the law is, not what it ought to be.[49] The goal of the judge is to discover the existing meaning of the law, based on traditional legal materials such as text, structure, history, and purpose.[50] And the duty of the judge is to act as the faithful agent of those who enacted the law, be they a council, a legislature, or the people themselves.[51]

Although "[p]articular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule,"[52] positivists maintain that "the life of the law" consists mainly of cases in which the

47. *Id.* at 124.

48. THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

49. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 157 (W.E. Rumble ed., 1995) (1832) ("The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry."); *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

50. It may be questioned whether "purpose" should be counted among the traditional *legal* materials on the view that purposive reasoning is necessarily *moral* in nature. *See* Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2405 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)) ("To ask what a hypothetical 'reasonable member of Congress' 'would have wanted,' I suspect, is not much different from asking what the judge thinks would be best, at least within the general constraints of the statutory scheme."). Because "purpose" is commonly regarded as a source of *legal* meaning, however, it is treated as such here. *See id.* at 2404–05 (describing the debate between textualists and purposivists as "an intramural disagreement over what methodology will best translate the public will into law").

51. *See* John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1648 n.1 (2001) ("The faithful agent theory assumes that judges have a duty to discern and enforce legislative instructions as accurately as possible and to abide by those commands when legislative intent is clear."); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189 (1987) ("In our system of government the framers of statutes and constitutions are superiors of the judges. The framers communicate orders to the judges through legislative texts (including, of course, the Constitution). If the orders are clear, the judges must obey them.").

52. HART, *supra* note 22, at 126; *see also* Hart, *supra* note 42, at 607 ("Fact situations do not await us neatly labeled, creased, and folded, nor is their legal classification written on them to be simply read off by the judge.").

application of the law is clear.[53] Consider, for instance, the application of the hypothetical ordinance above to a man driving his minivan through the park on his way to work. Given that a minivan meets the very definition of a "vehicle"—"a carrier of goods or passengers . . . *specif[ically]*: MOTOR VEHICLE"[54]—the ordinance plainly prohibits the man's conduct.[55] Or consider the case of a girl in the park pushing a toy truck through a sandbox. The truck is not designed to carry actual goods or passengers, and it has no motor. It is merely a model of a "vehicle"—a miniature replica of the real thing—so the girl's behavior clearly falls outside the ordinance.[56]

The case of the minivan (in which the law clearly applies) and the case of the toy truck (in which it clearly does not) are what positivists call legally "provided-for"[57] or "regulated"[58] disputes. Such disputes are marked by three related characteristics. First, the law yields a solution—a uniquely correct answer—to the question presented.[59] Is the man guilty of violating the ordinance? The answer "provided for" by the law is yes, because a minivan is a "vehicle." Is the girl? The answer "provided for" by the law is no, because a toy truck is not a "vehicle." Second, resolving the dispute does not require the exercise of any judicial discretion.[60] There is no room for such discretion because the answer "provided for" by the law is conclusive. Finally, to decide the dispute by making new law would entail the rewriting of existing law.[61] Thus, if a court were to hold that the man is *permitted* to drive his minivan in the park, or that the girl is *prohibited* from playing with her toy truck in the sandbox, the court would not just be making the law; it would be replacing the law already on the books.

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53. HART, *supra* note 22, at 135; *see id.* at 126 ("There will indeed be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable . . . ."); *id.* at 128 (referring to "the great mass of ordinary cases" in which legal rules work "smoothly"); *id.* at 131 ("Of course even with very general standards there will be plain indisputable examples of what does, or does not, satisfy them.").

54. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2538 (1961).

55. HART, *supra* note 22, at 126 ("If anything is a vehicle a motor-car is one.") (internal quotation marks omitted).

56. Hart suggests that "a toy motor-car electrically propelled" would present a hard case. *Id.* at 129; *see also* Hart, *supra* note 42, at 607 (mentioning "toy automobiles"). It is unclear, however, whether the toy car he has in mind could transport a child. A toy car that could do so would certainly present a harder case than that of the toy truck considered here.

57. *See* HART, *supra* note 22, at 272 (referring to "*un*regulated" cases as "legally *un*provided-for") (emphases added).

58. RAZ, *supra* note 29, at 181.

59. *Id.* at 182.

60. *Id.* at 181.

61. *Id.* at 182.

Accordingly, a legally provided-for case need not, and should not, proceed beyond the first stage of the judicial process: if the court faithfully applies the law, the matter should end there.

C. Deciding Hard Cases

Things are more complicated when there is no legally provided-for answer. Consider what the hypothetical ordinance means for a woman in the park riding her bicycle. On the one hand, a bicycle is a carrier of passengers, which suggests that it is a "vehicle"; on the other, a bicycle has no motor, which suggests that it is not. Does "vehicle," as used in the ordinance, embrace the broader definition of the term, which encompasses carriers generally, or the narrower one, which is limited to carriers with motors? A court might find it unclear what a "skilled, objectively reasonable user of words" would understand "vehicle" to mean in this context.[62] The term certainly includes minivans and excludes toy trucks. But beyond this "core of certainty" lies "a penumbra of doubt,"[63] which surrounds bicycles and perhaps other non-motor carriers, such as roller skates,[64] baby strollers,[65] and wheelchairs.[66] Positivists call such indeterminacy "open texture,"[67] a consequence of the "limit . . . to the guidance which general language can provide."[68] Because such indeterminacy is "inherent in the nature of language,"[69] it is an inevitable part of the law.

Not every theory of interpretation, of course, gives precedence to the

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62. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988); *see also* Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., 1997) ("We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79–80 (2006) (describing the textualist's inquiry).

63. HART, *supra* note 22, at 123; *see also* RAZ, *supra* note 29, at 193 (noting "the cases which fall within the vague borderlines of various descriptive concepts").

64. *See* HART, *supra* note 22, at 126; Hart, *supra* note 42, at 607.

65. *See* Thomas O. Sargentich, *The Contemporary Assault on Checks and Balances*, 7 WIDENER J. PUB. L. 231, 251 (1998) ("Surely in this context a baby carriage would not be a prohibited vehicle.").

66. *See* Pierre Schlag, *No Vehicles in the Park*, 23 SEATTLE U. L. REV. 381, 381 (1999).

67. HART, *supra* note 22, at 135.

68. *Id.* at 126, 128 (describing open texture as "the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact").

69. *Id.* at 126.

semantic meaning of the enacted text, and a court might look beyond the words of the ordinance to the subjective intentions of the legislators who enacted them. But positivists believe there is a limit as well to the guidance that such intentions can provide.[70] The problem is not merely that legislators seldom think alike,[71] or that their genuine beliefs are often difficult to discover.[72] Rather, according to positivists, there is a problem even more fundamental: given that "the world in which we live" cannot be reduced to "a finite number of features," it is impossible for legislators to anticipate "all the possible combinations of circumstances which the future may bring."[73] This "relative ignorance of fact" means that legislative intentions will not always be determinate.[74] So, in the case of the bicycle, one could easily imagine a legislative history ambiguous or silent on whether bicycles should be allowed in the park. Perhaps council members expressed conflicting views on the issue, or perhaps they lacked the foresight to discuss the issue at all.[75] Either way, it would be unclear whether the council actually intended the ordinance to cover bicycles.

If the text and history of the ordinance fail to resolve the dispute, a court might seek guidance in the general purposes behind the ordinance.[76] It might ask how a hypothetical "reasonable member"[77] of the city council "pursuing reasonable purposes reasonably"[78] "*would have wanted* a court to

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70. *See* RAZ, *supra* note 29, at 193 ("[A]ppeal to legislative intention is often of no avail, for that intention, even when ascertained, is often itself indeterminate.").

71. *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small.").

72. *See id.* at 870–71 ("Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hundreds of ways, and which by itself indicates little or nothing of the pictures which the statutory descriptions imply.").

73. HART, *supra* note 22, at 128; *see also* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980) (acknowledging that "judges must decide unanticipated cases" because "legislators cannot foresee all eventualities").

74. HART, *supra* note 22, at 128.

75. *Cf.* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 164 (1988) (noting that legislative history may yield "no clear answer" when "legislators . . . did not focus directly on the problem at hand," or when they "clearly recognized and expressed their opinions on the precise question at issue" but "took diametrically opposite positions").

76. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 88 (2005) (explaining that a purpose-based approach remains viable "even when Congress did not in fact consider a particular problem").

77. *Id.* (internal quotation marks omitted).

78. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS

interpret the [ordinance] in light of present circumstances in the particular case."[79] But positivists maintain that there is a limit to the guidance that even a purpose-based approach can provide. Even assuming that the "reasonable purposes" of a law can be identified, there will inevitably be cases in which those purposes conflict, leaving judges with "no neutral way" to decide which to favor.[80] The case of the bicycle may well be such a case. A council member in supporting the ordinance could have been pursuing a number of purposes, all of them reasonable. One purpose could have been to enhance the peace and quiet of the park by eliminating the distraction of vehicles. Another could have been to make the park more enjoyable to children, who would otherwise have to be wary of vehicles while playing. But when it comes to whether there should be bicycles in the park, these purposes conflict. A ban on bicycles might enhance the park's peacefulness, while detracting from its enjoyment by children. Should "some degree of peace in the park" give way to the "pleasure or interest" of children, or vice versa?[81] It may not be clear how a "reasonable member" of the city council would have decided this question. When the law suffers from this "relative

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IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958).

79. BREYER, *supra* note 76, at 88. A purposivist approach is similar to an approach that seeks to imaginatively reconstruct the legislature's intentions. *See* United States v. Klinger, 199 F.2d 645, 648 (2d Cir. 1952) (L. Hand, J.) ("Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered words, and to impute to them how they would have dealt with the concrete occasion."), *aff'd per curiam by an equally divided court*, 345 U.S. 979 (1953); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) ("[T]he task for the judge called upon to interpret a statute is . . . one of imaginative reconstruction. The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar." (footnote omitted)); Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907) (describing, as a legitimate means of interpretation, efforts to "find out directly what the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy").

80. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 230 (2d ed. 2006). Even when a law has only one "reasonable" purpose, it will not always be clear how far the legislature sought to pursue that purpose. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646–47 (1990) ("'[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.'" (quoting Rodriguez v. United States, 480 U.S. 522, 525–26 (1987))).

81. HART, *supra* note 22, at 129.

indeterminacy of aim,"[82] a purposivist must look elsewhere for a basis of decision.

But what if a judge, following whatever method of interpretation he deems appropriate (whether textualism, intentionalism, purposivism, or some combination thereof), exhausts all the relevant legal materials without finding an answer to the statutory question presented? The judge, then, is confronted with what positivists call a "hard case"—a case "in which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete."[83] In a hard case, the law runs out before providing a solution,[84] leaving a gap that cannot be filled by merely applying the law.[85] As a result, according to positivists, the judge has no choice but to proceed to the next stage in the judicial process: law-making. At this (the second) stage, it is not enough to say what the law is; the case can be resolved only by saying what the law should be. Faced with a gap in the law, the court must exercise some discretion to fill it.[86]

Assuming, then, that in the case of the bicycle, existing law fails to dictate a solution, how should a judge go about the task of deciding it? One way would be to "act just as legislators do,"[87] namely, "by deciding according to his own beliefs and values."[88] The judge could, for example, weigh the interests of children against those of other park-goers. And after doing so, the judge might conclude that a policy prohibiting bicycles in the park would achieve the greatest good, and that bicycles should therefore be "vehicles" within the meaning of the ordinance.[89] Or the judge might conclude that, all things considered, the best policy would be to allow

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82. *Id.* at 128.

83. *Id.* at 272.

84. *Id.* at 273 (describing "hard cases" as ones "where the existing law fails to dictate any decision as the correct one"); RAZ, *supra* note 29, at 181 (describing "unregulated" disputes as ones that "do not have a correct legal answer").

85. *See* HART, *supra* note 22, at 272 ("If in such cases the judge is to reach a decision and is not, as Bentham once advocated, to disclaim jurisdiction or to refer the points not regulated by the existing law to the legislature to decide, he must exercise his *discretion* and *make* law for the case instead of merely applying already pre-existing settled law.").

86. *Id.*; *see also* Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (recognizing a degree of "law-making" left to judges in cases of statutory interpretation, the extent of which depends on the "relative specificity or generality of [Congress's] statutory commands").

87. RAZ, *supra* note 29, at 197.

88. HART, *supra* note 22, at 273; *see also* RAZ, *supra* note 29, at 197 (explaining that judges in hard cases "should adopt those rules which they judge best"); *id.* at 199 ("[I]n their law-making judges do rely and should rely on their own moral judgment.").

89. *See* HART, *supra* note 22, at 128–29. This is not to say that the judge's decisionmaking should necessarily have a consequentialist or utilitarian cast.

bicycles in the park, and that they should therefore not be "vehicles." Where the law runs out, judges face "a fresh choice between open alternatives."[90] But, maintain positivists, the judge as legislator still has a responsibility to exercise reasoned judgment[91]: whatever law the judge makes ought to reflect "a reasonable compromise between . . . conflicting interests."[92]

Before legislating from the bench, however, judges might consider the institutional significance of doing so: instead of focusing on *what* the law should be, they might think about *who* should really be making it.[93] Judges considering the latter question in the context of the criminal law, for example, might conclude that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."[94] If so, then judges might exercise restraint in hard cases by declining to extend the criminal law beyond the terms clearly set by the legislature. By resolving statutory ambiguities in favor of the criminal defendant—that is, by applying a so-called rule of lenity[95]—judges would ensure that no one "languish[es] in prison" for a crime the legislature did not make.[96] A judge who took such institutional concerns seriously would conclude that bicycles are not "vehicles" after all, regardless of what he personally thinks of permitting them in the park.[97] In doing so, the judge

90. *Id.* at 128.

91. *Id.* at 273; *see also* RAZ, *supra* note 29, at 197 (arguing that judges in hard cases have a "legal duty" not "to act arbitrarily"); Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 847 (1972) ("Courts are never allowed to act arbitrarily. Even when discretion is not limited or guided in any specific direction the courts are still legally bound to act as they think is best according to their beliefs and values. If they do not, if they give arbitrary judgment by tossing a coin, for example, they violate a legal duty.").

92. HART, *supra* note 22, at 132. Of course, there may be cases in which the only reasonable compromise is no compromise at all.

93. *See generally* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996) (focusing not on *what* the criminal law should be, but on *who* should make it).

94. United States v. Bass, 404 U.S. 336, 348 (1971).

95. Rewis v. United States, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.").

96. HENRY J. FRIENDLY, BENCHMARKS 209 (1967); *see also* United States v. Santos, 553 U.S. 507, 514 (2008) (recognizing that the "venerable" rule of lenity "keeps courts from making criminal law in Congress's stead"); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded . . . on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.").

97. Raz himself recognized that judges "may be guided by law as to the manner in

would necessarily be exercising some discretion—but in a way that avoids legislating from the bench.

The notion that judges ever have discretion may seem alarming in a democracy such as ours. But it is a reality in hard cases, and what is important is that judicial discretion is never unlimited. For one thing, judicial discretion is constrained by the law that already exists.[98] Although law-making may sometimes be a necessary step in the judicial process, it is never the only one: "There are no pure law-creating cases."[99] Even hard cases are "partly regulated" because the law has to be applied as well as made.[100] Given that the term "vehicle" clearly includes cars, for example, a judge faced with a hard case cannot, without violating his duty to apply the law, define the term in a way that would exclude them. In any given hard case, then, the gap to be filled by law-making is only so big, its size depending on how determinate the existing law is.

For another thing, judicial discretion is constrained by the kind of cases that happen to arise. Unlike legislators, judges cannot "introduce large-scale reforms or new codes."[101] In exercising their discretion, judges can fashion "only rules to deal with the specific issues thrown up by particular cases."[102] Even a judge who believes that bicycles should be allowed in the park, therefore, is powerless until the issue is properly presented in a case before him. And even a judge who believes that bicycle-riding should be encouraged more generally must wait for yet other hard cases involving, say, rules governing bicycle registration or safety.[103] Unable to set their own dockets or enact far-reaching reforms, judges are limited to filling gaps in the laws that happen to be implicated in the cases they hear. Their discretion is at most interstitial.[104]

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which discretion should be exercised." RAZ, *supra* note 29, at 96. He also recognized that "[s]uch instructions may be given in a statute, but they may also exist only in the practice of the courts." *Id.* This Article argues that like the rule of lenity, the *Chevron* doctrine should be understood as a judge-made rule guiding the courts' law-making discretion in hard cases. *See infra* Part II. For a fuller discussion of other canons of construction, see *infra* Section III.B.

98. *See* HART, *supra* note 22, at 273.

99. RAZ, *supra* note 29, at 195.

100. *Id.* at 182; *see also id.* at 195 ("In every case in which the court makes law it also applies laws restricting and guiding its law-creating activities.").

101. HART, *supra* note 22, at 273.

102. *Id.* at 275.

103. *See* RAZ, *supra* note 29, at 200 ("[I]t is usually impossible for the courts to introduce in one decision all the changes necessary for the effective implementation of a radical reform in any aspect of the law.").

104. HART, *supra* note 22, at 273; *see also* RAZ, *supra* note 29, at 200 (noting the "piecemeal nature of judicial law-making").

The fact remains, however, that in hard cases there are "two completely different stages in the process of decision": one in which the law is applied and the other in which it is made.[105] Unlike legally provided-for cases, hard cases cannot be resolved at the first stage; when the law "fails to dictate a decision either way,"[106] the matter must proceed to the second. Nor can hard cases be resolved without the exercise of some judicial discretion; although judges need not legislate from the bench, they must decide, one way or another, how to fill the gaps left open by the law.[107]

This picture of the judicial process is of course simplified. It suggests a sharp divide between law-applying and law-making, such that judges can make a clean break from one stage to the next. But distinguishing the two stages in a judicial opinion is not always easy.[108] One reason is that judges sometimes do not realize that they have proceeded from one stage to the next; "law-making need not be intentional," and occasionally it is not.[109] Another is that judges sometimes deliberately obscure the extent to which they are exercising any discretion, either "to avoid the need to bear full

105. HART, *supra* note 22, at 273. The law-applying/law-making distinction does not quite track the interpretation/construction distinction much discussed in constitutional law. The latter distinguishes the "process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text" (interpretation) from the "process that gives a text legal effect" (construction). Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010). Giving a text legal effect, however, need not entail any law-making; indeed, it may involve only law-applying.

106. HART, *supra* note 22, at 273.

107. Given the nomenclature, one might assume that hard cases are unlike regulated cases in a further respect: the former are difficult to decide while the latter are easy. But though many hard cases are more challenging than regulated ones, not all are. *See* RAZ, *supra* note 29, at 182 ("Regulated cases can be complex and more difficult to decide than unregulated cases. The difficulty in solving a complex tax problem according to law may be much greater than that of solving a natural justice problem according to moral principles."). The opposite of a hard case is thus not a simple one, but rather a case in which the law, no matter how complex, provides a solution.

108. *See* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 395 n.143 (2005) ("[S]tatutory interpretation is not a crisp two-stage process, in which interpreters first determine the range of meanings that Congress could be thought to have intended and then use a different set of tools to select a single interpretation from that range."); RICHARD A. POSNER, HOW JUDGES THINK 85 (2008) ("A judge does not reach a point in a difficult case at which he says, 'The law has run out and now I must do some legislating.'"); RAZ, *supra* note 29, at 208 ("In cases of indeterminacy there is often no clear divide between application and innovation."). According to Ronald Dworkin, the way lawyers and judges speak about the law betrays no awareness that there are two different stages of judicial decisionmaking. RONALD DWORKIN, LAW'S EMPIRE 37–43 (1986).

109. RAZ, *supra* note 29, at 207. "Whether or not a case falls within the vague, indeterminate borderline area of a descriptive concept is often itself an indeterminate issue." *Id.* at 208.

responsibility for it or to avoid having to justify it by long and explicit arguments."[110] Still another reason is that there is often no need for judges to distinguish law-applying from law-making when nothing turns on the difference. If, for instance, judges have to impose their own construction on the statute anyway, there is no point in identifying statutory ambiguities along the way.[111] But the most important reason why distinguishing the two stages is often difficult is that "on most occasions the reasoning justifying law-making decisions is similar to and continuous with decisions interpreting and applying law."[112] Argument by analogy, for example, permeates judicial reasoning at both stages in the process.[113] And when "the same kind[s] of arguments are used in applying and creating laws,"[114] it should come as no surprise that judges "move[] imperceptibly from one function to the other."[115]

Notwithstanding these caveats, the account of adjudication set forth here remains controversial in certain circles. Legal positivism "assumes that it is possible to distinguish between the roles of the courts in applying and making law."[116] Not everyone shares this assumption: legal realists deny that courts ever merely apply the law, while Dworkinians deny that courts need ever make it.[117] Still, there is a real sense in which "we are all to some degree positivists now."[118] Central tenets of legal positivism have been

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110. *Id.* at 208 n.20.

111. *Cf.* Edelman v. Lynchburg Coll., 535 U.S. 106, 114 (2002) (concluding that because the agency's construction of the statute is the one the Court would have imposed on its own anyway, "there is no occasion to defer and no point in asking what kind of deference, or how much"); POSNER, *supra* note 108, at 85 (explaining that a judge might not distinguish law-applying from law-making when "[h]e knows that he has to decide and that whatever he does decide will (within the broadest of limits) be law"); Note, *Implementing* Brand X*: What Counts as a Step One Holding?*, 119 HARV. L. REV. 1532, 1537 (2006) ("Before *Chevron*, a court usually had no reason to distinguish whether its interpretation was the only reasonable one, or merely the best one. . . . Courts would have been unlikely, after constructing the best interpretation of a statute, to assert that other interpretations were not reasonable.").

112. RAZ, *supra* note 29, at 208; *see also* HART, *supra* note 22, at 274 ("It is true that when particular statutes or precedents prove indeterminate, or when the explicit law is silent, judges do not just push away their law books and start to legislate without further guidance from the law.").

113. RAZ, *supra* note 29, at 208–09.

114. *Id.* at 209.

115. *Id.* at 208.

116. *Id.* at 197.

117. *See* H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 973–74, 983 (1977).

118. Frank I. Michelman, *Thirteen Easy Pieces*, 93 MICH. L. REV. 1297, 1298 (1995) (reviewing RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995)).

accepted not only by disciples of Hart and Raz,[119] but also by legal pragmatists,[120] and even by natural law theorists.[121] Among their ranks, positivists can count politicians,[122] jurists,[123] and academics[124] alike. The next Part shows how this overlapping consensus on the nature of law can help us understand the workings of the *Chevron* doctrine.

II. *CHEVRON* AS A DOCTRINE OF HARD CASES

Under *Chevron*, judicial review of agency interpretations of federal statutes is governed by a two-step inquiry. At Step One, the reviewing court asks "whether Congress has directly spoken to the precise question at issue."[125] If yes, then "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[126] If no, then the court must proceed to Step Two, where it asks "whether the agency's answer is based on a permissible construction of the statute."[127]

This Part argues that the *Chevron* doctrine embodies the positivist account of the law described above. It explains how the doctrine's two steps correspond to the "two completely different stages in the process of decision" identified by legal positivists: law-applying and law-making.[128]

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119. *See, e.g.*, Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 163 (1982); John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 202 (2001).

120. *See, e.g.*, POSNER, *supra* note 108, at 9 ("Because the materials of legalist decision making fail to generate acceptable answers to all legal questions that American judges are required to decide, judges perforce have occasional—indeed rather frequent—recourse to other sources of judgment, including their own political opinions or policy judgments, even their idiosyncrasies.").

121. *See, e.g.*, John Finnis, *The Truth in Legal Positivism*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 195, 203–04 (Robert P. George ed., 1996); Robert P. George, *Natural Law*, 31 HARV. J.L. & PUB. POL'Y 171, 192 (2008) ("[Natural law] theorists have had no difficulty accepting the central thesis of what we today call legal positivism—that is, that the existence and content of the positive law depends on social facts and not on its moral merits.").

122. *See, e.g.*, 151 CONG. REC. 21,032 (2005) (statement of Sen. Barack Obama) (noting the existence of "hard cases" in which the law "will not be directly on point" or "will not be perfectly clear").

123. *See, e.g.*, POSNER, *supra* note 108, at 9; William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976).

124. *See* Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law*, 40 WM. & MARY L. REV. 1623, 1646 (1999) (stating that "the dominant orthodoxy," at least "among legal academics," is that judges in hard cases make law).

125. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

126. *Id.* at 842–43.

127. *Id.* at 843.

128. HART, *supra* note 22, at 273.

Translated into the language of positivism, the question at Step One is whether existing law provides a uniquely correct answer to the dispute. If it does, then the court must enforce the law. But if the law runs out before providing a solution, then the court must proceed to Step Two. There, the question is whether the construction furnished by the agency is one the court could have imposed by making law on its own. If it is, then the court must exercise its limited discretion by deferring to the agency. Only if it is not must the court itself make new law, as if it were a legislature.

Sections A and B describe how positivism provides a cogent theory of Steps One and Two, respectively. Section C shows how this positivist account of *Chevron* answers recurring objections to judicial deference to agency interpretations of law. And Section D explains how this novel theory of *Chevron* challenges—and improves upon—the conventional wisdom, which instead grounds the doctrine in a presumption about congressional intent.

A. Chevron *Step One: Applying the Law*

"When a court reviews an agency's construction of the statute which it administers . . . ," the Court explained in *Chevron*, "[f]irst, 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."[129] In a footnote, the Court went on to say:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.[130]

These passages set forth the contours of *Chevron* Step One. But they raise questions of their own: What is meant by "the intent of Congress"? What are the "traditional tools of statutory construction"? And when is the intent of Congress "clear"?

Positivism answers these questions in a coherent way. As in any ordinary case of statutory interpretation, courts should begin by determining what existing law says (i.e., the intent of Congress) using the tools they would normally use to apply the law (i.e., the traditional tools of statutory construction). If the law provides a solution before running out (i.e., if the

129. *Chevron*, 467 U.S. at 842–43.

130. *Id.* at 843 n.9 (citations omitted).

intent of Congress is clear), then they should simply enforce the law. In short, *Chevron* Step One asks courts to apply the law, the first stage in the positivist's process of decision.

1. "Intent of Congress"

Chevron phrases the Step One inquiry in different ways, but always in terms of what Congress has said or done: Has Congress "spoken to the precise question at issue"?[131] Has Congress "addressed" it?[132] Did Congress have an "intention"?[133] These various ways of referring to the "intent of Congress"[134] may sound like mere synonyms for "statutory meaning." But to the legal positivist, they are more than that; they are also a clue about which stage of the judicial process—law-applying or law-making—Step One represents. For if the object of the inquiry is the "intent of *Congress*," then the role of the judge is necessarily that of *Congress*'s faithful agent, whose task is to discover the meaning of the law already made. That the inquiry centers on congressional intent implies that judges are to begin their review of an agency's construction of a statute just as they would any case of statutory interpretation: by applying existing law.

A number of methods of statutory interpretation are rooted in faithful agent theory[135] and thus could be said to be consistent with "giv[ing] effect to the . . . intent of Congress" at Step One.[136] Surely an approach that seeks to discern what a majority of the members of Congress *actually* had in mind when they enacted a particular statute would be a suitable Step One methodology. But judges need not embrace the search for subjective legislative intent to act as Congress's faithful agents. The so-called new textualism,[137] for example, eschews reliance on "traditional conceptions of 'actual' legislative intent," directing judges to focus instead on "how 'a skilled, objectively-reasonable user of words' would have understood the statutory text in context."[138] And yet, modern textualists regard their

131. *Id.* at 842.
132. *Id.* at 843.
133. *Id.* at 843 n.9.
134. *Id.* at 842–43.
135. *See* Manning, *supra* note 51, at 1648 n.1; Posner, *supra* note 51, at 189.
136. *Chevron*, 467 U.S. at 843.
137. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 & n.11 (1990).
138. Manning, *supra* note 62, at 75 (quoting Easterbrook, *supra* note 62, at 65); *see also* Scalia, *supra* note 62, at 17 ("We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.").

method as "the only safe course for a faithful agent" on the view that "respect for the legislative process requires judges to adhere to the precise terms of statutory texts."[139] Modern purposivists have also abandoned the search for subjective legislative intent, but they, too, claim to respect Congress's wishes.[140] In their view, legislators think in terms of general purposes,[141] so fidelity requires that statutes be read from the perspective of a hypothetical member of the legislature, pursuing such purposes reasonably.[142] The upshot is that all three of these methodologies—intentionalism, textualism, and purposivism—would in theory be appropriate at Step One.

Not every approach to statutory interpretation, however, has as its object the "intent of Congress." Professor Ronald Dworkin's method of "constructive interpretation," for example, envisions judges as the legislature's collaborative partners, rather than its faithful agents.[143] It calls on judges to treat Congress as just another author in the "chain of law," and to "continue[] to develop, in what [they] believe[] is the best way, the statutory scheme Congress began."[144] Because the goal there would be to go beyond the intent of Congress, Dworkin's method of constructive interpretation would be inappropriate at Step One.[145] Equally inappropriate would be a method that authorizes judges to rewrite statutory terms on grounds of equity. According to Professor William Eskridge, such authority was originally understood to be part of the judicial power.[146] But regardless of whether Eskridge's view of history is correct,[147] Step One rules out reliance on equity and other considerations that have nothing to do with the intent of Congress. The range of appropriate methods at Step One is limited to those consistent with faithful-agent theory—that is, with

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

140. *See* BREYER, *supra* note 76, at 88, 98–101; HART & SACKS, *supra* note 78, at 1378.

141. *See* BREYER, *supra* note 76, at 98–101; Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 400, 406 (1942).

142. *See* BREYER, *supra* note 76, at 88, 98–101; HART & SACKS, *supra* note 78, at 1378.

143. DWORKIN, *supra* note 108, at 315.

144. *Id.* at 313. It might be argued that Dworkin's method of constructive interpretation applies only in hard cases, but Dworkin expressly maintained that it "is equally at work in easy cases." *Id.* at 354.

145. Dworkin would claim that whether his method of constructive interpretation is appropriate or not, judges have no choice but to engage in some form of it. *See id.* at 316–17.

146. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation*, 101 COLUM. L. REV. 990, 995–97 (2001).

147. For a competing view of the original understanding of the judicial power in statutory interpretation, see John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

applying the law, as opposed to making it.

2. "Traditional Tools of Statutory Construction"

Chevron instructs courts at Step One to use "traditional tools of statutory construction" to ascertain Congress's intent.[148] Positivism guides our understanding of these tools. If Step One corresponds to the law-applying stage of the judicial process, then the "traditional tools of statutory construction" refer to the tools used ordinarily by judges to discern the existing meaning of a statute. As such, they encompass a range of diverse but familiar devices, from analysis of statutory text, to consideration of legislative history and purpose, to application of selected canons of construction.[149]

This account of the "tools of statutory construction" finds support in *Chevron*'s use of the label "traditional," which indicates that the tools themselves are no different from those used to apply statutes generally.[150] It also finds support in other of the Court's decisions. In *General Dynamics Land Systems, Inc. v. Cline*, for example, the Court described the Step One inquiry as involving "regular interpretive method."[151] Like "traditional," "regular" suggests that the tools for discerning Congress's intent at Step One are nothing special, but rather those a court would employ at the initial, law-applying stage of any statutory case. And indeed, the Court has invoked the use of "traditional tools of statutory construction" not only in cases involving *Chevron*,[152] but also in ordinary cases of statutory interpretation, in which no administrative interpretation was at issue.[153]

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148. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

149. For a discussion of how *Chevron* relates to other canons of construction, see *infra* Section III.B.

150. *Chevron*, 467 U.S. at 843 n.9. Depending on how one reads it, *Chevron*'s statement that, "[f]irst, *always*, is the question whether Congress has directly spoken to the precise question at issue" might also suggest that Step One is an inquiry a court "always" conducts when interpreting statutes. *Id.* at 842 (emphasis added).

151. 540 U.S. 581, 600 (2004).

152. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 185–86 n.3 (1991); Dole v. United Steelworkers of Am., 494 U.S. 26, 35 (1990); INS v. Cardoza-Fonseca, 480 U.S. 421, 446–48 (1987).

153. *See, e.g.*, Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 590 (2008) (holding that "traditional tools of statutory construction and considerations of *stare decisis*" left no ambiguity for the sovereign-immunity canon to resolve); Caron v. United States, 524 U.S. 308, 316 (1998) (noting that the "traditional tools of statutory construction" must be used to resolve ambiguities in a criminal statute before resorting to the rule of lenity); Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988) ("Because the Federal Rules of Evidence are a

It should come as no surprise, then, that the growing debate within the Court regarding the tools to be employed at Step One mirrors the broader debate among the Justices regarding interpretive methods generally. Justices Scalia, Kennedy, and Thomas, commonly considered among the Court's textualists, have suggested that the Step One inquiry be confined to an examination of statutory text and structure.[154] Justice Stevens, by contrast, has insisted that other sources of statutory meaning, particularly legislative history, be consulted as well.[155] Viewed through a positivist lens, *Chevron* does not take sides in this methodological dispute.[156] For if Step One is no different from the law-applying stage of any case of statutory interpretation, then debates over proper interpretive methods are just as legitimate at Step One as they are in other statutory cases. One should therefore not read too deeply into the fact that *Chevron* itself discusses legislative history as part of its Step One analysis.[157] That discussion may simply reflect the fact that the opinion was written by Justice Stevens, or the fact that in 1984 the new textualism had yet to emerge as a viable alternative to intentionalism and purposivism.[158] When it comes to

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legislative enactment, we turn to the 'traditional tools of statutory construction' in order to construe their provisions." (citation omitted) (quoting *Cardoza-Fonseca*, 480 U.S. at 446)); J.W. Bateson Co. v. United States *ex rel.* Bd. of Trs. of the Nat'l Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 594 (1978) (concluding that the interpretive approach adopted by the court of appeals was ruled out by the "traditional tools of statutory construction").

154. *See, e.g.*, Negusie v. Holder, 555 U.S. 511, 542 (2009) (Thomas, J., dissenting) ("If the text of a statute governing agency action directly addresses the precise question at issue, then, 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.") (internal quotation marks and brackets omitted); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 292 (1988) (Kennedy, J.) ("If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute."); *Cardoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring) (criticizing the Court's "exhaustive investigation" of the statute's legislative history at Step One).

155. *See, e.g.*, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 106 (2007) (Stevens, J., concurring) ("Analysis of legislative history is, of course, a traditional tool of statutory construction."); *Cardoza-Fonseca*, 480 U.S. at 432–43 (majority opinion) (Stevens, J.) (examining the statute's legislative history at Step One).

156. *Cf.* Merrill & Hickman, *supra* note 3, at 869 n.197 ("*Chevron* appears largely agnostic about how a court should go about ascertaining whether a statute has a clear or unambiguous meaning at step one . . . .").

157. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 862–64 (1984); *see also id.* at 845 (stating that an agency's statutory construction should not be disturbed "unless it appears from the statute or its legislative history that the [construction] is not one that Congress would have sanctioned") (internal quotation marks omitted).

158. The new textualism did not emerge until the Court's 1986 Term, Justice Scalia's first. *See* Eskridge, *supra* note 137, at 623.

methodology, Step One requires merely that judges employ the tools they normally would in discerning the "intent of Congress."

3. "Clear"

A final ambiguity in the operation of Step One remains: when is the intent of Congress "clear"? The question is of central importance because it represents "the dividing line between the two steps in the sequential inquiry."[159] To the positivist, it also represents the dividing line between the two stages of the judicial process. Thus, in positivist terminology, the intent of Congress is "clear" when the dispute over statutory meaning can be resolved at the first stage alone, by merely applying the law. That will be so when the statute provides a solution to the interpretive question, making the exercise of judicial discretion unnecessary. In other words, the intent of Congress is "clear" when the meaning of the statute is determinate. "How clear is clear?"[160] Clear enough to render the dispute legally provided-for.

It follows that a statute is *not* clear when the law runs out before providing a uniquely correct answer.[161] And indeed, the Court's opinion in *Chevron* describes "silent or ambiguous" statutes as those susceptible to more than one "permissible" construction[162] because of "gap[s] left open by Congress."[163] It even addresses the causes of such gaps, citing sources of indeterminacy familiar to positivists: perhaps Congress "consciously desired" to leave a question of law unclear; perhaps it was "unable to forge a coalition on either side of the question"; or perhaps it "simply did not consider the question" at all.[164] All of this suggests that the positivist's definition of clarity is correct: asking whether the statute is "clear" is akin to asking whether the case is legally provided-for, and concluding that the statute is "silent or ambiguous" is the same as concluding that the law has run out.

Conceiving of Step One as the law-applying stage of the judicial process sheds light not only on the terms of the inquiry, but also on the

159. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1000 (1992).

160. Scalia, *supra* note 3, at 520.

161. *Chevron*, 467 U.S. at 843.

162. *Id.* at 843 & n.11.

163. *Id.* at 866; *see also id.* at 843 ("'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'") (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

164. *Id.* at 865.

consequences of reaching an answer. *Chevron* provides that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[165] Positivism explains why giving effect to Congress's unambiguously expressed intent is mandatory. When the intent of Congress is "clear," "that is the end of the matter,"[166] because no room for judicial discretion remains; the statute provides a solution to the dispute, and judges have a duty to apply the law. Moreover, because Congress's "intention is the law,"[167] any law-making would entail rewriting existing law—law already made by Congress. Thus, concluding that the statute is "clear" means that the court need not—and should not—proceed any further.

Commentators have noted that federal judges differ in the frequency with which they find a statute "clear" at Step One.[168] Some have attributed these differences to interpretive methodology, claiming, for example, that textualists are less likely to acknowledge the existence of ambiguity than purposivists are.[169] But if judges have been applying the positivist definition of clarity all along, then the differences may be attributable instead to differing views about the determinacy of the law—views that may have little to do with interpretive methodology. Two judges might both be textualists, and yet have different thresholds for concluding that an interpretation is uniquely correct in light of the statutory text; one judge, for example, might require a probability of correctness of only 51% (i.e., that the interpretation be "more likely than not" correct), while the other might require a probability of as high as 90%.[170] Such probabilities represent a judge's

165. *Id.* at 843 n.9.

166. *Id.* at 842.

167. *Id.* at 843 n.9.

168. *See* Seidenfeld, *supra* note 19, at 94–95; Note, *Step One*, *supra* note 19, at 1691–92.

169. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 354 (1994) ("[T]he general pattern in the Court appears to suggest something of an inverse relationship between textualism and the use of the *Chevron* doctrine."); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 826 (2006) ("Justice Breyer, the Court's most vocal critic of a strong reading of *Chevron*, is the most deferential justice in practice, while Justice Scalia, the Court's most vocal *Chevron* enthusiast, is the least deferential.") (footnotes omitted); Scalia, *supra* note 3, at 521 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists."). *But see* Note, *Step One*, *supra* note 19, at 1696 n.39 ("It is enough to assume that the relationship—if any—between a judge's theory of statutory interpretation and the requisite clarity that a judge demands before deciding a *Chevron* case at Step One is indeterminate.").

170. For a similar example, see Note, *Step One*, *supra* note 19, at 1698. Justice Scalia, for

standard of proof for legal arguments—of "when 'enough' evidence has been gathered to warrant a legal truth claim about the [law's] meaning."[171] And though such standards may bear some correlation with a judge's interpretive methodology, they may be linked more closely to other aspects of a judge's judicial philosophy.[172] In any event, there will inevitably be cases in which judges conclude that the law is unclear, whatever their standard for proving the law. And if the statute fails to provide a solution—if the law runs out—then courts must proceed to Step Two.

B. Chevron *Step Two: Making the Law*

At Step Two, the presence of an administrative interpretation is finally relevant. As the Court explained in *Chevron*:

> If . . . 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.[173]

The Court stressed in a footnote that "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have

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his part, rejects the view that "ambiguity exists only when the arguments for and against the various possible interpretations are in absolute equipoise." Scalia, *supra* note 3, at 520. "[N]othing in *Chevron* tells judges, even in principle, where the threshold should be located." Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 694 (2007).

171. Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992) (emphasis removed). Some might argue that *Chevron* imposes its own standard of proof by requiring that the statute be "clear" for the inquiry to end at Step One. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 836 (2010) ("*Chevron* cannot mean that the reviewing court may defer to the agency only when the traditional tools of statutory construction provide *no answer whatsoever* to the interpretive question. . . . *Chevron* instead must mean that a reviewing court should defer to the agency if the application of the traditional tools of statutory construction fails to supply a *sufficiently clear* answer to the interpretive question."). But clarity is only *what* must be proved; *how* it must be proved, including by what standard of proof, is a separate matter.

172. *Cf.* Frederick Liu, Book Note, *The Supreme Court Appointments Process and the Real Divide Between Liberals and Conservatives*, 117 YALE L.J. 1947, 1956 (2008) (reviewing CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS (2007)) ("The real divide between judicial liberals and judicial conservatives lies in their views of the relative number of hard cases the Supreme Court hears.").

173. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (footnote omitted).

reached if the question initially had arisen in a judicial proceeding."[174] Rather, the agency construction must be upheld so long as it is one among "permissible,"[175] or "reasonable,"[176] interpretations of the statute.

Like Step One, Step Two contains ambiguities of its own. What would it mean for a court to "impose its own construction on the statute"? When is an interpretation of a statute "permissible"? And why should a court defer to a "permissible" agency interpretation at all?

Once again, positivism clarifies these ambiguities in the doctrine. Viewed through the lens of legal positivism, Step Two corresponds to the second stage in the process of decision: law-making. When the law runs out (i.e., when the statute is silent or ambiguous), the court has no choice but to exercise some discretion. The presence of an agency interpretation, however, means that the court itself need not act as a legislature (i.e., impose its own construction on the statute). Instead, the court may defer to the agency construction, so long as that construction is one the court could have imposed on its own (i.e., is permissible). Such deference is justified as an act of judicial self-restraint, born of the recognition that law-making in our democratic system is more legitimate when carried out by politically accountable agencies than by unelected judges.

1. "Impose Its Own Construction"

When a statute is "silent or ambiguous," the court cannot resolve the dispute by relying on the "intent of Congress" alone. "[I]n the absence of an administrative interpretation," *Chevron* explains, it "would be necessary" for the court to "impose its own construction on the statute."[177] The Court's diction is telling. "Impose" connotes an act of independent will, not faithful agency. The Court's use of the word signals that absent an administrative interpretation, the judicial role at Step Two is that of making the law, not merely applying it.

For a court to "impose its own construction on the statute" would thus be for it to engage in law-making of its own, just as a legislature would, based on its own beliefs and values. The Court in *Chevron* accurately characterized this gap-filling process as one of finding "a reasonable accommodation of manifestly competing interests,"[178] echoing the positivist view that "a reasonable compromise between many conflicting interests" is

174. *Id.* at 843 n.11.
175. *Id.* at 843.
176. *Id.* at 844.
177. *Id.* at 843.
178. *Id.* at 865.

what a court must achieve in hard cases.[179] The Court even recognized that filling statutory gaps entails the exercise of judicial discretion, citing, in an often-overlooked footnote, *The Spirit of the Common Law* by Roscoe Pound.[180] There, on the pages referenced by the Court, Pound discusses "the myriad cases in respect to which the lawmaker had no intention because he had never thought of them."[181] In such cases, Pound explains, "the courts, willing or unwilling, must to some extent make the law under the guise of interpretation."[182] By citing Pound, the Court implicitly acknowledged that judges make new law when they "impose [their] own construction" on a "silent or ambiguous" statute.[183]

2. "Permissible"/"Reasonable"

Chevron, of course, holds that a court need not "impose its own construction" when the "agency's answer" to the statutory question presented "is based on a permissible construction of the statute."[184] What it means for a construction to be "permissible" (or equivalently, "reasonable") has long puzzled scholars and jurists,[185] but positivism makes the term clear. If Step Two is the law-making stage of a hard case, then a "permissible" construction is any construction the court itself could have imposed through exercise of its law-making discretion. As that discretion is limited by existing law,[186] so, too, is the range of permissibility: a construction is "permissible" if it fills a statutory gap without rewriting the law already made by Congress, as expressed in the statute's clear terms; conversely, a construction is impermissible if it is contrary to the application of existing law.[187]

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179. HART, *supra* note 22, at 132.

180. *Chevron*, 467 U.S. at 843 n.10.

181. ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 174 (photo. reprint 1999) (1921).

182. *Id.*

183. *Chevron*, 467 U.S. at 843.

184. *Id.*

185. *See* Levin, *supra* note 20, at 1260 (finding the "vagueness of the step two standard . . . troubling"); Sunstein, *supra* note 3, at 2104 ("The Supreme Court has given little explicit guidance for determining when interpretations will be found reasonable.").

186. *See supra* notes 98–100 and accompanying text.

187. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 n.4 (2009) ("[S]urely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable."); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741 (1996) (explaining that when *Chevron* deference applies, the agency "possess[es] whatever degree of discretion the ambiguity allows"); Clark Byse, *Judicial Review of Administrative*

Given that the "intent of Congress" delimits what is "permissible," traditional legal materials, such as the text, history, and purpose of the statute, are just as relevant at Step Two as they are at Step One. From a positivist perspective, however, the two steps remain distinct.[188] Properly understood, Step One is an exercise in law-applying; the question is whether existing law provides an answer to the statutory question presented. Step Two, by contrast, is an evaluation of law-making; the question is whether existing law requires an answer different from that provided by the agency. The distinction is more than theoretical. The law may fail to provide a solution at Step One, and yet rule out the agency's answer at Step Two.[189] That is because the size of a statutory gap is never unlimited; even in hard cases, the law provides some guidance before running out. Thus, even when a gap has been left open by Congress, the agency's construction may be impermissible because it fails to fit within it.[190]

Interpretation of Statutes: An Analysis of Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 256 n.10 (1988) ("[I]f the intent of Congress is clear, a nonconforming interpretation would necessarily be unreasonable."). Understanding "permissible" and "reasonable" to describe interpretations that are not ruled out by the clear terms of the statute is consistent with their usage in the context of other canons of statutory construction. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 545 (2001) ("It is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue."). It is also consistent with their usage in the context of contract interpretation. *See, e.g.*, Universal Sales Corp. v. Cal. Press Mfg. Co., 128 P.2d 665, 672 (Cal. 1942) ("[W]hen a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court."); State v. Home Indem. Co., 486 N.E.2d 827, 829 (N.Y. 1985) ("If . . . the language of the insurance contract is ambiguous and susceptible of two reasonable interpretations, the parties may submit extrinsic evidence as an aid in construction . . . ."); J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003) ("A contract is unambiguous if it can be given a definite or certain legal meaning. On the other hand, if the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, creating a fact issue on the parties' intent.") (citation omitted).

188. *Contra* Levin, *supra* note 20, at 1261 (questioning why "the second step [is] not superfluous"); Stephenson & Vermeule, *supra* note 20, at 599 (arguing that *Chevron*'s two steps are "mutually convertible").

189. *See, e.g.*, Natural Res. Def. Council, Inc. v. Reilly, 976 F.2d 36, 43–44 (D.C. Cir. 1992) (Silberman, J., concurring).

190. *See* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 318 (1988) (Scalia, J., concurring in part and dissenting in part) ("The authority to clarify an ambiguity in a statute is not the authority to alter even its unambiguous applications . . . ."). That the two steps are distinct and serve different purposes is not to say that a court could not proceed directly to Step Two. *See, e.g.*, Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2017 (2012); *Entergy*, 556 U.S.

Some maintain that Step Two requires courts to do more than determine whether an agency construction is contrary to the "intent of Congress." In their view, a construction is "permissible" (or "reasonable") only if it is also the product of a reasoned decisionmaking process.[191] Accordingly, they regard Step Two as something akin to "arbitrary" and "capricious" review under the APA,[192] which requires courts to take a "hard look" at the reasoning behind an agency's exercise of policy discretion.[193] In applying such review at Step Two, courts would be authorized to reject agency constructions on grounds that the agency failed to consider certain factors or failed to "articulate a satisfactory explanation for its action."[194]

There is nothing inconsistent between "hard look" review of agency decisionmaking and a positivist conception of *Chevron*. But if, as some have suggested, the only point of equating Step Two with "hard look" review is to keep *Chevron*'s two steps distinct,[195] then there is no reason for making such review part of the doctrine. Under a positivist conception, *Chevron*'s two steps correspond to the two stages of the judicial process: law-applying and law-making. Given that these stages are "completely different,"[196] there is, for the reasons above, no redundancy to avoid. Moreover, agency interpretive decisions are already subject to "hard look" review under the APA itself. Incorporating "hard look" review into the *Chevron* doctrine would thus create a redundancy of its own, rendering the APA "superfluous."[197]

3. Why Defer?

The test of permissibility thus boils down to whether the agency construction is contrary to existing law. If it is, then it is impermissible, for the law-making discretion of the agency, no less than that of the court, is

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at 218 n.4.

191. *See* sources cited *supra* note 20–21. There is some support for this view in the Supreme Court's opinions. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001) (citing the Administrative Procedure Act's (APA's) "arbitrary" and "capricious" standard in its exposition of Step Two); Rust v. Sullivan, 500 U.S. 173, 183–87 (1991) (conflating "arbitrary" and "capricious" review with Step Two's "permissibility" analysis).

192. 5 U.S.C. § 706(2)(A) (2012).

193. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009); Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–44 (1983).

194. *State Farm*, 463 U.S. at 43.

195. *See* Levin, *supra* note 20, at 1270; Stephenson & Vermeule, *supra* note 20, at 602–03.

196. HART, *supra* note 22, at 273.

197. Stephenson & Vermeule, *supra* note 20, at 603.

constrained by the law already created by Congress. If it is not, then it is permissible, for it is a construction the court itself could have imposed on the statute. But if the discretion of the agency is no greater than that of the court, then what is the point of deference anyway? Why should courts defer to the judgment of agencies in filling gaps in the law, when they could fill those gaps using their own judgment?

Positivism places this question of institutional choice—of whose statutory constructions should prevail—in its proper context. For if Step Two corresponds to the second stage of the judicial process, then the question is not which institution should prevail in *applying* the law, which by then has run out. Rather, the question is which institution should prevail in *making* the law, to fill the gap left open. When the issue is framed in these terms, considerations of legitimacy naturally come to the fore. In a democracy such as ours, we expect the law to be made by the people and their elected representatives. The prospect of judicial law-making threatens this ideal, for federal judges are not popularly elected. Of course, heads of federal agencies are not either, but they at least are subject to political control, particularly through supervision by the President.[198] In our democracy, this "link to the electorate" gives agency law-making a measure of legitimacy that judicial law-making lacks.[199] Thus, by deferring to an agency's permissible construction of a statute, a court allows statutory gaps to be filled by a more legitimate source of law-making power. *Chevron* emerges as a doctrine of judicial self-restraint, grounded in the recognition that, as members of the "least accountable" branch,[200] judges should avoid legislating from the bench as much as possible.[201]

This legitimacy-based justification for deference finds support in *Chevron*

198. Farina, *supra* note 4, at 466.

199. *Id.*

200. *Id.*

201. Others have argued that *Chevron* is best understood as a doctrine of judicial self-restraint, though without grounding the doctrine in the notion of hard cases. *See* Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for* Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275, 1289 (1991); Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 292 (2011); Note, *Justifying the* Chevron *Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043, 2056 (2010) [hereinafter Note, *Rule of Lenity*]. Others have also argued that *Chevron* deference is best justified by the relative legitimacy of agency policymaking, though without situating the doctrine within positivist theory. *See, e.g.*, Manning, *supra* note 3, at 626; Seidenfeld, *supra*, at 289–90; Note, *Rule of Lenity*, *supra*, at 2056. And the Court itself has acknowledged that *Chevron* prevents judges "from substituting their own interstitial lawmaking for that of an agency," *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 (2013) (internal quotation marks omitted), though without abandoning its view that "*Chevron* is rooted in a background presumption of congressional intent," *id.* at 1868.

itself. There, the Court recognized that agencies may be more *capable* policymakers than courts, particularly when "the regulatory scheme is technical and complex" and "[j]udges are not experts in the field."[202] But in justifying judicial deference to agency statutory constructions, the Court devoted "far greater emphasis" to the recognition that agencies are more *legitimate* policymakers,[203] given that judges "are not part of either political branch of the Government."[204] The Court noted that "[w]hile agencies are not directly accountable to the people," they are answerable to a Chief Executive who is.[205] And because "it is entirely appropriate for [the Chief Executive] to make . . . policy choices," the Court explained, an agency may "properly rely upon the incumbent administration's views of wise policy to inform its judgments."[206] Thus, the Court concluded:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.[207]

As the Court recognized, this legitimacy-based rationale is hardly trivial. "The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones," the Court explained, because "'[*o*]*ur Constitution* vests such responsibilities in the political branches.'"[208] The relative legitimacy of agency law-making is therefore a consequence of not just democratic

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202. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984). The strength of this expertise-based rationale would seem to vary from case to case; there may be some areas—civil rights, for example—in which courts are in fact more capable law-makers than agencies. *See* Note, *Rule of Lenity*, *supra* note 201, at 2045–46 ("[T]he expertise of the agency, standing on its own, would be weak grounds for a blanket rule of deference to agency interpretations.").

203. Manning, *supra* note 3, at 626.

204. *Chevron*, 467 U.S. at 865.

205. *Id.*

206. *Id.*

207. *Id.* at 866; *see also id.* at 864 (stating that arguments over policy "are more properly addressed to legislators or administrators, not judges").

208. *Id.* at 866 (emphasis added) (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)); *see also* U.S. CONST. art. I, § 1 (vesting "[a]ll legislative Powers herein granted" in Congress); *id.* art. I, § 7 (giving the President the power to veto legislation passed by Congress); *id.* art. II, § 2 (giving the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties"); *id.* art. II, § 3 (giving the President the power to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient").

theory, but constitutional structure.[209] It is thus wrong to assert that "conceiving of *Chevron* as a judge-made norm robs it of much of its normative force."[210] No less than other canons of construction, such as the so-called federalism canon[211] or the rule of lenity,[212] *Chevron* has a constitutional underpinning.

To say that *Chevron* is constitutionally *inspired*,[213] however, is not to say that it is constitutionally *required*.[214] If, as this Article argues, *Chevron* is a judge-made doctrine, then its regime of deference can be overridden by Congress at any time. Congress could adopt a blanket rule requiring courts to impose their own construction on a statute in any case of ambiguity.[215] Or, instead of abolishing deference across the board, Congress could eliminate it on a statute-by-statute basis by specifying, for instance, "that in all suits involving interpretation or application of the Clean Air Act the courts [a]re to give no deference to the agency's views, but [a]re to determine the issue de novo."[216] Justice Scalia is surely correct that there is no "constitutional impediment" to Congress doing any of these things.[217]

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209. *See* Manning, *supra* note 3, at 625 ("*Chevron* deference rests . . . on premises of constitutional derivation.").

210. Merrill & Hickman, *supra* note 3, at 869.

211. *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (holding that an intent to "upset the usual constitutional balance of federal and state powers" will not be attributed to Congress unless Congress makes that intent "unmistakably clear in the language of the statute") (internal quotation marks omitted).

212. *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345 (noting that the rule of lenity is "considered essential to securing a variety of values of near-constitutional stature," such as fair notice and legislative supremacy).

213. *See* Manning, *supra* note 3, at 623 (describing *Chevron* as "[a] [c]onstitutionally-[i]nspired [c]anon of [c]onstruction"); Seidenfeld, *supra* note 201, at 289–90.

214. Professors Douglas Kmiec and Richard Pierce have each come close to arguing that separation of powers principles *mandate* judicial deference to agency policy decisions. *See* Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 286 (1988) ("*Panama Refining Corp.* and *Chevron* cannot both be right. If expansively worded delegations of legislative authority are permissible, interpretations made in pursuit of that authority merit judicial deference."); Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2227 (1997) ("[*Chevron*] is one of the most important constitutional law decisions in history, even though the opinion does not cite any provision of the Constitution.").

215. *See* Silberman, *supra* note 3, at 824 ("Congress could reverse *Chevron*'s presumption generically by amending the Administrative Procedure Act (APA).").

216. Scalia, *supra* note 3, at 515–16.

217. *Id.* at 516; *see also* Silberman, *supra* note 3, at 824 ("As Justice Scalia has observed, for any given statute, Congress could rebut *Chevron*'s presumption—that ambiguous statutes should be interpreted by the agency rather than the judiciary—by stripping the agency of deference.").

"It is generally assumed that common-law rules are subordinate to rules of positive legislation[,]"[218] and in this respect *Chevron* is no different from any other judge-made, common-law doctrine. The authority to decide hard cases may be part of the judicial power, but it is still subject to constraints imposed by Congress.

C. Solving Chevron*'s Puzzles*

The preceding Sections applied the teachings of positivism to the workings of the *Chevron* doctrine. They argued that Step One corresponds to the law-applying stage of the positivist's process of decision, and that Step Two corresponds to the law-making stage. And they showed how viewing *Chevron* in these terms answers recurring questions about the doctrine's application—about the object of the Step One inquiry, and the tools for conducting it; about when a statute is "clear," as opposed to "ambiguous"; about when an agency construction is "permissible," and when a court must "impose its own construction on the statute"; and about why a court should defer to a "permissible" agency construction as a matter of first principles.

This Section moves beyond the intricacies of the two-step inquiry to consider questions about judicial deference more generally. It examines three familiar puzzles about the propriety of such deference: (1) whether *Chevron* is consistent with Article III of the Constitution; (2) whether it "asks judges to develop a cast of mind that often is psychologically difficult to maintain";[219] and (3) whether it results in a "paradox" in the sense that judges must defer to agencies whose interpretive methods differ sharply from their own.[220] This Section shows how conceiving of *Chevron* as a doctrine of hard cases solves these puzzles.

1. Marbury*'s Instructions*

While some scholars have suggested that the *Chevron* doctrine is constitutionally required, others have questioned whether it is even constitutionally permissible. Article III of the Constitution vests the "judicial Power" in "one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."[221] Construing the scope of this power in *Marbury v. Madison*, Chief Justice Marshall famously

218. Merrill & Hickman, *supra* note 3, at 868.
219. Breyer, *supra* note 3, at 379.
220. Mashaw, *supra* note 27, at 504.
221. U.S. CONST. art. III, § 1.

declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[222] Some believe *Chevron* stands for something altogether different and seemingly irreconcilable: "that in the face of ambiguity, it is emphatically the province of the *executive* department to say what the law is."[223] In their view, *Chevron* is "a kind of counter-*Marbury*,"[224] a doctrine fundamentally at odds with the understanding that "[t]he interpretation of the laws is the proper and peculiar province of the courts."[225]

When *Chevron* is understood as a doctrine of hard cases, however, any tension with *Marbury* disappears. *Chevron* mandates deference to agency constructions of law only when a statute is "silent or ambiguous," and in positivist terms, that is so only when the law runs out before providing a solution. Thus, under a positivist conception of *Chevron*, deference enters the picture only when the court has done all it can to "say what the law is" but the law nevertheless fails to yield a single right answer. At that point, resolving the dispute becomes a matter not merely of applying the law but also of making it, and any deference by the court would extend only to the agency's views of what the law *should* be. Properly understood, therefore, *Chevron* does not interfere with a court's Article III duty to apply the law. The court remains obliged to reject any agency construction that conflicts with the application of existing law, and the scope of judicial deference is confined to hard cases and the making of new law by the agency.[226]

Of course, conceiving of *Chevron* as a doctrine of hard cases raises the separate question whether federal courts have the authority to decide hard cases at all. History suggests that the answer is yes—that such authority

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222. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

223. Sunstein, *supra* note 7, at 2589 (emphasis added); *see also* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 2 (1983) ("Marshall's grand conception of judicial autonomy in law declaration was not in terms or in logic limited to constitutional interpretation, and taken at face value seemed to condemn the now entrenched practice of judicial deference to administrative construction of law."); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1160 (2008) ("If *Chevron* is a revolution, it is one seeking to overturn . . . almost two centuries of constitutional understandings."); Scalia, *supra* note 3, at 513 ("[O]n its face the suggestion [that courts should defer to an executive agency on a question of law] seems quite incompatible with Marshall's aphorism . . . .").

224. Sunstein, *supra* note 7, at 2589.

225. THE FEDERALIST NO. 78, *supra* note 48, at 525.

226. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

was implicit in Article III's grant of "judicial Power."[227] The framers of the Constitution recognized that the law would at times be ambiguous, and that such ambiguities would be left for the Judiciary to resolve in the course of deciding individual cases.[228] The founding generations even contemplated the use of judge-made doctrines to guide the exercise of judicial discretion in hard cases. As one such doctrine (albeit of relatively recent vintage), *Chevron* is no less legitimate an exercise of the "judicial Power" than, say, the rule of lenity, which was applied in the early Republic by Chief Justice Marshall himself.[229] Indeed, as one insightful student note has argued, *Chevron* can be seen as "a modern successor to the rule of lenity,"[230] given that both doctrines "require[] the judiciary to refrain from exercising political discretion in order to ensure that such discretion remains in the politically accountable branches," be it the Legislature (in the case of the rule of lenity) or the Executive (in the case of *Chevron*).[231] Thus, there is no tension between *Chevron* and the Constitution.[232] Quite the opposite: as explained above, *Chevron* reflects the

227. H.L.A. Hart himself believed that the "jurisdiction to settle [hard cases] by choosing between the alternatives which the statute leaves open" "seems obviously to be part, even if only an implied part," of the judicial power. HART, *supra* note 22, at 153. Of course, "there might be a legal system which contains a rule that whenever the courts are faced with a case for which the law does not provide a uniquely correct solution they ought to refuse to render judgment." Raz, *supra* note 91, at 845; *see also* HART, *supra* note 22, at 272 (noting that "Bentham once advocated" that judges in hard cases should "disclaim jurisdiction or . . . refer the points not regulated by the existing law to the legislature to decide"). But in our legal system, cases do not leave the courts' jurisdiction when they turn out to be hard.

228. *See* THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."); Manning, *supra* note 147, at 88 n.340.

229. *See* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.); The Adventure, 1 F. Cas. 202, 204 (Marshall, Circuit Justice, C.C.D. Va. 1812) (No. 93); Note, *Rule of Lenity*, *supra* note 201, at 2055–56.

230. Note, *Rule of Lenity*, *supra* note 201, at 2053.

231. *Id.* at 2056.

232. Nor is there any tension between *Chevron* and the APA, which provides that a "reviewing court shall decide all relevant questions of law, [and] interpret . . . statutory provisions." 5 U.S.C. § 706 (2012). Some have argued that the APA requires courts to resolve statutory ambiguities on their own, without deferring to agency views. *See* Duffy, *supra* note 4, at 193 ("*Chevron* was an APA case, so any attempt to justify its rule should begin with the APA. The doctrine runs into trouble immediately."); Eskridge & Baer, *supra* note 223, at 1160 ("If *Chevron* is a revolution, it is one seeking to overturn the APA . . . ."); Merrill & Hickman, *supra* note 3, at 868 ("If *Chevron* is a judicially developed norm, it is particularly difficult to explain why the doctrine supersedes the instruction in the APA that courts are to

norm, derived from the Constitution's separation of powers, that judges should avoid legislating from the bench whenever possible.

2. Breyer's Psychology

The second puzzle comes from Justice Breyer, an early critic of the *Chevron* doctrine. While a judge on the Court of Appeals for the First Circuit, he wrote an article advocating a "complex approach" to judicial deference under which courts would consider a "range of relevant factors" in deciding whether to defer to an agency.[233] Insofar as *Chevron* represented a "simpler approach," mandating deference in *all* cases in which the agency offered a reasonable construction of the statute, Justice Breyer feared that its two-step inquiry was too rigid.[234] In his view, one of the reasons "a strict view of *Chevron*" could not "prove successful in the long run" was that:

> [S]uch a formula asks judges to develop a cast of mind that often is psychologically difficult to maintain. It is difficult, after having examined a legal question in depth with the object of deciding it correctly, to believe both that the agency's interpretation is legally wrong, *and* that its interpretation is reasonable. More often one concludes that there is a "better" view of the statute for example, and that the "better" view is "correct," and the alternative view is "erroneous."[235]

It may be true that a judge would find it psychologically difficult to "believe both that the agency's interpretation is legally wrong, *and* that its interpretation is reasonable." As a doctrine of hard cases, however, *Chevron* demands no such thing; it never asks judges to uphold as "reasonable" an agency construction they believe to be "legally wrong." That is because an agency construction is "reasonable" only if it is consistent with application of existing law—which is to say, legally permissible. And an agency construction is "legally wrong" only if it is ruled out by application of existing law—which is to say, unreasonable. For the positivist, then, a "reasonable" construction is never "legally wrong," and a "legally wrong"

'decide all relevant questions of law.'"); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 196 (2006) ("[Section 706] seems to suggest that ambiguities must be resolved by courts and hence that the *Chevron* framework is wrong."). But the APA's requirement of independent judicial review extends only to questions of law-applying; accordingly, it does not preclude judicial deference on questions of law-making. *Chevron* is consistent with the APA for the same reasons it is consistent with Article III.

233. Breyer, *supra* note 3, at 373. The merits of Justice Breyer's approach are considered in Section III.A, *infra*.

234. *Id.*

235. *Id.* at 379.

interpretation is never "reasonable." Furthermore, because deference is warranted only when the law is indeterminate, *Chevron* never requires a judge to defer to an agency construction contrary to his own view of the "correct" answer. If the judge believes there is a "correct" answer, then his duty is to apply it at Step One, without ever reaching the question of deference at Step Two. Justice Breyer's psychology-based critique thus fails: *Chevron* does not require judges either to accept interpretations they believe legally wrong or to reject interpretations they believe legally right.

The doctrine does require judges to uphold constructions they dispute as a matter of policy—constructions they themselves would not impose on the statute if they were acting as legislators. Reframing Justice Breyer's critique, one might ask whether it is psychologically difficult for judges to believe both that the agency's construction is unwise policy *and* that its construction is legally permissible. The distinction between law and policy, however, is present in every case, not just cases raising questions of deference. Judges must always strive to distinguish their views of what the law is from their views of what the law should be. And though at times they may be tempted to conflate the two, the challenge of keeping them separate is simply part of the judicial role. As a doctrine of hard cases, *Chevron* asks judges merely to respect a distinction they must always observe between applying the law and making it. If it is too psychologically difficult to do so, then the problem lies not with *Chevron*, but with our system of laws more generally.

3. Mashaw's Paradox

The final puzzle comes from Jerry Mashaw, an administrative law professor at Yale Law School. In perhaps the first article to consider "administrative interpretation in its own right,"[236] Mashaw observed that "legitimate techniques and standards for agency statutory interpretation diverge sharply from the legitimate techniques and standards for judicial statutory interpretation."[237] He noted, for example, that it is appropriate for agencies to "[f]ollow presidential directions" when construing statutes, but inappropriate for courts to do the same; it is also acceptable for agencies to interpret statutes in light of the "contemporary political milieu," but not for courts to do likewise.[238] These differences give rise to what Mashaw called the "paradox of deference"[239]: "How can a court's

236. Mashaw, *supra* note 27, at 503.
237. *Id.* at 504.
238. *Id.* at 522 tbl.1.
239. *Id.* at 504.

determination of 'ambiguity' or 'reasonableness' at *Chevron*'s famous two analytical 'steps' be understood as deferential when that determination emerges from the normative commitments and epistemological presumptions of 'judging' rather than 'administering'?"[240]

The paradox vanishes, however, when *Chevron* is understood as a doctrine of hard cases. The positivist views courts and agencies as occupying different roles within the *Chevron* framework. Courts have a single responsibility: to apply existing law. But the responsibilities of agencies are two-fold: in addition to following existing law, they must make new law in hard cases. Given that the responsibilities of the two institutions differ, it should come as no surprise that their methods do as well. One would expect both courts and agencies to employ "traditional tools of statutory construction" when applying existing law.[241] But surely such tools are ill suited to the task of law-making, the goal of which is to achieve "a reasonable accommodation of manifestly competing interests."[242] In fashioning new law, agencies are properly guided by the methods of the legislator, not the methods of the judge.

Quite appropriately, then, most of the techniques that Mashaw identified as appropriate for agencies (but not courts) are ones associated with law-making. If agencies must occasionally make new law, then we should not be surprised when they "[f]ollow presidential directions" and "pay constant attention to [the] contemporary political milieu," in order to ensure that their law-making reflects the popular will.[243] The Court recognized as much in *Chevron*, when it stated that an agency could "properly rely upon the incumbent administration's views of wise policy."[244] Nor should we be surprised when agencies fill statutory gaps with an eye to "insur[ing] hierarchical control over subordinates"[245] or "mak[ing] the statutory scheme effective,"[246] for those are the sort of things we would expect any responsible law-maker to do.

There is thus no paradox of deference. Indeed, if deference is to be justified at all, the perspectives of courts and agencies *must* differ. The real paradox would be if they did not. For what would be the point of deference if courts and agencies went about the task of statutory

240. *Id.* at 537–38.

241. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

242. *Id.* at 865.

243. Mashaw, *supra* note 27, at 522 tbl.1.

244. *Chevron*, 467 U.S. at 865.

245. Mashaw, *supra* note 27, at 522 tbl.1.

246. *Id.* at 518 (internal quotation marks omitted).

construction in exactly the same way? Under *Chevron* as a doctrine of hard cases, deference is justified only because agencies are more legitimate law-makers than courts; and agencies have greater legitimacy precisely because they approach statutory construction from a different place in the constitutional order.

D. Challenging the Conventional Wisdom

The notion of hard cases not only elucidates *Chevron*'s two-step inquiry, but also solves longstanding puzzles about judicial deference generally. And yet, the conventional wisdom, as reflected in Supreme Court case law and academic commentary, is that *Chevron* rests instead on a presumption about congressional intent—a presumption that "a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[247]

The conventional wisdom is not without some merit. By grounding deference in the commands of Congress, the congressional-intent theory eliminates any tension between *Chevron* and Article III.[248] If deference rests on a congressional delegation of law-making authority to the agency, then by deferring to the agency, the court is "simply applying the law as 'made' by" Congress.[249] To "say what the law is" is thus to say that the law commands deference. But this ability to reconcile *Chevron* with the Constitution is hardly special; as explained above, the notion of hard cases accomplishes the same thing, though by way of different reasoning.

For the reconciliation to work, moreover, the delegation on which the congressional-intent theory rests must be grounded in reality. One must be able to say that Congress, aware of the potential for ambiguities in the laws it enacts, actually means for them to be resolved by agencies.[250] But "the

247. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000); *see also* sources cited *supra* notes 2–3.

248. Manning, *supra* note 3, at 627 ("If the Court presumes that ambiguity is a delegation of interpretive discretion to the agency, then a reviewing court satisfies its *Marbury* obligation simply by accepting an agency's reasonable exercise of discretion within the boundaries of the authority delegated by Congress.").

249. Monaghan, *supra* note 223, at 28.

250. H.L.A. Hart himself endorsed "delegation of limited powers to the executive" as a legislative solution to the problem of judicial discretion in hard cases. HART, *supra* note 22, at 275; *see also id.* at 131 ("Sometimes the sphere to be legally controlled is recognized from the start as one in which the features of individual cases will vary so much in socially important but unpredictable respects, that uniform rules to be applied from case to case without further official direction cannot usefully be framed by the legislature in advance. Accordingly, to regulate such a sphere the legislature sets up very general standards and then delegates to an administrative, rule-making body acquainted with the varying types of case,

evidence supporting the presumption that Congress generally intends agencies to be the primary interpreters of statutory ambiguities is weak."[251] No one seriously denies that the presumption about congressional intent is but a legal fiction created by the Judiciary.[252] And if the presumption is a judge-made fiction, then *Chevron* must necessarily be a judge-made doctrine, as this Article argues.[253]

Unlike the presumption about congressional intent, a theory of deference grounded in the notion of hard cases owns up to the fact that *Chevron* is a doctrine "developed by courts based on their own authority."[254] To explain *Chevron* as a doctrine of hard cases is to acknowledge that the law has limits; that when the law runs out, new law must be made to fill the gap; and that new law is more legitimately made by a politically accountable agency in such cases. By tracing *Chevron* deference to its true source, this positivist account of the doctrine bears an important virtue that the congressional-intent theory lacks: intellectual honesty.

But the hard-cases theory is not just more honest; it is more instructive. Unlike the presumption about congressional intent, the hard-cases theory is robust enough to answer longstanding questions about the application of *Chevron*'s two-step inquiry. At Step One, for example, the theory shows how the inquiry into "whether Congress has directly spoken to the precise question at issue" merely replicates the initial, law-applying stage of any case of statutory interpretation. And at Step Two, the theory shows how the question "whether the agency's answer is based on a permissible construction of the statute" is just another way of asking whether the court itself could have imposed the same construction by making law on its own. By contrast, the presumption about congressional intent tells us hardly anything about how clear is "clear," when a construction is "permissible," or other aspects of the two-step inquiry. It is little wonder, then, that such questions have continued to persist after all these years. Jeremy Bentham once said that it would be "foolish" to adhere to a legal fiction if "[w]hat you have been doing by the fiction" could be done just as well without it.[255] Adhering to the conventional account of *Chevron* is even worse, because what we have been doing by the fiction could be done *better* with a theory

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the task of fashioning rules adapted to their special needs.").

251. Merrill & Hickman, *supra* note 3, at 871.

252. *See* sources cited *supra* note 7.

253. *See* Barron & Kagan, *supra* note 5, at 212.

254. Merrill & Hickman, *supra* note 3, at 868.

255. JEREMY BENTHAM, *Rationale of Judicial Evidence: On the Cause of Exclusion of Evidence—The Technical System of Procedure*, *in* 7 THE WORKS OF JEREMY BENTHAM 196, 283 (John Bowring ed., Russell & Russell, Inc. 1962) (1843).

grounded in reality.

Despite shedding little light on the workings of *Chevron*'s two-step inquiry, the congressional-intent theory does illuminate the scope of *Chevron*'s domain—the question when, if ever, courts should withhold deference to a reasonable agency construction of law. It is here where the implications of the conventional wisdom diverge most sharply from those of a theory grounded in the notion of hard cases. The next Part explains why.

III. IMPLICATIONS FOR *CHEVRON*'S DOMAIN

Prior to the Supreme Court's decision in *Chevron*, judicial deference to agency constructions of law was contextual. When a statute expressly delegated authority to an agency "to define a statutory term or prescribe a method of executing a statutory provision," deference was required.[256] But in the absence of an express statutory delegation, deference "depended upon multiple factors that courts evaluated in light of the circumstances of each case."[257] The Court's decision in *Chevron* seemed to replace this multifactor analysis with a categorical rule mandating deference whenever a statute is ambiguous and an agency construction reasonable.[258] By its terms, *Chevron* seemed to require courts to defer to *every* reasonable agency construction of *any* statutory ambiguity.[259]

In the years following *Chevron*, however, courts began doubting the wisdom of such a categorical rule, asking whether it made sense to *always* defer to the agency when *Chevron*'s two steps were satisfied.[260] Today,

256. United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982) (internal quotation marks omitted); *see also* Batterton v. Francis, 432 U.S. 416, 425 (1977) (holding that because Congress "expressly *delegated* to the Secretary [of Health, Education, and Welfare] the power to prescribe standards for determining what constitutes 'unemployment' for purposes of [Title IV of the Social Security Act]," a reviewing court could not set aside the Secretary's interpretation "simply because it would have interpreted the statute in a different manner").

257. Merrill & Hickman, *supra* note 3, at 833.

258. *See* Christensen v. Harris Cnty., 529 U.S. 576, 589 n.* (2000) (Scalia, J., concurring in part and concurring in the judgment) (reading *Chevron* to establish a blanket presumption that "ambiguities are to be resolved (within the bounds of reasonable interpretation) by the administering agency").

259. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

260. Ironically, it was Justice Stevens, the author of the Court's opinion in *Chevron*, who led early efforts to cabin *Chevron*'s domain. Sunstein, *supra* note 232, at 188 & n.2; *see* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (Stevens, J.) (suggesting that *Chevron* deference does not apply to "pure question[s] of statutory construction," as distinguished from mixed questions of law and fact); Negusie v. Holder, 555 U.S. 511, 538 (2009) (Stevens, J., concurring in part and dissenting in part) (arguing in favor of "the narrower interpretation of *Chevron* endorsed by the Court in *Cardoza-Fonseca*").

questions regarding *Chevron*'s domain regularly show up in one of two forms: first, whether the *Chevron* framework should apply to particular types of agency action; and second, whether other canons of statutory construction should displace the deference mandated by *Chevron*. This Part considers the implications for these questions of *Chevron* as a doctrine of hard cases.

A. Understanding Chevron *Step Zero*

In their influential article on *Chevron*'s domain,[261] Professors Thomas Merrill and Kristin Hickman coined the term "Step Zero" to describe the "inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all, as opposed to [a different] framework or deciding the interpretational issue de novo."[262] The necessity of a Step Zero inquiry is far from obvious. Are not Steps One and Two sufficient by themselves to establish when *Chevron* deference is appropriate? No, according to Merrill and Hickman: "if *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply."[263] It is therefore not enough that the statute is ambiguous and the agency construction reasonable; Congress may have intended for courts to apply a different framework even when Steps One and Two are satisfied.

The trouble lies in the fact that "tangible evidence"[264] of Congress's intent regarding *Chevron*'s application will almost always be lacking. To be sure, "Congress has broad power to decide what kind of judicial review should apply to what kind of administrative decision."[265] But as already noted,[266] "Congress so rarely discloses (or, perhaps, even has) a view on this subject as to make a search for legislative intent chimerical and a conclusion regarding that intent fraudulent in the mine run of cases."[267] As a result, the best a court can typically do is construct a "'hypothetical' congressional intent on the 'deference' question"[268] based on "the practical features of the

261. Just after its publication, the article was cited by the Supreme Court in *United States v. Mead Corp.*, 533 U.S. 218, 230 n.11 (2001).

262. Merrill & Hickman, *supra* note 3, at 836.

263. *Id.* at 872.

264. Breyer, *supra* note 3, at 371.

265. Barron & Kagan, *supra* note 5, at 203.

266. *See supra* notes 4, 5, and 7 and accompanying text.

267. Barron & Kagan, *supra* note 5, at 203.

268. Breyer, *supra* note 3, at 371; *see also* BREYER, *supra* note 76, at 106 ("It is quite possible that no member of Congress actually thought about the matter. But a judge can still ask how a reasonable member of Congress would have answered it had the question come to mind.").

particular circumstance" and the court's own judgment of whether judicial deference would "make[] sense" in light of them.[269]

That is the approach the Court took in *United States v. Mead Corp.*,[270] the first case to address the Step Zero inquiry in detail. Justice Souter's opinion for the Court in *Mead*, joined by all his colleagues except Justice Scalia, held that judges may infer that Congress intended *Chevron* to apply "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law."[271] The Court noted that one "very good indicator" that Congress has delegated such authority is whether the agency has the "power to engage in adjudication or notice-and-comment rulemaking."[272] "It is fair to assume generally," the Court explained, "that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[273] The Court was quick to emphasize, however, that it has "sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."[274] Of the "variety of indicators that Congress would expect *Chevron* deference," the Court stressed, the formality of the administrative action is only one.[275]

The Court proceeded to identify other indicators in subsequent cases, beginning with *Barnhart v. Walton*.[276] There, writing for the same eight-Justice majority as in *Mead*, Justice Breyer held that the agency construction at issue qualified for *Chevron* deference despite having been originally promulgated "through means less formal than 'notice and comment' rulemaking."[277] According to the Court, there were other factors—"the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the

269. Breyer, *supra* note 3, at 370 (internal quotation marks omitted); *see also* Barron & Kagan, *supra* note 5, at 212 ("Because Congress so rarely makes its intentions about deference clear, *Chevron* doctrine at most can rely on a fictionalized statement of legislative desire, which in the end must rest on the Court's view of how best to allocate interpretive authority.").

270. 533 U.S. 218 (2001).

271. *Id.* at 226–27.

272. *Id.* at 229.

273. *Id.* at 230.

274. *Id.* at 231.

275. *Id.* at 237; *see also id.* at 227 ("Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent.").

276. 535 U.S. 212 (2002).

277. *Id.* at 221.

complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"—that made the construction *Chevron*-eligible.[278] Citing some of those same factors in *Zuni Public School District No. 89 v. Department of Education*, the Court held that the *Chevron* framework was applicable there as well.[279] Writing again for the majority in *Zuni*, Justice Breyer emphasized that "the matter at issue . . . [was] the kind of highly technical, specialized interstitial matter that Congress often does not decide itself, but delegates to specialized agencies to decide."[280]

Ironically, the effect of the Court's Step Zero jurisprudence in *Mead* and subsequent cases has been a return to the pre-*Chevron* days, when the scope of judicial deference depended on the circumstances of each case. Having embraced *Chevron*'s supposed origins in congressional intent, the Court has now embraced the search for such intent. And because such intent is for the most part a fiction, the search necessarily entails consideration of "various 'practical' circumstances"[281]—chief among them "the interpretive method used [by the agency] and the nature of the question at issue."[282] The consequence is a substantial narrowing of *Chevron*'s domain. Under *Mead* and subsequent Step Zero cases, "'interpretations contained in policy statements, agency manuals, and enforcement guidelines' . . . are beyond the *Chevron* pale."[283] So, too, apparently are "questions of major importance"[284] and "central legal issues,"[285] on the view that they are too far removed from "the kind of highly technical, specialized interstitial matter" Congress would presumably want an agency to decide.[286]

Conceiving of *Chevron* as a doctrine of hard cases entails a drastically different approach to Step Zero—an approach that would restore *Chevron*'s status as a categorical rule. Recall that *Chevron* as a doctrine of hard cases is grounded not in congressional intent, but in judicial self-restraint; and that

278. *Id.* at 222.

279. 550 U.S. 81, 89–90 (2007).

280. *Id.* at 90.

281. Breyer, *supra* note 3, at 372.

282. *Barnhart*, 535 U.S. at 222.

283. United States v. Mead Corp., 533 U.S. 218, 234 (2001) (quoting Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000)).

284. BREYER, *supra* note 76, at 107; *see also* Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (citing the "importance of the issue of physician-assisted suicide" in concluding that the Attorney General's interpretation of the Controlled Substances Act to prohibit doctors from prescribing drugs for use in suicide was not *Chevron*-eligible).

285. Negusie v. Holder, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part) (citing *Barnhart*, 535 U.S. at 222).

286. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 90 (2007).

the purpose of the doctrine, when so conceived, is not to enforce a congressional delegation of power to the agency, but to prevent an exercise of legislative power by the court. Given that purpose, it follows that *Chevron* should apply each time the exercise of such legislative power can be avoided by deference to a more legitimate lawmaker—which is in *every* case where the statute is ambiguous and the agency construction reasonable. Conceived as a doctrine of hard cases, *Chevron* would contemplate deference *whenever* Steps One and Two are satisfied.

To embrace *Chevron* as a doctrine of hard cases would thus be to render Step Zero unnecessary—and unwarranted. If the purpose of the *Chevron* doctrine is to keep judges from acting as legislators, then *Mead* and other Step Zero decisions serve only to undermine that purpose by arbitrarily preserving judicial law-making discretion in cases in which the agency did not speak with the "force of law."[287] Under a legitimacy-based rationale, the supposed "force" of the agency construction is simply irrelevant; even when the construction is issued without the "force of law," it still represents a form of law-making more legitimate than a court's imposition of its own construction on the statute. What matters for purposes of legitimacy is that agencies are politically accountable while judges are not—a fact unaffected by whether the agency construction appears in a policy statement instead of a regulation, or whether the case concerns a major question rather than an interstitial one.[288] When *Chevron* is understood as a doctrine of hard cases, there is simply no reason to limit the scope of its domain because of such "practical" considerations as the formality of the administrative action and the nature of the question at issue.

As a doctrine of hard cases, therefore, *Chevron* has only two steps.[289] But

287. *Cf.* Note, *Rule of Lenity*, *supra* note 201, at 2063 ("Once *Chevron* is understood as a constitutional responsibility of the judiciary to avoid policymaking power, it makes little sense to limit deference only to those interpretations issued with the force of law."). It is true that even if *Chevron* deference does not apply, the court must still review the agency construction under the doctrine set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See Mead*, 533 U.S. at 234. But *Skidmore* is itself a doctrine of discretion, which does nothing to constrain a court's discretion in hard cases. *See Skidmore*, 323 U.S. at 140 (holding that agency rulings should be given such weight as they have the "power to persuade"); *cf.* Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1340 n.6 (2011) (Scalia, J., dissenting) ("If one has been persuaded by another, so that one's judgment accords with the other's, there is no room for deferral—only for agreement. Speaking of '*Skidmore* deference' to a persuasive agency position does nothing but confuse.").

288. If anything, the relative illegitimacy of judicial law-making grows with the importance of issue. *See* Sunstein, *supra* note 232, at 233.

289. Professors Matthew Stephenson and Adrian Vermeule have argued that *Chevron* has only one step. Stephenson & Vermeule, *supra* note 20, at 597. Insofar as they mean that Steps One and Two are analytically indistinct, they are wrong. *See* Richard M. Re, *Should*

though there is no place for a Step Zero, there is still need for an additional rule, implicit in any regime of judicial deference: a rule of recognition for agency constructions of law.[290] After all, a court cannot defer to an agency construction under any doctrine without first identifying what that construction is. A rule of recognition for agency constructions would thus serve three purposes.

First, it would identify the criteria for determining which agency's constructions matter for the statute in question. Just as a law enacted by the General Assembly of Ohio would not qualify as a federal statute, a construction adopted by the Board of Immigration Appeals would not qualify as a construction of the Internal Revenue Code. An agency charged with administering one statute may lack authority to administer another.[291] A rule of recognition would tell us whose constructions are relevant.

Second, a rule of recognition would specify the general characteristics that an administrative action must possess to count as the construction of the relevant agency.[292] The import of an administrative action will frequently be obvious, but questions may arise regarding whether an action represents the agency's authoritative position. What if, for instance, a construction was approved by the agency's assistant director, but not by the director himself? Or what if a construction was advanced only in the course of litigation by the agency's lawyers? By specifying certain criteria of administrative validity, a rule of recognition would establish whether such constructions should be attributed to the agency.

Third, a rule of recognition would order the various criteria of validity in a hierarchy, thus making "provision . . . for their possible conflict."[293] Suppose, for example, that two agencies, in the course of administering the same statute, construed the same provision in inconsistent ways. Or suppose that a single agency, in the course of adjudicating separate disputes, issued two different interpretations of the same provision, one in a published opinion and the other in an unpublished opinion. A rule of

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Chevron *Have Two Steps?*, 89 IND. L.J. 605, 608 (2014) ("[T]raditional *Chevron* has two steps that respectively ask whether the agency's view is mandatory and whether it is reasonable."); *supra* text accompanying notes 188–190.

290. For a discussion of rules of recognition generally, see *supra* Section I.A.

291. It may even be the case that no agency is charged with administering a particular statute. *See* Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (explaining that a federal criminal statute "is not administered by any agency but by the courts").

292. *See* HART, *supra* note 22, at 95.

293. *Id.*

recognition would settle which of two conflicting but otherwise valid constructions was supreme.

To get a sense of how a rule of recognition would function in practice, one need look no further than the opinions of Justice Scalia. Unlike the rest of his colleagues on the Court, Justice Scalia has rejected the notion that *Chevron* deference should be limited to agency constructions issued with the "force of law."[294] "[A]dher[ing] to the original formulation of *Chevron*,"[295] he has maintained instead that deference should extend to "all *authoritative* agency interpretations of the statutes [that agencies] are charged with administering."[296] An interpretation is "authoritative," according to Justice Scalia, if it "represent[s] the judgment of central agency management, approved at the highest levels."[297] And the purpose of that limitation, Justice Scalia has explained, is to ensure that "it is truly the agency's considered view, [and not] the opinions of some underlings, that are at issue."[298] By identifying certain agency constructions as valid or not depending on whether they represent the authoritative view of the agency charged with administering the statute, Justice Scalia's rule meets the very definition of a rule of recognition. Of course, his is not the only possible rule of recognition for agency constructions of law; nor is his rule, as expressed in his opinions, necessarily as developed as it could be. But unlike the rule developed by the Court in *Mead* and subsequent Step Zero cases, Justice Scalia's rule is at least consistent with *Chevron* as a doctrine of hard cases.[299]

Finally, a note about timing: as the name "Step Zero" suggests, scholars have generally thought of the Step Zero inquiry as occurring *before* Step One. Merrill and Hickman, for their part, have referred to the inquiry as a

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294. *See* United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (criticizing the Court's Step Zero holding as "neither sound in principle nor sustainable in practice").

295. *Id.* at 256.

296. *Id.* at 241.

297. *Id.* at 258 n.6; *see also id.* at 257 (stating that an agency construction is "authoritative" if it "represents the official position of the agency").

298. *Id.* at 258 n.6.

299. This despite the fact that Justice Scalia accepts the conventional wisdom that *Chevron* is grounded in a presumption about congressional intent. *See id.* at 241, 256–57. In light of his rejection of the Court's Step Zero jurisprudence, Justice Scalia has been said to favor "nearly unlimited deference" to agencies. Barron & Kagan, *supra* note 5, at 206. But that is not true, given the relative infrequency with which he finds a statute ambiguous at Step One. *See* Scalia, *supra* note 3, at 521. In fact, Justice Scalia was the least deferential of the Justices, according to a study of Supreme Court cases decided between 1989 and 2005. Miles & Sunstein, *supra* note 169, at 826.

"threshold issue."[300] On a positivist reading of *Chevron*, however, Step One is simply the ordinary law-applying stage of any case of statutory interpretation, regardless of whether an agency construction is available. Only if the law runs out is judicial deference—of any type—even a possibility.[301] There is thus no need to ask whether an agency construction was issued with the "force of law," or even whether it represents the authoritative position of the agency, until *after* Step One.[302] And indeed, that is when the Court has at times conducted the inquiry.[303] At a minimum, then, Step Zero should be renamed Step One-and-One-Half.[304] But it would be even better if Step Zero were discarded altogether.

B. Understanding the Relationship Between Chevron *and Other Canons*

For centuries, courts have applied various rules of construction in interpreting statutes. The relationship between these canons and judicial deference is "one of the most uncertain aspects of the *Chevron* doctrine,"[305] and grounding *Chevron* in a presumption about congressional intent has brought little enlightenment. Of course, *Chevron* itself directs courts to "employ[] traditional tools of statutory construction" in "ascertain[ing] [whether] Congress ha[s] an intention on the precise question at issue."[306]

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300. Merrill & Hickman, *supra* note 3, at 848.

301. *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1247 (2007) ("[B]ecause a reviewing court will not defer to an agency under either doctrine if the statute's meaning is clear, the *Skidmore* standard implicitly replicates *Chevron*'s first step.").

302. Put differently, when the statute's meaning is clear, the choice among *Chevron*, *Skidmore*, or some other standard is moot—which probably explains why, in the majority of cases the Court hears in which an agency construction is available, the Court declines to invoke any deference regime whatsoever. *See* Eskridge & Baer, *supra* note 223, at 1100 (reporting that no deference regime was invoked in 53.6% of the cases involving an agency interpretation that the Court heard between 1984 and 2006); Sunstein, *supra* note 232, at 191 ("Many cases can be decided without resolving the Step Zero question; in such cases, it will not matter whether *Chevron* deference is applied.").

303. *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 711–14 (2011) (inquiring into *Chevron*'s domain only after completing Step One); Barnhart v. Walton, 535 U.S. 212, 221–22 (2002) (inquiring into *Chevron*'s domain only after completing both Step One and Step Two).

304. *See* Joseph Cordaro, Note, *Who Defers to Whom? The Attorney General Targets Oregon's Death with Dignity Act*, 70 FORDHAM L. REV. 2477, 2506 (2002).

305. Bradley, *supra* note 3, at 675; *see also* Nelson, *supra* note 4, at 348 ("With a few notable exceptions, . . . legal scholars have spent little time trying to dispel the uncertainty.") (footnote omitted).

306. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

That "would seem to support reliance on at least some canons of construction" at Step One.[307] But which canons? And what happens to *Chevron*'s domain when applying a canon would rule out an agency construction that would otherwise be deemed permissible at Step Two? Should the canon displace judicial deference, or vice versa?

In answering these questions, some scholars[308] have found it useful to discuss the canons in terms of their traditional categorization into two types: textual canons, which function as "guidelines for evaluating linguistic or syntactic meaning,"[309] and substantive (or normative) canons, "rooted in broader policy or value judgments."[310] When the canons are viewed through the lens of legal positivism, however, a different typology emerges, consisting of three categories: law-applying canons, which help courts discern meaning already existing in a statute; ambiguity-creating canons, which create ambiguity where a statute would otherwise be clear; and law-making canons, which guide courts' exercise of discretion in the face of statutory ambiguity. This Section explains these categories and their relationship to *Chevron* as a doctrine of hard cases.

1. Law-Applying Canons

The first category consists of canons corresponding to the first stage of the positivist's process of decision: applying the law. These are canons designed to aid courts in their efforts to discover the existing meaning of a statute. By serving as guides to what the Legislature intended, these canons help uncover what the law is. They should thus be considered among the "traditional tools" properly employed at Step One, when the question is "whether Congress has directly spoken to the precise question at issue."[311]

All of the so-called textual canons qualify as law-applying canons. "[A]imed at identifying the intended meaning of statutory language,"[312] textual canons help courts apply the law. Examples include the plain

307. Bradley, *supra* note 3, at 675.

308. *See, e.g.*, Bamberger, *supra* note 14, at 71–76.

309. ESKRIDGE, FRICKEY & GARRETT, *supra* note 80, at 341.

310. *Id.* at 342.

311. *Chevron*, 467 U.S. at 842. Of course, the extent to which the law-applying canons can give content to the law is limited. As H.L.A. Hart recognized, "Canons of 'interpretation' cannot eliminate, though they can diminish, [the law's open texture]; for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation." HART, *supra* note 22, at 126.

312. Nelson, *supra* note at 4, at 349; *see also* Bamberger, *supra* note 14, at 72 ("[T]extual canons offer tools for deciphering evidence of statutory meaning supplied by Congress itself . . . .").

meaning rule, the canons of word association, the canons of negative implication, the grammar and punctuation rules, and the whole act rule.[313] Consistent with their law-applying function, such canons are regularly invoked by courts at Step One.[314]

What about the so-called substantive canons? At first glance, most substantive canons would seem to fit the "law-applying" description. Most are premised, after all, on a presumption about congressional intent.[315] The canon of constitutional avoidance, for example, has been described by the Court as rooted in "the reasonable presumption that Congress did not intend [a statutory meaning] which raises serious constitutional doubts"; the Court has thus referred to the canon as "a means of giving effect to congressional intent."[316] But the presumptions underlying substantive canons are widely regarded as fictions, even in the case of the avoidance canon: as Professor John Manning has noted, "[V]irtually no one (except the Supreme Court Justices) views [the rationale for avoidance] as resting upon a plausible account of what a rational legislator would intend."[317] It

313. ESKRIDGE, FRICKEY & GARRETT, *supra* note 80, app., at 389–90.

314. Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 501 (1998) (invoking the canon that "similar language contained within the same section of a statute must be accorded a consistent meaning"); MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 225–28 (1994) (relying on the plain meaning of a statutory term as reflected in relevant dictionaries); Dole v. United Steelworkers of Am., 494 U.S. 26, 36 (1990) (invoking the canon, known as *noscitur a sociis*, that "words grouped in a list should be given related meaning") (internal quotation marks omitted); *see also* Bradley, *supra* note 3, at 675 ("[T]he Court regularly applies text-oriented canons in determining whether Congress has spoken to an issue under Step One of *Chevron*."); Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 745 (2004) ("[C]ourts generally have applied rules of syntax in preference to agency interpretations on the ground that the syntax rules represent traditional tools of statutory construction by which courts can discern whether Congress has directly answered a statutory question under *Chevron* Step One.").

315. *See* Bamberger, *supra* note 14, at 73–74 (noting that normative canons are "often framed in terms of fictions about legislative intent").

316. Clark v. Martinez, 543 U.S. 371, 381–82 (2005).

317. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 419 n.108 (2010); *see also* FRIENDLY, *supra* note 96, at 210 ("It does not seem in any way obvious, as a matter of construction, that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them."); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 854 (2001) ("It is certainly true that the system presumes that Congress intends to act constitutionally . . . . It is quite a different point, however, to assume that Congress would want its work to be interpreted as not even approaching the constitutional line."); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 92 ("[T]here is no evidence whatsoever that members of Congress are risk-averse about the possibility that legislation they believe to be wise policy will be invalidated by the courts.").

follows that substantive canons "do not really help a court ascertain whether Congress has spoken to an issue."[318] Most are designed instead "to guide judges when the available information about intended meaning has run out."[319] Thus, with a few exceptions discussed in the next Section, substantive canons are strictly law-making in nature and not appropriately invoked at Step One.[320]

2. Ambiguity-Creating Canons

Ambiguity-creating canons, as their name suggests, create ambiguity where the statute would otherwise be clear. They function by eliminating what would normally be the best reading of a statute, thus leaving the court with the task of resolving the resulting ambiguity. Because these canons create hard cases where none before existed, they are properly applied at Step One, while the court is determining whether there are any statutory gaps for the agency to fill.

The best example of an ambiguity-creating canon is the absurd results canon (also known as the absurdity doctrine), which holds that "judges may deviate from even the clearest statutory text when a given application would otherwise produce 'absurd' results."[321] *Green v. Bock Laundry Machine Co.*[322] illustrates how the canon can create ambiguity. At issue in *Bock Laundry* was former Federal Rule of Evidence 609(a)(1), which governed the admission of evidence for attacking the credibility of a witness. The rule provided that evidence of a witness's prior felony convictions "shall be admitted" for that purpose, but only if the trial court determines that the "probative value of admitting [the] evidence outweighs its prejudicial effect to the *defendant*."[323] All nine Justices agreed that the rule could not mean what it said given the "odd" result it would produce in civil cases: a civil defendant would always be able to impeach a civil plaintiff's witnesses with evidence of their prior felony convictions, because such evidence could

318. Bradley, *supra* note 3, at 676.

319. Nelson, *supra* note at 4, at 349; *see also* Mendelson, *supra* note 314, at 746 ("Substantive presumptions or canons really represent a judicial resolution of a statutory question where the evidence of what Congress meant is unclear.").

320. *Contra* Morales-Izquierdo v. Gonzales, 486 F.3d 484, 504 (9th Cir. 2007) (en banc) (Thomas, J., dissenting) (arguing that the avoidance canon is "properly applied at step one of the *Chevron* analysis" because "the canon is unquestionably a 'traditional tool of statutory interpretation'").

321. Manning, *supra* note 139, at 2388.

322. 490 U.S. 504 (1989).

323. *Bock Laundry*, 490 U.S. at 509 (quoting FED. R. EVID. 609(a)(1) (1987)). .

never be shown to prejudice the defendant.[324] Having eliminated the most straightforward reading of the rule as absurd, the Justices were left with a hard case: If "defendant" could not mean literally *any* defendant, including a defendant in a civil case, then what did it mean?[325] The Justices disagreed about how this canon-created ambiguity should be resolved. While a majority decided to interpret "defendant" to mean "criminal defendant," such that "only the accused in a criminal case should be protected from unfair prejudice by the balance set out in Rule 609(a)(1),"[326] a minority would have interpreted "defendant" to require "the trial court to consider the risk of prejudice faced by any *party*."[327] Of course, the Court lacked the benefit of an agency construction in *Bock Laundry*, but if such a construction had been available and permissible, the Court could have simply deferred to it. Given the possibility of deference that applying the absurd results canon can create, it makes sense for courts to apply the canon at Step One before concluding that the "intent of Congress" is dispositive.[328]

Ambiguity-creating canons also include a subset of substantive canons known as clear statement rules. Clear statement rules provide that a statute shall not be construed to have a particular meaning unless that meaning is unequivocally expressed in the text of the statute itself. An example is the federalism canon, which holds that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."[329] From a positivist perspective, clear statement rules can be viewed as operating in two steps. The first is the creation of ambiguity. A clear statement rule raises the standard for proving that a statute has a

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324. *Bock Laundry*, 490 U.S. at 509–10; *see id.* at 527 (Scalia, J., concurring in the judgment); *id.* at 530 (Blackmun, J., dissenting).

325. *See id.* at 511 (majority opinion) (discussing the alternative meanings of "defendant"); *id.* at 529 (Scalia, J., concurring in the judgment) (same).

326. *Id.* at 523–24 (majority opinion); *see id.* at 529 (Scalia, J., concurring in the judgment).

327. *Id.* at 530 (Blackmun, J., dissenting) (emphasis added).

328. *See* Scalia, *supra* note 3, at 515. In addition to employing the absurd results canon to create an ambiguity, courts could invoke the canon to rule that an otherwise permissible agency construction is absurd. The latter use of the canon, however, would make little sense. That a construction has been adopted by an agency should be conclusive evidence that it is *not* absurd. *See* Sunstein, *supra* note 3, at 2117 ("[T]he court ought to be especially cautious in attributing irrationality or absurdity to the agency's view. It is the agency that is most likely to be in a good position to know whether the application, taken in context of the statutory scheme as a whole, is in fact irrational or absurd.").

329. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (internal quotation marks omitted).

particular meaning by demanding the clearest of evidence: an unequivocal expression in the statutory text.[330] A judge, operating under his usual standard of proof, may attribute that meaning to the statute even in the absence of such evidence. But because of the clear statement rule, the judge may no longer do so; his preferred reading of the statute—the one he considers uniquely correct—may not satisfy the rule's heightened standard of proof. What was once a clear statute is thus made ambiguous. The ambiguity is short-lived, however, because a clear statement rule moves inexorably to its second, law-making step, where it resolves the ambiguity by disfavoring a particular interpretation of the statute (e.g., an interpretation that alters the usual federal-state balance). Thus, despite creating ambiguity, clear statement rules rarely, if ever, create opportunities for judicial deference. Indeed, they can also be described as law-making canons, the topic of the next Section.

3. Law-Making Canons

Law-making canons correspond to the second stage of the positivist's process of decision. Their application presupposes the existence of a hard case in which the statute is silent or ambiguous on a point of law. When such a case arises, law-making canons guide the court's exercise of its limited discretion, allowing the statutory gap to be filled in a predictable, rule-like way.

As a doctrine of hard cases, *Chevron* is itself a law-making canon, aimed at resolving what the law should be when the law runs out.[331] But *Chevron* is not the only canon of this kind. There are other canons—commonly known as substantive canons—that are likewise rooted in fictions about congressional intent;[332] likewise triggered by the existence of hard cases; and likewise designed to tell courts what to do about statutory ambiguity.[333] What happens, then, when *Chevron* and another law-making canon give conflicting instructions about how to resolve a hard case? What happens, in other words, when deferring to a statutory construction under *Chevron* would violate a different canon disfavoring that very construction? Should *Chevron* trump the other canon, or the other way around?

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330. For a discussion of standards of proof for legal arguments, see *supra* notes 170–71 and accompanying text.

331. *See* Nelson, *supra* note at 4, at 357 ("[T]he basis for *Chevron* deference is itself a normative canon.").

332. *See* Bamberger, *supra* note 14, at 75 ("Both the normative canons and *Chevron* . . . are rooted in fictions about Congress's wishes.").

333. *See id.* at 72; Bradley, *supra* note 3, at 676; Nelson, *supra* note at 4, at 349.

The relationship between *Chevron* and other law-making canons remains "unsettled,"[334] but conceiving of *Chevron* as a doctrine of hard cases focuses the inquiry on the right question. A hard-cases approach to *Chevron* sees the doctrine's supposed foundation in congressional intent for what it is: a fiction. Going beyond that fiction, it shows that *Chevron* rests instead on a constitutionally inspired judgment about whose law-making is more legitimate in hard cases. Taking the same hard-cases approach to other canons yields a similar insight: behind every fiction about congressional intent lies a normative judgment, derived from values found in the Constitution or elsewhere.[335] The conflict between *Chevron* and other law-making canons thus boils down to a conflict between the values underlying them. When the law runs out, then, the question for the court is whether the values served by the other canon are subsumed in, or outweighed by, the value in deferring to a more legitimate (and occasionally more expert) law-maker in the agency. If they are, then the court should defer to the agency at Step Two, disregarding the other canon. If they are not, then the court at Step Two should apply the other canon, denying the agency deference.[336]

Consider the implications of this approach for *Chevron*'s relationship with clear statement rules, which function as a kind of law-making canon. Clear statement rules can be defended on the ground that "certain decisions are ordinarily expected to be made by the national legislature, with its various institutional safeguards,"[337] and not by either the Executive or the Judiciary. On this view, the purpose of requiring a clear statement is "to ensure congressional deliberation on the questions involved."[338] Suppose, then, that an agency has construed an ambiguous statute to "alter the usual constitutional balance between the States and the Federal Government."[339] Should the court apply *Chevron* and defer to the agency construction, or should it apply the federalism canon and insist on a clear statement from Congress? The balance of values suggests the latter. Deference to the

334. Note, Chevron *and the Substantive Canons*, 124 HARV. L. REV. 594, 594 (2010) [hereinafter Note, *Substantive Canons*].

335. *See* Nelson, *supra* note at 4, at 349.

336. Rejecting a categorical approach to reconciling *Chevron* with the substantive canons, Professor Kenneth Bamberger has argued that courts should take into account whether the agency construction "sufficiently reflects" the values animating the relevant substantive canon in reviewing the reasonableness of the construction at Step Two. Bamberger, *supra* note 14, at 72. Bamberger's approach, however, is inconsistent with the understanding of Step Two discussed in Subsection II.B.2, *supra.*

337. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 343 (2000).

338. Sunstein, *supra* note 3, at 2105.

339. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (internal quotation marks omitted).

agency would allow the ambiguity to be resolved by a more legitimate law-maker than the court. But the federalism canon is itself concerned about legitimacy, and it reflects the judgment that only Congress may legitimately decide to alter the usual federal-state balance. Because the federalism canon accounts for the sort of legitimacy-based considerations at the heart of *Chevron*, it should trump judicial deference—as should other clear statement rules, for the same reason.[340]

The balance of values in the case of other law-making canons, however, may tip the other way. Take the relationship between *Chevron* and the canon of constitutional avoidance, which holds that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[341] If an otherwise reasonable agency construction of an ambiguous statute raises serious constitutional questions, should the court confront those questions and defer to the agency if the construction turns out to be constitutional—or should the court apply the avoidance canon and impose its own construction on the statute? The avoidance canon has been said to rest on a "presumption that Congress did not intend [a statutory meaning] which raises serious constitutional doubts."[342] Looking beyond that obvious fiction,[343] one is left with two rationales for the canon. The first is that "a decision to declare an Act of Congress unconstitutional is the gravest and most delicate duty that [a] Court is called on to perform" and should therefore be avoided.[344] Even if one assumes that a decision to declare an act of the *Executive* unconstitutional raises the same concern, however, the rationale cannot support allowing the canon to trump *Chevron* given that the practical effect of applying the canon would be the same: invalidation of the agency construction. That leaves only the second rationale, described as

340. *See* Sunstein, *supra* note 3, at 2111; Note, *Substantive Canons*, *supra* note 334, at 610.

341. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). Some scholars have characterized the avoidance canon as a clear statement rule. *See* Manning, *supra* note 317, at 405; Sunstein, *supra* note 3, at 2111. The Court, however, has treated the canon as a doctrine that "enters in only where a statute is susceptible of two constructions." Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (internal quotation marks omitted); *see also* Clark v. Martinez, 543 U.S. 371, 402 (2005) (Thomas, J., dissenting) ("Just as we exhaust the aid of the 'traditional tools of statutory construction' before deferring to an agency's interpretation of a statute, so too should we exhaust those tools before deciding that a statute is ambiguous and that an alternative plausible construction of the statute should be adopted.") (citation omitted).

342. *Clark*, 543 U.S. at 381 (majority opinion).

343. *See supra* note 317 and accompanying text.

344. Rust v. Sullivan, 500 U.S. 173, 191 (1991) (internal quotation marks omitted).

the "prudential concern that constitutional issues not be needlessly confronted."[345] Deciding a constitutional question, however, is simply part of the Judiciary's traditional Article III duty to "say what the law is."[346] Resolving a statutory ambiguity, by contrast, entails an exercise of law-making power. From a perspective that views judicial law-making as relatively illegitimate, then, it is better for the court to avoid imposing its own construction on the statute than to avoid deciding a constitutional question. *Chevron* should trump the avoidance canon.[347]

As the foregoing demonstrates, the relationship between *Chevron* and the other canons of construction is complex. But positivism suggests a framework for making sense of it. Some canons help courts say what the law is, and these law-applying canons should be employed at Step One, along with the other tools courts traditionally use in the first stage of the judicial process. Other canons create ambiguity in existing law, and these ambiguity-creating canons should also be invoked at Step One, as the court looks for statutory gaps that need filling. Still other canons help courts say what the law should be, and these law-making canons should be considered at Step Two, when the court must decide whether judicial deference is appropriate after all. Thus, while ambiguity-creating canons may cause *Chevron*'s domain to expand, some law-making canons may cause it to contract.

CONCLUSION

Addressing an American audience in 1977, H.L.A. Hart portrayed the nation's jurisprudence as "beset by two extremes," which he called the Nightmare and the Noble Dream.[348] The Nightmare sees the judge as no different from the legislator.[349] It holds that "in spite of pretensions to the

345. *DeBartolo*, 485 U.S. at 575.

346. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

347. *See* Morales-Izquierdo v. Gonzales, 486 F.3d 484, 493 (9th Cir. 2007) (en banc) (holding that the canon of constitutional avoidance "plays no role in the second *Chevron* inquiry"); Kelley, *supra* note 317, at 835. *Contra* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.") (citation omitted); *DeBartolo*, 485 U.S. at 568; Sunstein, *supra* note 3, at 2113.

348. Hart, *supra* note 117, at 989.

349. *See id.* at 972.

contrary, judges make the law which they apply to litigants and are not impartial, objective declarers of existing law."[350] That is because, in the Nightmare, existing law is too indeterminate to contain any answers.

The Noble Dream represents the opposite view. Envisioning the law as limitless, it presumes the existence of "a single correct answer awaiting discovery" in every case.[351] Thus, in the Noble Dream, "the judge, however hard the case, is never to determine what the law *shall* be"; insofar as the law ever appears indeterminate, "the fault is not in *it*, but in the judge's limited human powers of discernment."[352]

Calling these visions "illusions," Hart rejected both the view that judges never apply the law and the view that they never make it.[353] "The truth, perhaps unexciting," Hart maintained, "is that sometimes judges do one and sometimes the other."[354] His insight that the judicial process in hard cases consists of two distinct stages—applying the law and making it—provides the best understanding of *Chevron*'s two-step inquiry. Though not every case is a hard case, hard cases do arise. And when they do, *Chevron* allows judges to decide them without legislating from the bench.

350. *Id.* at 973.
351. *Id.* at 984–85.
352. *Id.* at 983.
353. *Id.* at 989.
354. *Id.*

ARTICLE

A NEGATIVE EXTERNALITY BY ANY OTHER NAME: USING EMISSIONS CAPS AS MODELS FOR CONSTRAINING DEAD-WEIGHT COSTS OF REGULATION

SCOTT ANDREW SHEPARD*

Emissions caps work on a simple and compelling premise. Regulated entities, in the process of creating something desirable, like energy, create and expel a problematic byproduct, such as carbon. They do this because they exclusively reap a significant set of benefits (e.g., profits, market share, job security) from their efforts in the process of providing the generalized benefits that accrue from adding more energy resources to the market, and providing that energy to their customers. However, they suffer the harms caused by their emissions only diffusely and incidentally, along with the rest of society. These emissions, paid for primarily by the rest of society, are called negative externalities. Emissions-cap regimes are designed to make regulated entities more directly accountable for the costs of their emissions and give them heightened incentives to minimize those emissions. This process is known as internalizing the externalities.

Perhaps ironically, regulatory agencies occupy a position markedly similar to that of the regulated emitters. Agencies, in the process of creating something desirable, such as a cleaner environment, also create and impose externalities, such as burdens on business and

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the economy. They do this because they reap particular benefits (e.g., job security and prospects, additional authority and powers, prestige, and self-worth) from their efforts, while suffering the harms caused by the dead-weight costs of their regulations only diffusely and incidentally, along with the rest of society. Emissions-cap regimes therefore provide a condign—though nevertheless imperfect—model for establishing a system by which regulatory agencies can be obliged meaningfully to take account of, and to minimize, the efficiency and economic losses occasioned by their regulations.

This Article will propose and elaborate on a regulatory "Compliance-Cost Cap" system derived from emissions-cap models and the principles that animate such models, designed to oblige regulatory agencies to constrain the deadweight costs of their regulations.

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INTRODUCTION

The regulatory state deserves credit for many successes.[1] The United States, for instance, boasts an environment massively cleaner and healthier than was true a century or even a few decades ago.[2] Much credit for this improvement surely goes to environmental regulations established over the past few decades.[3] Increased regulation, however, hardly represents an unalloyed blessing.[4] Whatever its benefits, regulation has important negative characteristics as well: much of it makes it harder for business to grow, develop, or even survive; harder for economic development of any sort to occur; and harder for private individuals to support themselves.[5] And as with most other goods, the benefits from regulation occur primarily at the early stages of regulation; as the low-hanging fruit is reaped, additional regulation tends to harvest increasingly small rewards (environmental or otherwise) at increasingly high costs.[6] The *Code of Federal Regulations* (CFR) now runs well in excess of 150,000 pages. More than 3,500 new regulatory rulemakings per year generate upwards of 8,000 additional federal regulations annually (to say nothing of state and municipal contributions).[7] Compliance with federal regulations alone may cost regulated entities (including both businesses and individuals) well in

1. *See, e.g.*, OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, 2010 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 3 (2010) [hereinafter OMB 2010] (quantifying the partial benefits from regulation by the federal government from 1999–2009 at $128 to $616 billion); Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1490 (2002); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 74 (1990).

2. *See, e.g.*, RONALD J. RYCHLAK & DAVID W. CASE, ENVIRONMENTAL LAW xiv (2010); CRAIG COLLINS, TOXIC LOOPHOLES: FAILURES AND FUTURE PROSPECTS FOR ENVIRONMENTAL LAW 37–38, 58, 86 (2010).

3. *See* RYCHLAK & CASE, *supra* note 2, at xiv; COLLINS, *supra* note 2, at 37–38, 86.

4. *See, e.g.*, SUNSTEIN, *supra* note 1, at 74–110 (reviewing ways in which regulations fail).

5. *Id.* This should prove troubling even from a regulation-maximizing point of view: high compliance costs make society poorer which, on top of everything else, means that fewer resources are available to support additional regulatory or other government programs. *See also infra* notes 51–57 and accompanying text.

6. This is a fairly standard insight: the easiest, highest-reward tasks tend to get done early in a project, leaving the relatively hard, relatively expensive, and relatively low-yield tasks for later. *See* Keith H. Hirokawa, *Driving Local Governments to Watershed Governance*, 42 ENVTL. L. 157, 160 (2012) (identifying the principle at work in the regulatory context).

7. *See infra* notes 117–118 and accompanying text.

excess of one trillion dollars per year.[8] These high costs highlight the need for structural mechanisms to constrain them. Such structures should be designed to achieve the greatest regulatory benefit at the least cost, whether by enacting new, modifying existing, or repealing superannuated, duplicative, and otherwise inefficient regulation.

The regulatory Compliance-Cost Cap (CCC) program proposed in this Article presents such a mechanism. For more than thirty years, each federal administration has made at least nominal efforts to control regulatory-compliance costs and to ensure more regulatory benefit for each compliance-cost dollar.[9] The central such effort has been the obligation that agencies employ cost–benefit analysis (CBA) to evaluate prospective regulation.[10] CBA, however, has failed to restrain the seemingly inexorable rise in regulatory-compliance costs.[11] This is hardly surprising, as CBA-proper has traditionally applied only to executive agencies, not independent agencies.[12] Agencies face no penalties if they fail to undertake CBA, no consequences if they fail to follow the "recommendations" of CBA, and no obligation to follow a specific CBA formula.[13] Moreover, it is in the very nature of their position as regulators that agency personnel—who will be particularly aware of and partial to the benefits arising from regulation, but uniquely underattentive to the costs—are not in a good position to conduct CBA, because they find themselves essentially in the role of judging their effectiveness in their own cases.[14] Additionally, CBA has been subject to numerous critiques questioning which factors should be counted as part of the costs and benefits of regulation, and how (or

8. *See infra* Part I.C.

9. *See infra* Part I.B; John Bronsteen et al., *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L.J. 1603, 1606 (2013) (listing executive orders that have mandated cost benefit analysis (CBA) since 1981); Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1120 (2002) (analysis required for "any proposed regulation that would impose annual costs of more than $100 million on the economy"); Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1501–71 (2012) (codifying the CBA requirement).

10. *See* sources cited *supra* note 9.

11. *See generally infra* Part I.C; J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 765, 776–82 (2003) (recounting failed initiatives and noting that "direct initiatives to cull regulations have been abject failures").

12. *See* OMB 2010, *supra* note 1, at 3–4; *see also infra* Part I.B. President Obama's Regulatory "Czar," Cass Sunstein, has notionally extended CBA obligations to independent agencies, but in the same toothless version critiqued herein. *See, e.g.*, Exec. Order No. 13,579, 3 CFR 256 (2011).

13. *See infra* Part I.B.

14. *See id.*

whether) those factors should be counted.[15]

The CCC program is designed to remedy the shortcomings of CBA,[16] and to provide a genuinely effective means of containing regulatory-compliance costs and generating increased efficiencies from regulatory agencies without undermining the real benefits arising from well-considered and well-constructed regulatory regimes. It takes as its model emissions-cap regimes, the most familiar perhaps being a carbon-cap program popularly known as "cap-and-trade" (though there are emissions-cap programs, and even cap-and-trade programs, for other pollutants as well).[17] The central insight of emissions-cap programs is that entities subject to the cap, in the course of producing a valuable good such as energy, also produce harmful byproducts, such as carbon.[18] They pay too little attention to the byproducts, called "negative externalities," because many of the advantages flowing from their production of goods—advantages such as profits, job security, and job satisfaction—accrue to them directly, while the costs of the negative externalities flow out onto society generally.[19] As will be discussed below, though, private exchanges also produce positive externalities—i.e., *benefits* flowing from the exchange that are not fully captured by the bargaining parties.[20] In order to awaken producers to the negative externalities they create, emissions-cap programs limit, and then eventually reduce, the amount of negative externalities the regulated entities are permitted to produce, thus requiring them either to increase their goods-to-negative-externalities production ratio or to decrease production.[21]

The CCC program recognizes that regulatory agencies are in a materially similar position to that of the entities they regulate. Like regulated entities, agencies create a valuable good: the benefits of regulation.[22] As a result, regulators are rewarded with job security, promotion, job satisfaction, and other benefits.[23] Like their regulated counterparts, agencies are unable to capture all of the benefits arising from the goods they create: much of the benefit—as intended by the system—spills out to the public generally. One of the marginal dissimilarities between regulated entities and regulatory agencies is that regulated entities

15. *See infra* notes 243–47 and accompanying text.
16. *See infra* note 101 (detailing the shortcomings and failures of CBA).
17. *See infra* Part II.
18. *See id.*
19. *See infra* Part III.
20. *See id.*
21. *See infra* Part II.
22. *See infra* Part III.
23. *See infra* Parts I.B, III–IV.

are generally able to capture a larger quantum of the benefit created by their production than are regulatory agencies. As a result, compliance-cost caps cannot follow the emissions-cap model precisely.[24] Regulatory agencies also, however, create a byproduct: the costs of complying with their regulations, which are borne not by them, but by society.[25]

While agencies and regulators face incentives and inclinations to maximize regulatory reach and activity, to minimize their own efforts, and to maximize the positive-externality public benefits of their regulations, they face essentially no material incentives to minimize the negative-externality costs of complying with those regulations.[26] In order to make regulatory agencies attend meaningfully to the negative externalities they create, the CCC program will cap, and then for a time gradually and slowly reduce, the amount of negative externality that regulatory agencies are permitted to produce. The program will thus require agencies to increase the efficiency of their regulations or to decrease regulation, presumably by pruning away outdated, duplicative, or highly inefficient regulation, and by revising necessary but poorly crafted regulation.[27]

The CCC program would, for the first time, establish a real and meaningful check on the growth of regulatory-compliance costs and would genuinely incentivize regulatory agencies to do the work required to weed out or revise inefficient regulation. Unlike CBA and its brethren, CCC would set obligatory requirements, according to standards established and monitored by neutral arbiters.[28] It would force government, as an initial matter, to catalogue—and, as it were, index by entity regulated—the whole of its regulations, an effort which, regrettably, has never been undertaken.[29] It would require the government to acknowledge the costs associated with this totality of regulation, according to an objective metric to be applied consistently.[30] It would apply the capping mechanism to all costs imposed by government that do not arise from the taxing power or from genuine adjudication.[31] This would render all of government more transparent and responsible.[32] Thereafter, the caps on the costs of regulatory compliance would slowly fall for a period, creating pressures on regulators to wring

24. *See infra* Parts IV–V.
25. *See id.*
26. *See infra* Part V.
27. *See infra* Parts IV–V.
28. *See infra* Part I.B.
29. *See infra* note 115 and accompanying text.
30. *See infra* Part V.B.
31. *See infra* Part V.A.1–2.
32. *See id.*

excesses and inefficiencies from their regulations. Once a reasonable amount of tightening had occurred, compliance costs would be permitted to rise only in step with some coherent and constraining metric, such as real gross domestic product (GDP) or population growth.[33] Any increases in the total CCC outside of these constraints—whether for a specific new or existing agency, or for all agencies in general—would require an explicit act of Congress, thus again increasing transparency and accountability.[34]

In Part I, below, I review the reasons why we must develop an effective method to constrain the growth of regulatory-compliance costs, and to require regulatory agencies to promulgate efficient regulations and to revise or discard inefficient or ineffective regulations. In sum, the American economy is burdened by an unprecedented level of regulatory costs, rendering inefficient, outdated, or unproductive regulations particularly problematic. Regulatory agencies and regulators, meanwhile, presently have little structural incentive to minimize compliance costs, and require some formal mechanism that will oblige them to create and to become more efficient at creating the benefits of regulation at lower dead-weight costs. In Part II, I provide a brief summary of how emissions-cap programs work, and why they have been applied and proven effective.

In Part III, I establish that entities regulated under emissions caps and regulatory agencies are markedly similar. Each creates—and is rewarded for the creation of—valuable products, but also creates negative externalities to which they necessarily pay too little attention unless otherwise obliged. In Part IV, I provide an overview of the CCC program. I explain how it would require regulatory agencies to stop expansion, and eventually to reduce, compliance-cost externalities and create more efficient regulation. In this Part, I present various models for how the cap could be set so as to account for inflation and possibly for GDP growth. I consider how the cap deflator should be established, and review the limits of automatic deflation caps. I also consider the question of whether new agencies or programs should be provided additional regulatory compliance-cost budgets. I conclude that the purposes of CCC would best be achieved by establishing a single "global" compliance-cost cap when CCC is implemented and requiring that the compliance-cost budget for new agencies or initiatives be withdrawn from other regulatory agencies. I recognize that even if this conclusion is not followed—even if Congress should grant new regulatory agencies or initiatives new compliance-costs budgets that expand the global compliance-cost cap—the central CCC

33. *See infra* Part V.B.
34. *See infra* Parts III–IV.

goals of transparency and accountability will still be served.

In Part V, I add detail to the model. In Part V.A, I consider which government acts should be considered regulation, and what government-engendered costs should qualify as regulatory-compliance costs. I conclude that government activities that result in private expenditure that are not taxation (government action that results in money flowing directly to government coffers for a reason other than the imposition of a fine or other penalty) or genuine adjudication should qualify as regulation. In Part V.B, I explain how and by whom compliance costs should be calculated and why absolute cost calculations matter less under CCC. The cost-calculation model employed should be objectively established and applied and be used consistently for the calculation of all compliance costs, cost caps, and cost savings. I also explain why the benefits of regulation should play no more a role in compliance-cost cap determinations than the value of the goods produced by entities regulated under emissions caps are considered in determining those caps. Continuing, I consider the practical and prudential limits of cost-cap deflation. I recognize that just as sensible emissions caps do not generally set caps at zero, because the result of zero negative externalities might well be zero goods produced, so too the cost-cutting mechanisms of CCC cannot proceed forever, but merely for a period reasonably estimated to result in significant diminution of excessive or inefficient externalities. Thereafter, compliance costs may be permitted to grow, but growth must be restrained by some objective standard, so as to avoid a return to the unregulated growth of compliance-cost negative externalities that exists today. Potential standards might include inflation-only growth or, more capaciously, growth that accounted for GDP change.

I. THE NEED FOR STRUCTURAL INCENTIVES TO CONSTRAIN REGULATORY-COMPLIANCE COSTS

The American economy has struggled since at least the "credit crunch" of autumn 2008.[35] Economists disagree strenuously about the causes of and solutions to the malaise, but one cannot doubt that one economic handicap is the steady growth of regulation and regulatory-compliance costs.[36] Whatever the concomitant benefits of regulation, its costs include the

35. *See* Paul Wiseman, *Economic Recovery Is Weakest Since World War II*, YAHOO NEWS (Aug. 15, 2012, 12:41 PM), http://news.yahoo.com/economic-recovery-weakest-since-world-war-ii-152031546—finance.html.

36. *See id. Cf.* Hahn & Sunstein, *supra* note 1, at 1491 (arguing that, "[e]specially in a period in which economic growth and improved safety and health are among government's highest priorities," it is "a major problem" if costs of regulation "are high and the benefits low or nonexistent").

constraint of entrepreneurial vitality and a significant dampening of the engines of the American economy.[37] This, in turn, has negative consequences for individuals as they try to provide for themselves and their families; and likewise hampers government efforts to improve the environment, fund entitlement programs, or fulfill other national obligations or promises.[38]

For more than thirty years, every federal administration has grappled with this negative externality of regulation, and has sought to limit its effects, primarily (though not exclusively) by requiring CBA of major regulations issued by executive agencies.[39] These requirements have been relatively toothless and agencies have honored the requirements largely in the breach, or at best only incompletely.[40] The task of constraining compliance costs has been handed, without oversight or independent consequence, exactly to those whose central charge and focus is to produce public-protecting regulation, not to consider its costs and to constrain its reach[41]—with the unsurprising result that regulatory-compliance costs have not been constrained, but grow at a significant clip.[42] Given present circumstances, these ineffectual efforts at compliance-cost constraint and negative-externality reduction are insufficient. A more rigorous program, one that effects meaningful regulatory-cost containment, is required.

A. Economic Sclerosis

The American economy has been in real trouble since the credit crisis of late 2008.[43] Economic stress continues, and promises to continue.[44]

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37. *See* Hahn & Sunstein, *supra* note 1, at 1490.

38. *See id.*

39. *See generally infra* Part I.B. President Reagan introduced the first CBA executive order during his first month in office. *See* Exec. Order No. 12,291, 3 CFR 127 (1981). Each administration since has renewed the order. *See* Bronsteen et al., *supra* note 9, at 1606 (listing executive orders that have mandated CBA since 1981). Additionally, in the 1990s, Congress partially codified the obligation. *See* Unfunded Mandates Reform Act, 2 U.S.C. §§ 1501–71 (2012) (codifying the CBA requirement).

40. Bronsteen et al., *supra* note 9, at 1606.

41. *See id.*

42. *See infra* Part I.C.

43. *See, e.g.*, Wiseman, *supra* note 35.

44. *See, e.g.*, David M. Schizer, *Fiscal Policy in an Era of Austerity*, 35 HARV. J.L. & PUB. POL'Y 453, 454–60 (2012) (summarizing current economic conditions); Kenneth Casebeer, *O My Sons and Daughters, How Do I Immiserate Thee: Let Me Count the Ways*, 29 HOFSTRA LAB. & EMP. L.J. 1, 1–3 (2011) (same). Even the President, who might have been expected to embrace the outer edges of optimism during his reelection campaign recognized that full recovery will take some years more. *See* David Nakamura, *With Hope Dampened, Obama*

Economic growth remains stalled below the level necessary to compensate for population growth;[45] total employment still remains far below its peak before the crisis began;[46] and government debt has skyrocketed.[47] Even if the economy were to gain steam, national obligations will mount extravagantly over coming decades.[48] The baby boomers have begun to retire, and fewer workers shoulder the massive burden of paying boomers' retirement and healthcare expenses.[49] The "graying" of American society and the economic consequences of that graying will strain national resources and dampen economic growth for years.[50]

The size, scope, and cost of regulation contribute to the paucity of recovery. Regulatory compliance—even when the regulation efficiently serves some valuable social purpose—generally hinders business

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Changes Pitch, WASH. POST, Aug. 27, 2011, at A1.

45. *See, e.g.*, Schizer, *supra* note 44, at 456; Peter Coy, *U.S. Jobless Rate Drops for the Worst of All Reasons*, BLOOMBERG BUSINESSWEEK (Sept. 7, 2012), http://www.businessweek.com/articles/2012-09-07/weak-jobs-report-shows-obamas-long-road-ahead ("The share of working-age people who are either working or looking for work—known as the labor-force participation rate—fell to its lowest level since September 1981.").

46. *See, e.g.*, James Pethokoukis, *Chart of the Day: America's Missing 11 Million Workers*, AEIDEAS, (Aug. 3, 2012, 1:22 PM), http://www.aei-ideas.org/2012/08/chart-of-the-day-americas-missing-11-million-workers/; Gregor MacDonald, *Total Employment in the U.S. Falls Again*, GREGOR.US, (Aug. 5, 2011), http://gregor.us/economics/total-employment-in-the-us-falls-again/ (graphing information drawn from United States Total Employment in Millions (seasonally adjusted) 2001–2011, BUREAU OF LABOR STATISTICS).

47. Ian Katz, *U.S. Government Debt Reaches $16 Trillion for First Time*, BLOOMBERG BUSINESSWEEK, (Sept. 4, 2012, 6:14 PM), http://www.bloomberg.com/news/2012-09-04/u-s-government-debt-reaches-16-trillion-for-first-time.html (debt was $6.2 trillion a decade ago, $13 trillion in June 2010, $14 trillion in December 2010, and $15 trillion in November 2011). The debt is, for the first time, larger than U.S. gross domestic product (GDP). *See, e.g.*, News Release, Bureau of Economic Analysis, U.S. Dep't of Commerce, Gross Domestic Product: Second Quarter 2012 (Second Estimate); Corporate Profits: Second Quarter 2012 (Preliminary), (Aug. 29, 2012), *available at* https://www.bea.gov/newsreleases/national/gdp/2012/gdp2q12_2nd.htm (calculating annualized GDP as of end of second quarter 2012: $15.61 trillion).

48. *See, e.g.*, Susan A. Channick, *Taming the Beast of Health Care Costs: Why Medicare Reform Alone is Not Enough*, 21 ANNALS HEALTH L. 63, 63 (2012) (describing the tremendous increase in healthcare costs over the next decade).

49. *See, e.g.*, Patricia E. Dilley, *Taking Public Rights Private: The Rhetoric and Reality of Social Security Privatization*, 41 B.C. L. REV. 975, 987–88 (2000).

50. *See, e.g.*, Channick, *supra* note 48, at 67 (citing the COB's finding that federal healthcare expenditures will increase to 10% of GDP in 2035); Nicholas Eberstadt, *Are Entitlements Corrupting Us? Yes, American Character Is at Stake*, WALL ST. J., Aug. 31, 2012, http://online.wsj.com/news/articles/SB10000872396390444914 (recounting exponential growth of entitlement programs and payments over the last 40 years).

investment, development, expansion, and mutability.[51] It is, as a general rule, cheaper to conduct business without having to comply with a regulation than having to comply with it.[52] Nor are the effects limited to private lives and private enterprise. President Obama's early calls for a vigorous economic stimulus designed to fund "shovel-ready" initiatives[53] withered under the realization, as the President himself eventually acknowledged,[54] that there are no shovel-ready projects in this age of

51. *See, e.g.*, Ruhl & Salzman, *supra* note 11, at 759 ("While rules promulgated by agencies have created obvious benefits, they have equally generated economic and liberty costs to regulated parties and society at large.") (citing Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 409, 411 (1990)).

52. The point here is not that regulations can never make doing business cheaper. It is that most regulation will add to the cost of doing business even if the regulation has some countervailing social justification. For instance, we might as a society determine that restaurants must include calorie information in their menus. See, e.g., Christine Cusick, Comment, *Menu-Labeling Laws: A Move from Local to National Regulation*, 51 SANTA CLARA L. REV. 989, 995–1004 (2011) (recounting local and federal menu-labeling requirements, including, most recently, nationwide requirements included in the Affordable Care Act). This may be a public good, but complying with it is almost always going to cost facilities providers more than *not* complying with it. This conclusion is obvious for private business facility providers because if providing the features required by the regulation had been a money-making proposition, the businesses would have provided those features already. This logic fails only if the government genuinely knows better than businesses how those businesses can make money, and if its regulations successfully and efficiently incorporate this insight. Even in the rare instances in which this is true with regard to *some extant* businesses, it is not true for marginal competitors and for would-be market entrants; rather, the increased mandatory costs of compliance force marginal competitors (who can least bear those additional costs) out of business, and discourage new market entrants (who face higher barriers to entry). *See, e.g.*, Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 872, 907–08, 911, 918–20 (1999); Nicole V. Crain & W. Mark Crain, *The Regulation Tax Keeps Growing*, WALL ST. J., Sept. 27, 2010 at A17 (arguing that their studies demonstrate that regulatory costs per worker fall disproportionately on small businesses). As a result of fewer competitors entering the market and some being forced out, the otherwise-available supply of the product or facility to which the regulation applies has been reduced, thus raising the price of that product or facility for all users. *See, e.g.*, Zywicki, *supra*, at 854.

53. Brian Naylor, *Stimulus Bill Gives "Shovel-Ready" Projects Priority*, NPR, (Feb. 9, 2009, 12:49 AM), http://www.npr.org/templates/story/story.php?storyId=100295436 ("As President Obama urges Congress to pass the $800 billion-plus stimulus package, one of his favorite selling points is the thousands of projects nationwide that he calls 'shovel ready'—meaning planning is complete, approvals are secured and people could be put to work right away once funding is in place.").

54. *See, e.g.*, Peter Baker, *The Education of a President*, N.Y. TIMES, (Oct. 12, 2010), http://www.nytimes.com/2010/10/17/magazine/17obamat.html?gwh=7F81C785446123B1416714C1059CA8C5&gwt=regi (quoting the President as "realiz[ing] too late that 'there's no such thing as shovel-ready projects' when it comes to public works").

regulation. Regulatory-compliance obligations put years between the conception and initiation of such projects and materially add to their completion time.[55] Some political commentators, meanwhile, point to the government funded and managed success of the Hoover Dam as a model for, and defense of, public works spending,[56] without recognizing that the modern regulatory state makes any such projects effectively impossible today.[57]

Moreover, increased regulation is hardly the only driver of environmental or general social improvement. Substantial research suggests that one of the most important factors indicating ecological health is a country's wealth: richer societies can afford to be cleaner.[58] Wealthier

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55. *See, e.g.*, Adam J. White, *Infrastructure Policy: Lessons from American History*, NEW ATLANTIS Spring 2012, at 3, 31; *Federal Permitting Process Overhaul: Hearing on H.R. 4377 Before the H. Comm. on the Judiciary*, 112th Cong. (2012) (statement of William L. Kovacs, Senior Vice President, Envtl., Tech. & Regulatory Affairs, U.S. Chamber of Commerce).

56. *See* NBC News, *Rachel Maddow: The Hoover Dam*, YOUTUBE (Apr. 22, 2011) http://www.youtube.com/watch?v=s0gNga6v9EY ("We've got to figure out whether or not we are still a country that can think this big."); *see also* President Obama, Remarks by the President at the Building and Construction Trades Dep't Conference (Apr. 30, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/04/30/remarks-president-building-and-construction-trades-department-conference (declaring that a new Hoover Dam or similar project can be built now if "you've got enough people with the same goal, pulling in the same direction, looking at the same game plan").

57. The Hoover Dam is not an example of a modern successful public works project because it is highly improbable that it, or other western dams, would be built today because of the negative effects that they have had on the habitats of local species. *See, e.g.*, Michael Cohen, *The Delta's Perennial Drought: Instream Flows for an Over-Allocated River*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 115 (2006) (detailing and objecting to the effect of the Hoover Dam on the Colorado River ecosystem).

58. Actually, the research has demonstrated that societies tend to follow a U-shaped curve, called "the environmental Kuznets curve," which describes this progression:

> At low levels of development, both the quantity and the intensity of environmental degradation are limited to the impacts of subsistence economic activity on the resource base and to limited quantities of biodegradable wastes. As agriculture and resource extraction intensify and industrialization takes off, both resource depletion and waste generation accelerate. At higher levels of development, structural change towards information-based industries and services, more efficient technologies, and increased demand for environmental quality result in levelling-off and a steady decline of environmental degradation.

THEODORE PANAYOTOU, ECONOMIC GROWTH AND THE ENVIRONMENT, ECONOMIC SURVEY OF EURPOE 2003, NO. 2 45–46 (2003), *available at* http://www.unece.org/fileadmin/DAM/ead/sem/sem2003/papers/panayotou.pdf.

These studies confirm what a broad knowledge of American history would illustrate, that the United States (along with most developed and many developing countries) are on the upslope of this U-shaped curve (though perhaps not for all possible environmental-pollution factors). *See, e.g.*, *id.* at 45–56 (reviewing the literature to conclude that consensus

societies may well achieve a portion of this additional quantum of greenery (or other benefits positively correlated with increased wealth) through the regulatory process.[59] It still holds, though, that the most efficient and least compliance-cost generating regulations will, *ceteris paribus*, achieve society's regulatory goals with the least possible diminishment of the country's wealth. This in turn will foster a virtuous cycle (as compared to the less-efficient-regulation alternative): achieving the regulatory goals while leaving more wealth and permitting more wealth accumulation, which will in turn engender more support for a yet cleaner environment and more resources with which to achieve those ends, and so on.[60] Even from a maximum-possible-regulation standpoint, then, it proves beneficial to demand—and to establish structures that will engender—the most efficient (or at least more efficient) regulation.[61]

More broadly, President Kennedy was essentially correct: a rising tide does lift all—or nearly all—boats. Americans of all income levels have unprecedented access to technologies, conveniences, quality-of-life benefits and even luxuries that were wholly unavailable—at any price—to any of their grandparents because of economic growth.[62] If the legitimate purpose

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has been reached on this broad conclusion); Jesse H. Ausubel & Paul E. Waggoner, *Dematerialization: Variety, Caution, and Persistence*, 105 PROC. OF THE NAT'L ACAD. OF THE SCI. OF THE U.S. 12,774, 12,779 (2008), *available at* http://www.pnas.org/content/105/35/12774.full.pdf+html (reviewing history to reach the same conclusion).

59. And there is every reason to believe that in virtually all developed countries, environmental regulation does play a significant role in the greening process, but arguably not the primary role, and it is certainly not the sole factor. *See generally supra* note 58 and accompanying text.

60. *Cf.* Hahn & Sunstein, *supra* note 1, at 1493 ("Expensive regulation may well increase prices, reduce wages, and increase unemployment (and hence poverty). Resources now being devoted to small or imaginary problems might be diverted instead to areas where, by all accounts, they could produce far more good.").

61. *See, e.g.*, *id.*; Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549, 1642–43 (1991) ("The federal . . . approach has had success but has run out of steam, and has little chance of dealing effectively with the major air pollution problems that threaten our atmosphere on a global basis. We cannot save the environment just by creating more regulations.").

62. *See, e.g.*, Brian Palmer, *How Rich are Poor People?*, SLATE (Sept. 14, 2011, 6:24 PM), http://www.slate.com/articles/news_and_politics/explainer/2011/09/how_rich_are_poor_people.html; ROBERT RECTOR & RACHEL SHEFFIELD, HERITAGE FOUND., BACKGROUNDER NO. 2575, AIR CONDITIONING, CABLE TV, AND AN XBOX: WHAT IS POVERTY IN THE UNITED STATES TODAY? 2–3 (2011), *available at* http://thf_media.s3.amazonaws.com/2011/pdf/bg2575.pdf; W. MICHAEL COX & RICHARD ALM, MYTHS OF RICH & POOR: WHY WE'RE BETTER OFF THAN WE THINK (1999). Each of these texts in various ways retails the myriad and manifold ways in which the poor live vastly better lives

of regulation is to improve the lives of citizens, as it must be, then inefficient regulation will work directly against its intended purpose by stymying economic growth, no matter how well intentioned in the first place.[63]

We have been warned that we face an era of shared sacrifice—higher taxes, fewer benefits, extended working lives.[64] Regulation, too, must share this new austerity.[65] Moreover, the very extent of regulation creates its own need for mechanisms of constraint. Convention shows us that a few dozen pages of regulation will likely impact few people regardless of whether those regulations are the most efficient or objectively worth regulating. The case is obviously reversed when the regulation books run to the hundreds of thousands of pages,[66] and compliance levies a perhaps multi-trillion dollar annual cost.[67] Even if an economy manages to lumber forward under such a burden, society must create mechanisms to constrain and constrict that burden.

B. An Absence of Mandatory Structural Incentives to Improve Regulatory Efficiency

The modern regulatory state has failed to rein in its regulatory impulses. Many of the incentives regulators face push them consistently to increase regulatory burdens.[68] While regulators also face some countervailing

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than did even the wealthy of earlier generations, from material comforts to quality and quantity of life to access to information and healthcare to entertainment and education options and beyond.

63. *See, e.g.*, Hahn & Sunstein, *supra* note 1, at 1491–93.

64. *See, e.g.*, Carol E. Lee & Damian Paletta, *New Obama Deficit Plan; Nearly Half of $3 Trillion Proposed to Come From Taxes; GOP Opposes Fresh Levies*, WALL ST. J., Sept. 19, 2011 (President Obama calling for increased taxes and sacrifice); Paul Kane & Lori Montgomery, *Obama, Boehner Press Debt-Limit Arguments in National Addresses: President Obama, House Speaker Boehner Present Dueling Debt-Limit Plans to Nation*, WASH. POST, July 26, 2011, at A1 (considering Obama's call for "shared sacrifice" in dealing with the national debt in the form of "deep cuts in federal spending to be coupled with higher taxes on the wealthy and on large corporations").

65. As will be discussed below, executive agencies (but not independent agencies) have been formally obliged to undertake CBA for big-ticket regulatory programs since 1981. *See infra* notes 100–107 and accompanying text.

66. *See* OFFICE OF THE FED. REG., FED. REG. PAGES PUBLISHED (1936–2012), at 2, *available at* https://www.federalregister.gov/uploads/2013/05/FR-Pages-published.pdf [hereinafter CFR Page Count]; Melany C. Birdsong, *Reforming Regulation: No Time Like the Present*, 32 HAMLINE J. PUB. L. & POL'Y 371, 380–81 n.20 (2011); Ruhl & Salzman, *supra* note 11, at 775.

67. *See infra* notes 119–127 and accompanying text (considering a range of incomplete estimates that suggest a floor of approximately one trillion dollars per year, and a ceiling that could reach several times that).

68. *See infra* notes 72–76 and accompanying text.

incentives to shirk[69] and arguably some related incentives to oppose certain specific regulations that would particularly disfavor established regulated entities,[70] they face essentially no mandatory structural obligations to police, much less ensure, regulatory efficiency. The effect of this lopsided incentive structure is demonstrated by the consistent expansion of regulatory obligations over time, largely unaccompanied by efficiency-minded revision or repeal of regulatory burdens.[71]

It is not surprising that regulatory agencies are teleologically "authority-enhancing," meaning that they are geared to multiply, rather than to pare, regulatory burdens. Proliferation of regulation permits agencies to be productive, and to demonstrate their productivity,[72] while at the same time giving themselves additional tasks, such as enforcing their new regulations. These new responsibilities necessarily increase their job security (and perhaps their pay and benefits), while also increasing their own power over others, their prestige, and—if they dislike the entities they are regulating or have made regulation their career in furtherance of a personal cause—their self-worth.[73] Additionally, given the extent of the revolving door between

69. *See infra* Part III.

70. *See id.*

71. *See infra* Part I.C (reviewing empirical evidence).

72. *See, e.g.*, Ruhl & Salzman, *supra* note 11, at 787 (noting that deregulatory efforts are difficult and offer little benefit) (citing EUGENE BARDACH & ROBERT KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 186 (1982); *cf.* Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767, 772–73 (1977); Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 22 TEL AVIV U. STUD. L. 9, 20 (1992); SUNSTEIN, *supra* note 1, at 100 (reviewing agency incentive to over- rather than to under-regulate).

73. *See, e.g.*, SUNSTEIN, *supra* note 1, at 99 ("The incentives to bureaucrats include the aggrandizement of bureaucratic self-interest and the preservation of individual agency autonomy."); Zywicki, *supra* note 52, at 890–93 (recounting motivations of regulators); JAMES Q. WILSON, BUREAUCRACY: WHAT AGENCIES DO AND WHY THEY DO IT xviii (1989) (explaining that William Niskanen, who led the public choice analysis of agencies, had concluded that, "The utility of a business person is assumed to be profits; that of a bureaucrat is assumed to be something akin to profits: salary, rank, or power."); Elie Appelbaum & Eliakim Katz, *Seeking Rents by Setting Rents: The Political Economy of Rent Seeking*, 97 ECON. J. 685, 685 (1987) ("However, following the work by Downs (1957), Buchanan and Tullock (1962), Stigler (1971), Peltzman (1976) and much of the public choice literature, regulators are not necessarily altruistic and may be expected to set rents at levels which are determined by their own interests. Thus, since regulators may also be expected to be rent seekers, the determination of the rent itself should be endogenised to reflect the fact that the rent setters are, themselves, rent seekers.").

Others have analyzed the complexity of career incentives for post-agency employment that face most top agency executives and argued that industry may hire pro- or anti-industry regulators in different circumstances for different reasons. Regulated entities

regulatory agency and regulated entity,[74] the proliferation of regulation while one serves as a regulator proportionally increases one's value when the time comes for the next door to revolve.[75]

There is no suggestion here that regulators must or necessarily do behave unethically, improperly, incompetently, or even self-consciously with regard to these incentives in order for the incentives to result in an

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may prefer strident regulators who understand well the complexities of regulation, or former regulators with whom they have enjoyed friendly relations, and who are more likely to be more suitable industry employees. Regulators respond rationally (self-interestedly) to those signals. To the extent that the latter are preferred, those who remain in regulatory agencies will be, proportionally, increasingly anti-industry. *See* PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES 164–74, 192 (1981); *see generally* WILSON, *supra*, at 51, 88; WILLIAM NISKANEN, JR., BUREAUCRACY AND PUBLIC ECONOMICS (1994); WILLIAM NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

74. The "revolving door" describes "the movement from private employment to the government and back." United States v. Medico Indus., Inc., 784 F.2d 840, 843 (7th Cir. 1986). In the United States, that door is well oiled. *See generally* Brook Masters, *Enter the Revolving Regulators*, FIN. TIMES, Apr. 23, 2012, http://www.ft.com/cms/s/0/2f5790fa-8d50-11e1-9798-00144feab49a.html#ixzz1szrA5xi0 ("in the US . . . changing sides is part and parcel of the way both the government and industry do business"); Robert Pack, *The Revolving Door*, WASH. LAW., Oct. 2001, at 22–27.

75. This is not to suggest that most, or even very many, regulators who leave government for industry are corrupt. *See, e.g.*, James S. Roberts, Jr., *The "Revolving Door": Issues Related to the Hiring of Former Federal Government Employees*, 43 ALA. L. REV. 343, 343 (1991); Masters, *supra* note 74; Stuart B. Nibley, *Jamming the Revolving Door, Making it More Efficient, or Simply Making it Spin Faster*, PROCUREMENT LAW., Summer 2006 at 1, 15–17 (recounting cases of revolving-door corruption and appearance-of-impropriety situations). But there need not be either corruption or even favor- or access-seeking impropriety, as these things are normally considered, for the effect alluded to above to occur. A recent newspaper article cited "advocates of a free flow between government and industry" as explaining that "the exchange benefits both sides. Regulators who understand the sector . . . are better positioned to draft sensible regulations and catch those who seek to evade them." Masters, *supra* note 74. But conversely, regulated entities are analogously well-served to hire ex-regulators who can help them to navigate through the "sensible" regulations that the regulators have helped to write—and the more complicated the regulations, the more necessary the guide through those "sensible" shoals. *See, e.g.*, *id.* ("Sarah Clarke . . . who returned to private practice . . . after five years at the [British financial regulator] says that . . . 'being able to advise a private client from the perspective of having worked on similar cases on the other side is invaluable in terms of knowledge, expertise and judgment.'"); Pack, *supra* note 74, at 22 ("*Common Cause* . . . defines the revolving door as the practice of government officials cashing in on their public service by leaving public office and going to work for the same special interests who were seeking favors from them while they were in office.") (internal quotations omitted). Only if the regulatory agencies have developed a complicated and porous regulatory structure, though, would such favors either be possible or necessary, and only under complex regulation would inside-the-agency expertise be something that has an outside-the-agency cash value. *Id.*, at 22.

ever-increasing regulatory burden with little effort to repeal or streamline extant regulations. Regulators are people, and necessarily consider issues of personal and family material self-interest.[76] Such considerations are natural, and could only be considered venality if regulators were expressly deciding in favor of their personal self-interest at the expense of doing their jobs as well as they define that term.

Yet regulators seldom find themselves confronted by the internal challenge of such venality. Rather, the structural nature of their positions as regulators causes regulators to conclude that the things that they should do as regulators coincide with the things that will provide them job security, promotion, and other personal advantages.[77] There are no doubt a few libertarians who go to work for a government agency with the express purpose of minimizing government's reach, but not many.[78] Rather,

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76. The public choice school first systematically expressed the central insight that regulators are influenced by considerations of material self-interest. *See, e.g.*, Zywicki *supra* note 52. While debate rages in the academy about how much effect material self-interest considerations play, and about whether concerns such as caring for one's family and promoting one's own particular vision of the public good should count as self-interest, even rejectionist critics of public choice theory accept the central proposition that material self-interest plays *some* role in regulator behavior, while a more widely defined self-interest plays a wider role. *See, e.g.*, Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, But Throw Out That Baby*, 87 CORNELL L. REV. 309, 323, 326, 333–34, 340–41 (2002) (recognizing that various public choice theorists define self-interest differently, but that even theories expressly opposed to public choice recognize that sometimes regulators "maximize their material well-being; more often, however [they] maximize the material well-being of themselves and their children. In other situations, what is most meaningful is to serve God, to serve one's country, to become famous, to experience adventure, to prove one's masculinity" or to serve other purposes).

77. *Cf.* Rubin, *supra* note 76, at 326 (considering the same issue in the context of public-choice review of judicial motivation).

78. *See, e.g.*, David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 119 (2000) ("That agencies are systematically more loyal to their basic mission seems persuasive, even obvious. People who are sympathetic to that mission *are* more likely to be attracted to work at the agency."); André Blais, Donald E. Blake, & Stéphane Dion, *The Voting Behavior of Bureaucrats*, *in* BUDGET-MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE 205 (1991) (suggesting that agency employees are more likely to support a significant role for government than the average voter); RICHARD A. HARRIS & SIDNEY M. MILKIS, THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES 47 (2d ed. 1996) ("Because the lifeblood of bureaucratic entities is administrative programs, bureaucrats enhance their position by helping to develop new programs and protect their current position by opposing the destruction of existing programs."). This is not to say that the vagaries of politics do not sometimes sweep into power parties or administrations dedicated to the proposition of reining in regulation and drawing in the reach of government. Surely some of President Reagan's political appointees at various agencies, for instance, very much wished to do exactly that. But the average civil service bureaucrat in

people who go into the "business" of regulation will generally think that more regulation is just the right thing to do, so that adding to regulatory directives represents their honest pursuit of the good.[79] Additionally, these regulators will most often focus on the advantages that arise from what they do, rather than on the advantages that arise from what regulated entities do or on the burdens that their regulations create for regulated entities and the negative consequences flowing from those burdens.[80] Similarly, they will simply understand the benefits better than the accompanying burdens.[81] After all, their expertise is in, and their focus is on, creating those benefits by the process of regulation. Regulators are more likely to see the burdens of their regulations merely as byproducts of the beneficial regulations and thus effectively not to see them as "real" burdens at all. Given that regulators attend more to the benefits to be reaped from their additional regulations than to the burdens to be created by compliance with those regulations,[82] it is easy to see why wholly honest, competent regulators, acting in good faith, would naturally tend to increase regulation and regulatory burden rather than repeal or streamline inefficient, ineffective,

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the trenches is an unlikely enemy of the expanding regulatory state. *See also* Peter Staler & Gary Lee, *Land Sale of the Century*, TIME, Aug. 23, 1982, at 18 (describing the cabinet career of James Watt, President Reagan's Interior Secretary).

79. *See, e.g.*, Rubin, *supra* note 76, at 345–48 ("The ordinary people who staff the modern state as administrators share these attitudes. They believe that government should 'do something' about the flood, or discrimination, or consumer abuse, and they believe that they themselves are doing it when they perform their regulatory roles. These culturally embedded attitudes are reinforced by their personal preferences. Like everyone else, they want to act in accordance with their beliefs in order to give their lives meaning."); STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 267–74 (2008) (recounting instances of regulators acting in what they understood to be the public interest); sources cited *supra* note 78.

80. *See, e.g.*, Rubin, *supra* note 76, at 345–48; CROLEY, *supra* note 79, at 267–74.

81. *See, e.g.*, Rubin, *supra* note 76, at 345–48; CROLEY, *supra* note 79, at 267–74.

82. *See, e.g.*, Rubin, *supra* note 76, at 347–48 ("Like everyone else, [regulators] want to act in accordance with their beliefs in order to give their lives meaning. This will lead them to act in a manner congruent with their beliefs about the purpose of government when carrying out their assigned roles. *It will also lead individuals to alter their beliefs to fit their assigned roles.*") (emphasis added); *see also* Catriona Mackenzie & Jacqui Poltera, *Narrative Integration, Fragmented Selves, and Autonomy*, HYPATIA Winter 2010, at 32 (arguing that people "constitute (and reconstitute) our self-identities through an ongoing and dynamic process of narrative self-interpretation that brings coherence and psychological intelligibility to the fragmentary nature of lived experience"); Adam Blatner, *Perspectives of Wisdom-ing*, REVISION, Summer 2005, at 31 (highlighting the human capacity for self-deception in defense of ordering narratives).

or antiquated regulation.[83] All of this explains the need for structural incentives and obligations to force regulators and regulatory agencies to focus on, and minimize, the regulatory-compliance burdens that they create.[84]

This conclusion should seem familiar and uncontroversial because it is, among other things, the justification for imposing emissions-cap regimes. There is no claim, at least outside of the most strident margins of the environmental movement,[85] that energy producers or other regulated entities actively desire to pollute the environment with their emissions. Rather, the central insight of emissions-cap programs is that regulated entities are naturally more focused on the good they purposefully produce than on byproducts that they incidentally generate and for which they bear no direct costs. Likewise, the central insight of the CCC program is that regulatory agencies (and their agents) must be required to attend to the externalized costs created by their production of the positive goods flowing from their regulations.[86]

Contrary accounts of agency and regulator motivation such as agency capture do not negate the CCC as a solution. While some scholars embrace the vision of agencies and regulators as authority-enhancing actors sketched above,[87] another strain of thought recognizes that administrators will face countervailing incentives. These will include incentives to make

83. *See, e.g.*, SUNSTEIN, *supra* note 1, at 94–96, 98 ("There is evidence as well that administrators take insufficient account of the systemic effects of regulatory controls, and the absence of coordination of the regulatory process has produced striking anomalies. Finally, once sensible regulatory strategies become obsolete over time."); Rob Frieden, *The Rise of Quasi-Common Carriers and Conduit Convergence*, 9 ISJLP 471, 472–78 (2014) (illustrating the antiquated nature and needless cost generation and innovation inhibition of regulations and regulatory schemes designed in the infancy of the modern telecommunications age); Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 FED. COMM. L.J. 103, 110–12 (same).

84. Ruhl and Salzman have catalogued some additional structural reasons why regulation grows, rather than modulating or shrinking. These include the general growth in the size of government, jurisdictional overlap, competition between agencies and regulated entities (with the agencies trying to limit the free scope of action, and regulated entities looking for ways to follow regulations while still doing as they wish). *See* Ruhl & Salzman, *supra* note 11, at 783–85.

85. *See, e.g.*, Martha F. Lee, *Violence and the Environment: The Case of "Earth First!"*, *in* MILLENNIALISM AND VIOLENCE 113 (Michael Barkun ed., 1996) (describing Earth First's aggressive beliefs).

86. This point is extrapolated below in Part III. Explicitly included in that discussion are considerations of whether, and to what extent, it matters that the goods produced by regulated entities are generally considered "private" goods, while the goods produced by regulating agencies are generally considered "public goods."

87. *See supra* note 73 and accompanying text.

the least effort consistent with career retention and advancement, which would not (at least from the initial position of no regulation) result in extensive regulation.[88] Similarly, extensive literature suggests that regulators are subject to industry capture and create regulations under the influence of excessive coziness with regulated entities, not with the public interest.[89]

While these countervailing accounts do partly detract from the preceding regulatory proliferation story of agency action, they do not ultimately weaken the argument in favor of CCC. The question is not whether agencies and regulators face any incentives other than those of regulation maximization. Clearly, they do. The question is whether any of those countervailing incentives move administrative actors in the direction of maximizing compliance-cost efficiency. Just as clearly, these incentives do not.

Consider first the ancient trope[90] of the lazy government functionary, determined to do as little work as possible, and thus uninterested in multiplying the breadth and depth of regulation. Were this trope a faithful representation of reality in the first instance, it would predict the rise of inert regulatory agencies that did not regulate much of anything. It is worth considering that this prediction strays rather far from reality. Even if the prediction were accurate, however, it would not predict that in a world of heavy regulation regulators would make any effort to streamline regulation or try to make it compliance-cost efficient. Rather, it would suggest regulators face strong incentives to make no efficiency-increasing

88. *See, e.g.*, DENNIS C. MUELLER, PUBLIC CHOICE III 373–84 (2003) (concluding that "state-owned companies were found to be significantly less efficient than privately owned firms supplying the same good or service"); Rubin, *supra* note 76, at 333 ("While instrumental rationality is a general orientation toward life, it exists within individual experience. That experience also includes emotion, fatigue, inattentiveness, laziness, and other nonrational features that can impair or redirect instrumental decisionmaking."). *See generally* FROM BUREAUCRACY TO BUSINESS ENTERPRISE: LEGAL AND POLICY ISSUES IN THE TRANSFORMATION OF GOVERNMENT SERVICES (Michael J. Whincop ed., 2003).

89. *See, e.g.*, *infra* notes 92–93 and accompanying text (considering capture and its establishment of barriers to entry); George J. Stigler, *The Theory of Economic Regulation*, BELL J. ECON. & MGMT. SCI., Spring, 1971, at 5 (as this dean of the regulatory-capture theory explained, "we propose the general hypothesis: every industry or occupation that has enough political power to utilize the state will seek to control entry. In addition, the regulatory policy will often be so fashioned as to retard the rate of growth of new firms.").

90. *See, e.g.*, Marc Abrahams, *Lazy Bureaucrats, Burden or Blessing?*, THE GUARDIAN, (Feb. 8, 2010), http://www.theguardian.com/education/2010/feb/09/improbable-research-lazy-bureaucrats. A related critique suggests that regulators are interested in regulating their conduct to minimize the amount of congressional oversight to which they are subject, so as to enjoy their fiefdoms relatively undisturbed. *See generally* WILSON, *supra* note 73.

efforts.[91]

Similarly, to the extent that agency capture occurs, it surely alters the content of regulation; otherwise the concept would not have much meaning.[92] Its likeliest effect, though, is not generation of no or most cost conscious regulation, but rather of regulation favoring established regulated entities.[93] The capturing industry, recognizing that the costs imposed by some regulations fall comparatively more heavily on smaller competitors or on would-be market entrants, embrace regulation.[94] The captured agency then implements these extant market leader favoring regulations, which fulfills its purpose of actually promulgating regulation, while at the same time enacting its "capture."[95] Needless to say, this is nothing like not regulating.

In short, while there are natural incentives tempering the constant expansion of regulation, these incentives will not lead regulators to attend to compliance-cost externalities. Moreover, to the extent that government considers these countervailing incentives problematic, it has imposed mandatory structures to mitigate the incentives.[96] Work rules and

91. *See, e.g.*, SUNSTEIN, *supra* note 1, at 99 ("Administrative officials are often resistant to change as well, tending to resolve conflicts among competing groups not necessarily in favor of those with the best arguments, but instead those whose demands require the least drastic departures from established responses.").

92. *See, e.g.*, Donald C. Langevoort, *The SEC as a Lawmaker: Choices About Investor Protection in the Face of Uncertainty*, 84 WASH. U. L. REV. 1591, 1599–1601 (2006) (noting that, "as is well known in the public choice literature, regulation is often a way of allocating rents among competitors: a key industry (or segment) might demand regulation because even if it costs them a good bit, it costs competitors or potential competitors more." The article then considers competing accounts of how capture may play itself out to regulated entities advantage on Wall Street.); Susan P. Crawford, *The Ambulance, the Squad Car, & the Internet*, 21 BERKELEY TECH. L.J. 873, 875 (2006) (describing regulatory capture in the telecommunications industry).

93. *See, e.g.*, CROLEY, *supra* note 79, at 15–22 (summarizing capture theory and noting opportunities for creating barriers to entry); Robert C. Ellickson, *Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?*, 74 S. CAL. L. REV. 101, 114 (2000) (noting that agency capture can lead to agencies and industry effectively colluding to raise barriers to entry by new competitors); Ruhl & Salzman, *supra* note 11, at 785–87.

94. *See, e.g.*, Stigler, *supra* note 89, at 5.

95. *See id.*

96. *See* 5 U.S.C. § 7513(a) (2012) ("[A]n agency may take an action . . . against an employee only for such case as will promote the efficiency of the service."); 5 CFR § 2635.705 (2013) ("[A]n employee shall use official time in an honest effort to perform official duties . . . [and] has an obligation to expend an honest effort and a reasonable proportion of his time in the performance of official duties.") *See generally* 5 U.S.C. §§ 7101–9001 (statutes covering Labor-Management & Employee Relations). It could be argued that

supervision require and encourage productive effort by employees—requirements and encouragement that, unlike CBA or other cost-restraint efforts, often bare teeth. Meanwhile, vast amounts of legislation and regulation exist to regulate the revolving door and to combat (however effectively) the specter of agency capture by regulated entities.[97]

Because no natural incentives exist to push regulators toward minimizing compliance-cost externalities, structural obligations favoring that result must be created. In fact, attempts at such structures have already been made. Most notably, administrations since the early 1980s have established various programs designed to improve the quality of regulation, slow the growth of compliance costs, or both.[98] These programs, though, have failed to stem the tide[99]—for entirely explicable reasons. Consider the obligation that agencies undertake CBA of major regulation.[100] The requirement is, as a practical matter, toothless.[101] Many agencies simply promulgate rules without undertaking appropriate CBA at all.[102] Others

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these regulations are overly cumbersome and result in too little incentive to create efficient performance, but this would be an argument for strengthening management authority to require efficiency, not an argument against establishing a meaningful method of restraining regulatory-compliance costs.

97. *See* U.S. OFFICE OF GOV'T ETHICS, STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH 39–46 (June 2009). *See generally supra* note 74.

98. *See, e.g.*, Coglianese, *supra* note 9, at 1120 (arguing that the CBA requirement was designed "to increase the cost-effectiveness and efficiency of federal regulation by compelling agencies to assess benefits and costs and to search for the lowest cost strategies"); Bronsteen et al., *supra* note 9, at 1612 (same); Exec. Order No. 13,563, 3 CFR 215 (2011) ("[E]ach agency must . . . propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify) . . . [and] select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity) . . . ."); Ruhl & Salzman, *supra* note 11 (reviewing other related initiatives).

99. *See, e.g.*, Ruhl & Salzman, *supra* note 11, at 765, 776–82 (noting that "direct initiatives to cull regulations have been abject failures" and recounting the failed initiatives); *infra* Part I.C. (discussing metrics indicating increased regulation and increased cost of regulation).

100. *See, e.g.*, Bronsteen et al., *supra* note 9, at 1605–06 nn.4–8 (listing executive orders that have mandated CBA since 1981); Coglianese, *supra* note 9, at 1120 (analysis required for "any proposed regulation that would impose annual costs of more than $100 million on the economy"); Unfunded Mandates Reform Act, 2 U.S.C. §§ 1501–71 (2012) (codifying the CBA requirement).

101. *See, e.g.*, Hahn & Sunstein, *supra* note 1, at 1490 ("Notwithstanding this public commitment [to CBA], national regulation has hardly come into compliance with" its principles).

102. *See, e.g.*, Robert W. Hahn et al., *Assessing Regulatory Impact Analyses: The Failure of*

avoid CBA by providing guidance outside of the normal rulemaking channels.[103] Even when an agency *does* perform CBA, it sets the parameters of its analysis,[104] which is not subject to judicial or other review[105] and is thus free to ignore whatever results it might generate.[106] In consideration of the natural inclinations of regulators detailed above, it is not surprising that agencies produce few regulation-constraining results.[107] Imagine that instead of the emissions-cap requirements considered below, regulated agencies instead were tasked with writing reports in which they were required to consider whether their good-production was worth the externalities it produced, and to proceed accordingly. Of course those regulated entities would have a natural tendency to overvalue the goods they produce, undervalue the externalities, and find ways to get where they want to go[108]—all of this in the best of good faith.[109] This is exactly why

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Agencies to Comply with Executive Order 12,866, 23 HARV. J.L. & PUB. POL'Y, 859, 861–62 (2000) (noting that "agencies only quantified net benefits . . . for 29 percent of the forty-eight rules" studied, even though effective CBA centrally requires such quantification).

103. *See, e.g.*, Ruhl & Salzman, *supra* note 11, at 781 ("With increasing ossification of notice-and-comment rulemaking, scholars have clearly documented the increasing reliance of agencies on non-legislative rules, such as guidance documents and interpretive rules.") (citing, *inter alia*, Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020–23 (D.C. Cir. 2000)) ("Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.").

104. The Office of Management and Budget (OMB) has repeatedly set out guidelines for agencies to follow, but, as seen above, these are rarely followed with any rigor. *See, e.g.*, Memorandum from Jacob J. Lew, Director of the Office of Mgmt. & Budget for the Heads of Departments and Agencies, (Mar. 22 2000), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m00-08.pdf [hereinafter 2000 OMB GUIDELINES]; Circular from the Office of Mgmt. & Budget to The Heads of Exec. Agencies and Establishments (Sept. 17, 2003), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf [hereinafter 2003 OMB GUIDELINES]; Hahn et al., *supra* note 102, at 871 (noting that the majority of rulemakings in the study are made without undertaking calculations basic to CBA).

105. *See* Exec. Order No. 13,563 § 7(d), 3 CFR §§ 215, 218 (2011); Hahn & Sunstein, *supra* note 1, at 1537; Coglianese, *supra* note 9, at 1124–25.

106. *See, e.g.*, Coglianese, *supra* note 9, at 1122 (citing ROBERT W. HAHN, REVIVING REGULATORY REFORM 57 (2001)); Hahn & Sunstein, *supra* note 1, at 1537.

107. *See, e.g.*, Coglianese, *supra* note 9, at 1123 (reviewing research suggesting that CBA and related review might "eliminat[e] or prevent[] regulations that were extremely inefficient outliers," but not much more); Hahn & Sunstein, *supra* note 1, at 1490–93, 1497, 1537–38 (recognizing problem, calling for judicial review of CBA determinations).

108. Hahn et al., *supra* note 102, at 866–70; Coglianese, *supra* note 9, at 1124.

109. *Accord* Coglianese, *supra* note 9, at 1124. Despite the in-built pro-regulation inclinations of agencies considered above, many scholars worry that CBA (at least in theory, and if it were actually performed) would prove too anti-regulatory. *See, e.g.*, RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT

Congress selects emissions caps (or other methods with objective standards, mandates, and consequences) rather than self-study reviews. And it is exactly why equivalent, mandatory caps must be applied to agencies.[110] Finally, as will be demonstrated in the next section, neither the natural incentives working against the multiplication of regulations and compliance costs, nor the structural efforts to encourage compliance-cost control and efficiency-maximization have proven effective.

C. Failure to Stem the Tide of Regulatory-Compliance Costs or to Systematically Review and Revise Underperforming Regulations

Regulators, then, are no more angels than we other mortals,[111] and are not naturally inclined to curb or reverse regulation. This point might be debatable as theory, but it is practically incontestable that regulators simply do not curb, reverse, or rationalize regulation very often, while they continue to produce more at a significant volume.

ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008). Some of these critics argue for the abandonment of CBA altogether. *See* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 210 (2004). Others argue that CBA is necessary, and should be saved, but that its fundamental assumptions should be realigned to render it more friendly to regulation. *See* REVESZ & LIVERMORE, *supra*; *see also* James K. Hammitt, *Are the Costs of Proposed Environmental Regulations Overestimated? Evidence from the CFC Phaseout*, 16 ENVTL. & RES. ECON. 281 (2000) (arguing from the example of chloroflurocarbon limitations that costs in CBA are overestimated).

110. Even the most thorough critics of CBA agree that the regulatory state cannot function without some sort of method of determining whether a given piece of regulation (or a regulatory structure generally) is worth doing, which of course requires some sort of objective mechanism. *See* ACKERMAN & HEINZERLING, *supra* note 109, at 211–16 (recognizing that "analysis of costs and benefits, in lowercase letters, is an essential part of any systematic thought about public policy, and has always been involved in government decision making," and describing their "holistic" approach); Bronsteen et al., *supra* note 9, at 1606–07 (identifying Ackerman and Heinzerling as among "the broadest critics of" CBA and recognizing need to measure costs of regulation). One author argued that

> [cost–benefit] analysis is necessary to allow the agency to understand, to the greatest extent possible, the consequences of its action and to make the basis for its decision known to the public. To act without such knowledge would bring into question the legitimacy of executive actions and be the definition of an "arbitrary or capricious" rulemaking.

Daniel Cohen, *S. 981, The Regulatory Improvement Act of 1998: The Most Recent Attempt to Develop a Solution in Search of a Problem*, 50 ADMIN. L. REV. 699, 716–17 (1998); *see* REVESZ & LIVERMORE, *supra* note 109, at 12–13 (same).

111. "If men were angels, no government would be necessary." THE FEDERALIST NO. 51 (James Madison).

Interestingly, the federal government does not keep a discrete and complete list of the regulations it imposes, much less integrate them into some coherent, user-friendly whole. Further, it does not keep a compilation of comprehensive estimates of the costs of complying with its multitudinous orders.[112] It is therefore somewhat difficult to identify a single, uncontroversial metric by which to quantify the growth of the regulatory burden.[113] Nevertheless, there are many that point toward some uncontroversial (though deeply troubling) conclusions: the federal regulatory burden is very large and growing steadily. One commonly used measure of the scope of regulation has been the page count of the CFR,[114] which reached 174,545 pages in 2012—nearly three times its length in 1970.[115]

Of course, the page count of the CFR can only serve as a broad (though still valuable) proxy for the scope, intrusiveness, and cost of even federal regulation.[116] By another measure, the government estimates that, "On average, Federal agencies and departments issue nearly 8,000 regulations

112. Imagine the tort suits that would flow against any manufacturer that organized its user's manual in the manner of the CFR, even if no civil or criminal liability could arise as the result of misuse of the manufacturer's product. The CFR does record most of the federal government's regulations, but it is not organized by what regulations might apply to any given activity of daily or economic life. *See, e.g.*, Ruhl & Salzman, *supra* note 11, at 770–71 ("The number of discrete compliance requirements in [the] highly regulated industry has not been quantified. If, as with solidified lava flows, one could freeze the accumulation of rules that the administrative state produced at any instant in the past twenty years, the absolute number of discrete compliance requirements would probably be quite large by any standard. However, we know of no attempt actually to count them."); JAMES L. GATTUSO & DIANE KATZ, HERITAGE FOUND., PAPER NO. 2663, RED TAPE RISING: OBAMA-ERA REGULATION AT THE THREE-YEAR MARK 2, (2012), *available at* https://thf_media.s3.amazonaws.com/2012/pdf/bg2663.pdf.

113. Ruhl & Salzman, *supra* note 11, at 769–75 (describing various possible metrics for measuring the growth of the regulatory burden).

114. *See* Birdsong, *supra* note 66, at 380 n.20 (noting page count); Ruhl & Salzman, *supra* note 11, at 774 (same); Coglianese, *supra* note 9, at 1127–28 (same).

115. *See* CFR Page Count, *supra* note 66; Birdsong, *supra* note 66, at 380 n.20; Ruhl & Salzman, *supra* note 11, at 774.

116. *See* JAMES L. GATTUSO, HERITAGE FOUND., BACKGROUNDER NO. 1801, REINING IN THE REGULATORS: HOW DOES PRESIDENT BUSH MEASURE UP? 8–11 (2004), *available at* www.heritage.org/research/regulation/bg1801.cfm (noting that measures like CFR pages and total regulations promulgated are fairly crude measures of regulatory activity; one flaw is that they do not distinguish between small and "major" rulemakings, and do not distinguish between regulatory and deregulatory rulemakings). The growth of the CFR can also only be an approximate proxy because a profoundly deregulatory measure would still be, at least in part, enacted through the promulgation of regulation, which would add to the number of pages in the CFR.

per year,"[117] a rate that nearly doubled from 1976 to 1996.[118]

The really relevant metric is how much it costs regulated entities of all types to comply with federal regulation. Not surprisingly, that number is contested—and, at its further reaches, necessarily imprecise.[119] Economist Mark Crain argues that the costs of compliance reached $1.75 trillion in 2008 (in 2009 dollars),[120] up from $843 billion in 2000 (in 1999 dollars),[121] and has steadily risen since.[122] Others claim that this figure is far too high.[123] The government's own figures can be understood to suggest that a partial estimation of compliance costs reveals that those costs rose from $584 billion in 1999–2000, to somewhere in a range of approximately $625–$650 billion in 2008–2009.[124] This measure, though, by its own

117. REGULATIONS.GOV SITE DATA, http://www.regulations.gov/#!siteData (last visited May 8, 2014).

118. *See* Coglianese, *supra* note 9, at 1127.

119. The full, indirect costs of regulation can never be calculated because "for many economic regulations, the major cost may not be any direct burden placed on consumers or businesses, but constraints on innovation. Assessing such losses is impossible because inventions that never existed cannot be measured." GATTUSO, *supra* note 116, at 3. *See also* GATTUSO & KATZ, *supra* note 112, at 4–5 (describing how agencies understate costs).

120. NICOLE V. CRAIN & W. MARK CRAIN, U.S. SMALL BUS. ADMIN., THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS 6 (2010), *available at* http://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full)_0.pdf [hereinafter CRAIN 2010].

121. W. MARK CRAIN & THOMAS D. HOPKINS, U.S. SMALL BUS. ADMIN., THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS: A REPORT FOR THE OFFICE OF ADVOCACY (2000), *available at* www.sbaonline.sba.gov/advo/research/rs207tot.pdf [hereinafter CRAIN 2000]. An interim 2005 report put the figure at $1.26 trillion in 2009 dollars. Note that some of the increase between 2005 and 2009 arises because Professor Crain updated his methodology. *See* CRAIN 2010, *supra* note 120, at 6–7. If the new methodology had been used in 2005, regulatory-compliance costs would have totaled $1.7 trillion in 2005, for an increase of $43 billion (or three percent of national income) over the period. *See id.* at 7.

122. Put another way, regulatory-compliance costs by these estimates consumed fourteen percent of the national income in 2008, up from eleven percent in 2004 and eight percent in 2000. *See* CRAIN 2010, *supra* note 120, at 6–7; CRAIN 2000, *supra* note 121, at 7. *See generally* GATTUSO & KATZ, *supra* note 112.

123. *See, e.g.*, Sidney Shapiro, *Do Regulations Cost $1.75 Trillion? Not Exactly*, HUFFINGTON POST, (Feb. 9, 2011), http://www.huffingtonpost.com/sidney-shapiro/do-regulations-cost-175-t_b_820311.html.

124. The $625–$650 billion figure is computed together in the following manner. The OMB estimated for Congress in 2000 that in the previous year ending March 31, 2000, "the total cost of regulation is nearly equal to the $584 billion Congress appropriated for all discretionary programs in FY 2000." OFFICE OF INFO. AND REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, MAKING SENSE OF REGULATION: 2001 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 3 (2001). In subsequent years, the OMB appears to have stopped making summative estimates, and instead has estimated how much cost has been

terms does not attempt to capture anything like the full compliance costs of all extant federal regulation,[125] and represents a cobbling together of disparate figures,[126] because the federal government makes no effort to calculate the total costs of federal regulatory compliance. It is clear that, however measured, the costs imposed by regulations are large and steadily growing.[127] Moreover, despite a few relative periods of deregulatory activity in a few regulatory agencies in past years, such agencies seldom review, revise, and retire inefficient or outdated regulations in the manner

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generated by the regulations passed during the previous ten years. In 2010 OMB estimated that "the estimated annual costs [of major Federal regulations reviewed by OMB from October 1, 1999 to September 30, 2009] are in the aggregate between $43 billion and $55 billion." OMB 2010, *supra* note 1, at 3. Putting these figures together results in a figure broadly in the $625–$650 billion range, though note in the following footnote the incomplete nature of that estimate.

125. As noted, these figures do not count important compliance-cost centers. OMB counts only what is reported to it from various executive agencies but such reports are materially incomplete. *Compare, e.g.*, OMB 2010, *supra* note 1, at 3, *with* GATTUSO, *supra* note 116. The OMB does not count any costs arising from independent agencies, or costs from agencies that do not report costs. *See, e.g.*, OMB 2010, *supra* note 1, at 3–4. And it does not include the costs of regulations deemed to be "non-major," i.e., to be estimated by their enacting agencies to generate less than $100 million in costs. *Id.*

126. *See supra* note 124.

127. Environmental regulation compliance costs, for instance, rose (in real terms) from $33 billion in 1972 to $141 billion in 1992. Adam B. Jaffe et al., *Environmental Regulation and the Competitiveness of U.S. Manufacturing: What Does the Evidence Tell Us?*, 33 J. ECON. LITERATURE 132, 140 (1995). It rose by $20 billion more in the following decade. *See* OFFICE OF INFO. AND REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL & TRIBAL ENTITIES (2007).

Taxes arising from healthcare regulation will also increase. *See* CURTIS S. DUBAY, HERITAGE FOUND., BACKGROUNDER NO. 2402, OBAMACARE: IMPACT ON TAXPAYERS (2010), *available at* http://s3.amazonaws.com/thf_media/2010/pdf/bg_2402.pdf (estimating the total tax increase under the Affordable Care Act at $503 billion); Scott E. Harrington, *The Continuing Debate on Health Insurance Reform*, NETWORKS FIN. INST. (Oct. 20, 2011), http://dx.doi.org/10.2139/ssrn.1947021 (noting that the Centers for Medicare and Medicaid Services estimate a $311 billion increase in health care costs during 2010–2019 but recognizing that that number might not be high enough because "in general, expenditures that increase health care costs and premiums can be counted; many expenditures that help control costs and premiums cannot, [which raises the] concern that the regulations will put upward pressure on costs and premiums").

Finally, new Wall Street regulation will also increase regulatory costs. *See* DOUGLAS W. ELMENDORF, CONGRESSIONAL BUDGET OFFICE, REV. OF CBO'S COST EST. OF DODD-FRANK WALL ST. REFORM CONSUMER PROT. ACT 7 (2011) (estimating the budget deficit increase caused by the Dodd Frank Act over a ten-year period at $6.3 billion).

advocated in this Article.[128]

Now, again, if regulators *were* particularly detail-obsessed angels, they would unerringly craft perfect, least-cost, best-effect regulations the first time, every time, and ensure—with no outside obligations required—that they had not duplicated or contravened any other regulatory schemes. But government recruiting amongst the Choir Invisible has been no better in recent years than that of the private sector. Hence, the CCC program.

II. EMISSIONS CAPS SUMMARIZED

Carbon-cap regimes are designed to create a carbon budget for the economy and for society.[129] The impetus for such regimes arose from the recognition that carbon dioxide is a greenhouse gas that is released in great quantities by the modern economy and that society would benefit by reducing carbon emissions.[130]

In broad terms, carbon-cap regimes work thus. Regulators determine how much carbon may be emitted into the atmosphere by regulated entities.[131] Regulated entities then determine how much carbon they will

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128. Gattuso highlights a relatively aggressive period of regulatory revision, but notes that even during that period, only about a quarter of significant regulatory actions were deregulatory in nature, and most of these were led by the Federal Communications Commission and the Securities and Exchange Commission—independent agencies. GATTUSO, *supra* note 116, at 9. In more recent years, virtually no cumulative inefficiency reduction has occurred. *See, e.g.*, GATTUSO & KATZ, *supra* note 112, at 2, 6. Similarly, Wilson pointed to the self-deregulation by the Civil Aeronautics Board, as an inexplicable exception that proves the otherwise solid rule. *See* WILSON, *supra* note 73, at 87–88 (citing MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 74–85 (1985)).

129. *See, e.g.*, Robert N. Stavins, *A Meaningful U.S. Cap-and-Trade System to Address Climate Change*, 32 HARV. ENVTL. L. REV. 293, 300–03, 305, 309–13 (2008) (touting an economy-wide cap-and-trade program and reviewing more narrowly targeted programs). Other emissions-cap programs work along broadly similar lines. *See, e.g.*, U.S. ENVTL. PROT. AGENCY, CAP AND TRADE PROGRAMS, http://www.epa.gov/capandtrade/programs.html#s5 (last visited May 8, 2014), (listing various federal and state emissions-cap programs, including programs capping sulfur dioxide (SO_2) and nitrogen oxides (NO_x) as well as carbon dioxide (CO_2)).

130. *See, e.g.*, Rychlak & Case, *supra* note 2, at 151–53 (summarizing the position that greenhouse gas emissions by industry and human society have led and will lead to further climate change); FRIEDRICH SOLTAU, FAIRNESS IN INTERNATIONAL CLIMATE CHANGE LAW & POLICY 21–49 (same, summarizing the position of the U.N.'s Intergovernmental Panel on Climate Change); Stavins, *supra* note 129, at 293–99 (same, and to note that carbon-cap programs represent a response to these considerations).

131. *See, e.g.*, Bruce R. Huber, *How Did RGGI Do it? Political Economy & Emissions Auctions*, 40 ECOLOGY L.Q. 59, 62 nn.12, 14 (2012), *available at* http://ssrn.com/abstract=2018329 (describing the mechanism proposed for Regional Greenhouse Gas Initiative (RGGI)); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1144 (2009)

emit and either buy or are granted carbon permits from the government that will allow them to emit carbon dioxide at a certain capped level.[132] This cap is then lowered over time, either by the retirement of some permits, by shrinking the amount of carbon emission that is authorized by each permit, or by other means.[133] In the cap-and-trade model, an additional means of reducing the total carbon budget is to reduce the amount of carbon authorized by each carbon permit each time a trade of such permits occurs, or by retiring some fraction of the total carbon permits exchanged in any given trade.[134] Given the nature of regulation and regulatory bodies, any potential trading component in CCC might prove far more awkward than valuable. Thus the CCC program does not rely on, and considers only peripherally, a trading component. It does, however, include a component that incorporates some of the efficiencies achieved by trading, by permitting agencies to work together to eliminate duplicative regulatory-compliance obligations and to split the compliance-cost savings engendered by their mutual efforts, and by allowing agencies to bank excess regulatory-cost reductions.[135]

Each year, then, the total amount of emissions released by regulated entities—the total amount of externalized cost generated in order to achieve the benefits created by the regulated entities—decreases, until some baseline is reached.[136] Each year, the challenge for the regulated entities will be to figure out how to continue to create the same amount of benefit (saleable product, be it petrocarbons, produced energy, products or services sold to consumers) while generating less of the accompanying dead-weight cost of emitted carbon (or, in a cap-and trade system, trade for or purchase more permits).[137] If regulated entities cannot find these efficiencies, then

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(describing mechanism employed in the Acid Rain Program).

132. Most emissions-cap programs give the permits to already extant producers as a means of buying those producers' support for the emissions-cap program. *See, e.g.*, Huber, *supra* note 131, at 4–5, 9–22. In fact, this gift of initial permits can make existing producers firm supporters of the cap programs, because the programs become an effective barrier to the entry of new competitors into the regulated entity's market. *See id.*

133. *See, e.g.*, Huber *supra* note 131, at 5 nn.12, 14; Carlson, *supra* note 131, at 1144. Many carbon-cap regimes include a permit trading component, and have thus been labeled "cap-and-trade" regimes. *See, e.g.*, Stavins, *supra* note 129, at 298–99.

134. *See, e.g.*, Stavins, *supra* note 129, at 307 (discussing different cap-tightening methods).

135. *See infra* Part IV.

136. *See, e.g.*, Huber, *supra* note 131, at 5 nn.12, 14; Carlson, *supra* note 131, at 1144. The baseline established in the Kyoto Treaty, for instance, was 1990 levels of carbon emissions. *See infra* note 161.

137. *See, e.g.*, Carlson, *supra* note 131, at 1144; Huber, *supra* note 131, at 12.

they must reduce the total amount of benefits that they produce.[138] The effect of the carbon-cap regime, then, is essentially to determine that the dead-weight costs of creating those lost benefits is just too high.

III. REGULATED ENTITIES AND REGULATORY AGENCIES COMPARED

Regulatory agencies are in a position markedly similar to that of industries regulated under emissions caps. Industries regulated under emissions caps create an undesirable cost in order to achieve a benefit. Regulatory agencies likewise create undesirable costs, such as an increase in the cost of doing business,[139] in order to achieve a benefit.

In the absence of an emissions-cap scheme,[140] regulated industries are able to externalize their costs. It is not the individual polluters alone who suffer the detriments arising from their emissions, but society generally.[141] True, the owners and employees of regulated industries will suffer along with all other citizens if emissions cause severe economic and social loss. But some of the gains that arise from creating energy are direct, and flow primarily to regulated entities, while the suffering will be diffuse—spread out across all members of society.[142] The case is the same with regulatory agencies. In the absence of the CCC program proposed here (or some other equally effective construct), regulatory agencies are able to externalize their costs: it is not the regulators who will entirely or even primarily suffer the detriments arising from the regulatory burdens that they create, but regulated entities and society generally.[143] Regulators may suffer proportionally if their regulations cause significant economic sclerosis, but they get some direct gains from having regulated, while the suffering the regulations create will be diffuse, spread out across all members of the society.[144]

One objection to equating the externalities of regulated entities to the externalities of the regulations themselves is that it fails because the benefits

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138. *See, e.g.*, Carlson, *supra* note 131, at 1144.

139. *See supra* Part I.A., I.C. (cataloguing costs of regulatory compliance and effects of those costs).

140. *See, e.g.*, Stavins, *supra* note 129, at 348–53 (carbon tax discussed, compared with cap-and-trade regime).

141. *See, e.g.*, *id.* at 298 (tradable emissions allowances "create a price signal for emissions . . . [which] provides firms with an incentive to reduce emissions that influences their production and investment decisions"); THOMAS H. TIETENBERG, EMISSIONS TRADING: PRINCIPLES AND PRACTICE 1 (2d ed. 2006).

142. *See* Stavins, *supra* note 129, at 298.

143. *See, e.g.*, Zywicki, *supra* note 52, at 849–50, 893.

144. *See, e.g.*, *id.*; *supra* Part I.B.

and detriments produced by regulated entities are "private"[145] while the benefits and detriments produced by regulatory agencies are "public" (or, if you prefer, "social").[146] Hence, the motivations of the agents of regulated entities are fundamentally different than those of the agents of regulatory agencies, such that negative-externality caps that will usefully constrain regulated entities will not work effectively when applied to regulatory agencies.[147] As the following paragraphs illustrate, however, the differences between the regulators and the regulated, and between the benefits and burdens they produce, are just not as broad or as material as is generally maintained. As a result, while the analogy between regulated entities and regulatory agencies is not exact, it is real, and is sufficient to allow negative-externality-containment caps devised for regulated entities to be applied comfortably, albeit with some modifications, to regulatory agencies.

The primary critique, however, undervalues the social effects of private actions and the private ramifications of public acts; the difference is more illusory than real, especially in the present context.[148] Most goods are

145. *See, e.g.*, Gerald D. Keim, *Corporate Social Responsibility: An Assessment of the Enlightened Self-Interest Model*, 3 ACAD. MGMT. REV. 32, 33 (1978) (stating that a pure private good is characterized by excludability and congestion, such that one's consumption of the good wholly excludes others from the benefits of consumption of that good. "A hamburger at McDonald's approximates a pure private good. One can be excluded from consuming a particular hamburger unless the acquisition price is paid, and if one consumes a specific hamburger, no one else may consume it (in its entirety); thus, there is no joint consumption."); David D. Haddock, *When Are Environmental Amenities Policy-Relevant?*, 44 NAT. RES. J. 383, 400–402 (2004) (similar definition). *But see, e.g.*, Walter Block, *Public Goods and Externalities: The Case of Roads*, J. LIBERTARIAN STUDIES 1, 1–2 (1983) (arguing that in reality there are no purely private goods).

146. *See* Keim, *supra* note 145, at 33 ("Unlike a private good, a public good, can be consumed or enjoyed by a number of individuals without regard to cost sharing . . . [excludability, and] [o]ne individual's consumption of a public good has no effect on others' abilities to consume the good. This is referred to as . . . joint-consumption or non-congestion."); *see also* MUELLER, *supra* note 88, at 11 (similar definition); Haddock, *supra* note 145, at 400–02 (same).

147. *See, e.g.*, Haddock, *supra* note 145 (difference between public and private goods).

148. The recognition that there are few purely public or purely private goods is not new. Paul Samuelson, one of the key protagonists of the public-goods literature, himself recognized that "the careful empiricist will recognize that many—though not all—of the realistic cases of government activity can be fruitfully analyzed as some kind of a blend of these two extreme polar cases," (i.e., of pure public goods and pure private goods). Paul A. Samuelson, *Diagrammatic Exposition of a Theory of Public Expenditure*, REV. OF ECON. & STAT. 350, 350 (1955). He nevertheless thought the distinctions broadly useful enough to justify significant public action. Later critics of Samuelson's work found his distinctions more materially flawed. *See, e.g.*, S.E. Holtermann, *Externalities and Public Goods*, 39 ECONOMICA 78, 81 (1972) ("Samuelson's formulation of a public good has been criticized . . . on the ground that defence [sic] is about the only commodity which strictly fits his definition.");

neither pure public nor pure private goods, most acts neither fully self-absorbed or outward bound, but are instead mixed goods that present characteristics of both a public and a private nature.[149]

Energy generation, for instance, is generally thought of as provision of a private good—and in part it is. Energy companies charge consumers for the energy they produce, and use the fees to fund their operations and pay their staffs and their investors. The unique volts that are used by one consumer cannot also be used by another consumer. To this extent, energy is a private good. To a much larger extent, though, energy exhibits characteristics of a public good. The benefits flowing from energy provision and consumption are manifold and vast. If no energy providers existed, modern civilization could not proceed. But for energy suppliers, almost the whole of modern economic activity would collapse. Yet those energy suppliers do not receive as payment essentially the whole of global GDP. This difference—between the value that energy provision adds to the modern economy and what the energy companies actually recoup for providing energy—represents the positive-externality, public-good portion of energy provision. Energy provision, then, bears characteristics both of private- and public-good provision, with the latter arguably swamping the former.

Inversely, regulation is generally considered to produce public goods (sub-benefits if you prefer)—and it does, in part. If a regulation successfully reduces pollution, then all citizens who breathe the clean air will receive the health benefits, and it would prove difficult to exclude those who were uninterested in paying for the cleaner air on the private market. On the other hand, other benefits of causing cleaner air *by the route of regulation* are not equally shared by all parties; some of those benefits flow uniquely back to the agency and to the regulators who promulgated the specific regulation. The very act of creating, reviewing, and then implementing the regulations creates work for the employees of the agency and increases their authority, prestige, self-worth and "value" in society.[150] Once the regulations are implemented, the regulated entities will have to make

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Denise Réaume, *Individuals, Groups, and Rights to Public Goods*, 38 U. TORONTO L.J. 1, 6 (1988) ("Not all public goods require either the imposition of duties on large numbers of people or peculiarly onerous duties . . . . Conversely, there are instances of private goods that require either onerous undertakings of others or the participation of many."); Keim, *supra* note 145, at 33 (same); Matthew J. Kotchen, *Green Markets and Private Provision of Public Goods*, 114 J. POL. ECON. 816, 817 (2006) ("green electricity" as an example of a mixed good).

149. *See* Keim, *supra* note 145, at 33.

150. *See supra* Part I.B.

various demonstrations of compliance, or submit to various types of inspection, all of which will create additional and continuing work for the employees of the regulatory agencies.[151] The regulations may permit opportunities for regulated entities to seek waivers or other special exceptions, which will create more work, authority, and prestige for the regulators.[152] Finally, regulators are by nature likely to think that goods achieved by regulation—especially goods achieved by *their* regulation—are particularly worthy. All of these are private characteristics of regulation, in that these benefits of regulation are not shared equally among all members of society, but flow particularly back to the agency and regulators who promulgated the regulation and reward them specifically for the production of the regulation-generated benefits.

Given that the goods, benefits, and burdens produced by regulators and regulated entities are far more similar than usually thought, it should not surprise that the agents of the regulators and the regulated entities are too in similar positions. Of course, the similarity is not complete; the mechanism by which the regulated entities benefit from their efforts is somewhat more direct than that for regulatory agencies because successful regulated entities capture the private-good portion of their production in the form of profits. The mechanism for regulatory agencies—which must, for instance, independently negotiate bigger budgets even if they prove highly productive—is more indirect. This is a meaningful difference that must be accommodated in the CCC plan: it would be incoherent to require agencies to pay for the privilege of "emitting" the externality of regulatory-compliance costs, since those payments would ultimately and entirely be borne by taxpayers, but would also be paid back *to* taxpayers.

Yet the position of the agents of the regulated entities and the regulators are even less dissimilar. Because the profits of a regulated entity run generally to the shareholders, rather than to the employees, regulated entities face agency problems[153] right along with regulatory agencies. Employees of both types of entities will be motivated by the desire to do

151. *See id.*

152. *See id.*

153. An agency problem arises whenever one person, the *principal*, engages another person, the *agent*, to undertake imperfectly observable discretionary actions that affect the wealth of the principal. The concern is that in exercising this unobservable discretionary authority, the agent will favor the agent's interests when the agent's interests diverge from those of the principal. Agency problems are common because no one has the time and skills necessary to do everything for himself.

Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1040–42 (2011) (internal citations omitted); *see* MUELLER, *supra* note 88, at 362 (positing that agents of government seek security and power rather than pure profit).

their jobs effectively and efficiently, to please their employers, and so to be rewarded for it. They will wish to be proud of themselves for having done a good job, given their talents, their objectives, and their constraints. Some of them will wish to do as little as is consistent with either securing the next promotion, or just not getting fired. Some of them will be tempted to "go native," whether that means regulators becoming captured by industry or industry employees adopting regulatory goals for the industry at the cost of undermining their fidelity to their principals, the shareholders. The principals in both are faced with the agency dilemma, and obliged in various ways to establish structural constraints that align the interests of their agents as closely as possible with their own. That the structures necessary in the somewhat different contexts of agency and regulated entity are thus somewhat different can hardly be surprising. But they are essentially the same problems because of the fundamental similarity between the goods produced by both types of entities and the agents with which they have to work.

The regulators and the regulated produce similar negative externalities, respond similarly to those externalities, and therefore must reasonably face similar constraining structures to require them to attend to and minimize those externalities. As has been discussed, regulated entities create negative externalities in the form of emissions; emissions caps programs are designed to minimize those externalities, to force increased efficiencies of the goods produced in terms of the emissions expelled.[154] Likewise, regulation inflicts compliance costs directly onto industry (while other costs are borne by the taxpayer in the form of the expanded budget of the regulatory agency required by all of the new duties that the agency has). The regulated entities will pass some of that cost of compliance on to consumers either in the form of higher rates or due to less competition after firms exit the market.[155] Some would-be entrants into the field may find the regulatory burden so heavy that they do not enter to create any energy, thus reducing the number of producers, and raising prices further.[156]

Regulators are, like all other citizens, both taxpayers and energy buyers, and so will suffer the increased tax burden and the increased energy prices along with the rest of the public. These, however, are diluted costs; they will pay only a little more in taxes and rates *in comparison* to the concentrated advantages that flow directly to them from increasing their regulatory authority, and therefore their job security, their authority, their prestige,

154. *See supra* Part II.
155. *See, e.g.*, Zywicki, *supra* note 52, at 854.
156. *See, e.g.*, Stigler, *supra* note 89, at 5.

and related goods.[157] As a result—and for all the reasons natural to people in their position, as considered above[158]—they will tend to discount or ignore the costs created by their regulations, while focusing on the benefits of new regulation, just as (so the logic of emissions caps concludes) regulated entities will tend to discount or ignore the costs created by emissions, while focusing on the benefits of new energy production, unless otherwise obliged.[159]

IV. THE COMPLIANCE-COST CAP PROPOSAL: OVERVIEW

Here, then, is a broad sketch of how CCC would work. Any CCC plan would require implementing legislation, just as adoption of a carbon-cap plan would require legislation.[160] Each regulatory agency would be required to calculate the total cost of the regulatory-compliance burden inflicted upon industry and society by its regulations as of some date certain in the recent past, a date before the introduction of the legislation.[161] A date in the recent past, rather than a date in the future, would have to be selected to ensure against regulatory agencies forcing through additional regulations with high compliance costs in order to increase their initial budgets.[162] This total cost would constitute the agency's regulatory-cost cap, or its maximum cost-of-compliance budget. Thereafter, the agency would be limited by that cap and that budget.[163] In no future year could its total regulatory-compliance burden exceed the budget (at least until the

157. *See id.*

158. *See supra* Part I.B.

159. *See, e.g.*, TIETENBERG, *supra* note 141, at 1.

160. *But see, e.g.*, Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration*, 34 HARV. J.L. & PUB. POL'Y 421 (2011) (recounting efforts of the EPA under the Obama Administration to cap greenhouse gas emissions despite the Administration's inability to pass cap-and-trade or other related legislation).

161. The Kyoto Protocol, for instance, which was agreed to in 1997 (though never ratified in the United States), used 1990 emissions as the basal year. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 3.1, Dec. 10, 1997, 37 I.L.M. 22, *available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf; *see also* TIETENBERG, *supra* note 141, at 1 (same for U.S ozone protection and acid rain regulation).

162. *See* Michael Wara, *Measuring the Clean Development Mechanism's Performance and Potential*, 55 UCLA L. REV. 1759, 1787 (2008) (discussing industry ramping up production more than anticipated when future base year selected, thus increasing their emissions caps).

163. *Compare* citations *supra* note 161 (system employed in these emissions-cap systems, except that where trading is permitted in these systems, individual actors can trade for varying specific emissions limits under a fixed program-wide cap), *with* TIETENBERG, *supra* note 141, at 1. *See also supra* notes 132–134 (considering trading analogues in the CCC program); *infra* notes 173–75 (same).

compliance-cost cap began a controlled reflation after the initial deflation period.[164] If the agency wished to implement new regulations that bore compliance costs, it would be obliged, to create room in its budget, to repeal outdated or ineffective regulation, or improve and streamline inefficient regulations.[165]

Then, as with carbon-cap regimes, the regulatory-burden caps would begin to fall, thus requiring regulatory agencies to improve regulatory efficiency and reduce the compliance-cost burdens they have imposed. There are a few different ways to achieve this result. One would be to establish a nominal cap, and adjust that cap upward for inflation each year (rendering it a real-dollar cap), and then subtract from that new total some percentage value (say, one percent) of the adjusted previous year total, thus effecting a real-dollar one percent decrease from the previous year. Note that the proposal is for a one percent decrease of the previous year's total adjusted cap, not one percent of the initial cap, whether adjusted or not. This distinction means that the regulatory agency's budget would not "zero out" after one hundred years because the total reduction in the cap would only ever be one percent (or another deflator) of the previous year's total budget.[166]

A third option would be to set the cap—and thus the compliance-cost budget—not in real-dollars, but as a fixed percentage of overall national income.[167] This could be accomplished by establishing the basel-year cap as the share of national income spent on compliance with an agency's total regulatory burden in that year. Then the cap could be adjusted in nominal-dollar terms each year so that it remains at the same share of national income (measured by GDP or some other method)—less the built-in deflator. Under this system, the regulatory agency's cost-of-compliance budget would, pre-deflator, grow along with the national economy. This method might require using a larger inflator than would otherwise be

164. *See infra* notes 168–71 and accompanying text.

165. *See id.*

166. Such a constant one percent reduction *would* however, if unchanged, eventually result in a very small budget indeed. Methods of tempering this result are considered below. *See infra* notes 184–185 and accompanying text.

167. This system would bear some resemblance to the Taxpayer Bill of Rights (TABOR), a tax-and-expenditure limitation structure adopted in Colorado. TABOR "limits annual revenue the state government can retain from all sources except federal funds to the previous year's *allowed* collections (not necessarily actual collections) plus a percentage adjustment equal to the percentage growth in population plus the inflation rate." Bert Waisanen, *State Tax and Expenditure Limits – 2008*, NAT'L CONF. OF ST. LEGISLATURES, *available at* http://www.ncsl.org/research/fiscal-policy/state-tax-and-expenditure-limits-2010.aspx.

employed, but the advantages of the method would be significant. In years of GDP growth, the compliance-cost budget would (before deflation) grow as well. This accommodation would be sensible because it seems broadly reasonable to expect that during years of economic growth, the number of entities affected by any given regulation will grow as well or, at least, the firms affected by the regulation will grow in productivity and output. This growth will or may have the natural effect of increasing the net costs of complying with an agency's regulations, even if those regulations have in no way changed. A best-fit CCC system will account for such "natural" changes in compliance costs.

Similarly, use of this method would also result in caps that fall at an accelerated rate during recessions. This too makes sense, for the inverse of the reasons considered above. Caps that fall particularly speedily during economic contractions would have another advantage: regulatory burdens would diminish during recessions as a means of spurring recovery and agencies would be required to lighten the regulatory load just when such lightening would be most needed. This would be a good result if agencies found themselves able to, for instance, suspend their relatively least-efficient regulations for the duration of the downturn. On the other hand, if such temporary suspensions proved unreasonably difficult or counterproductive, or if they simply failed to reduce compliance costs very much, or if agencies otherwise found themselves unable to adjust their compliance-cost budgets in sync with the vagaries of the business cycle, then the real-dollar value plus deflator method might prove preferable.

As described so far, the CCC program deals effectively with agencies that exist at the program's commencement. Its features can be expanded, however, to deal with new agencies (and regulatory remits) as well. One simple solution would be for Congress to establish an additional regulatory budget (and first-year regulatory cap) each time it authorizes a new agency. This solution, however, would undermine a central purpose of the CCC program, which is to constrain the total burden of regulatory compliance. Even under this least-restrictive system, though, the CCC program would still serve two important purposes. First, it would oblige Congress explicitly to establish the new agency's compliance-cost budget in the agency's establishing legislation, thus rendering Congress at least that much more transparently responsible for those costs of regulatory compliance. Second, the CCC program would begin, in the agency's second year of regulation, to reduce that agency's total compliance burden along with continuing to chasten the spending of other regulatory agencies.

Nevertheless, a better solution, one more consistent with the fundamental insights and purposes of the CCC program, would be one

under which Congress, in authorizing a new agency, establishes an initial cost-of-compliance budget and cap for the new agency, but does not make that budget supplemental to the already extant cumulative regulatory-compliance burden. This system could be achieved by including in the program a global, government-wide regulatory-compliance-cost cap in addition to the agency-specific caps. Such a global cap would be established at the commencement of the CCC program simply by adding together all of the agency-specific caps. The global cap would then adjust, in future years in which no new agencies were authorized, in the same manner—as the summation of the caps of existing agencies.

Each time a new agency began issuing regulations, however, space under the global cap, and within the global budget, would have to be made for this new agency and its new regulatory budget. Imagine, for example, that the CCC program were to go into effect in 2015, with a global regulatory-compliance-cost cap of $1.05 trillion, in real 2015 dollars. By 2020, by the workings of the deflator adjustments, the global cap would have fallen to $1 trillion (held in real 2015 terms for the sake of simplicity). In that same year, a new congressionally authorized agency were to come on line, one whose congressional remit grants it the authority to generate regulatory-compliance costs of $50 billion a year. Fifty billion dollars is five percent of $1 trillion. In order to accommodate the new agency under the existing global cap, all other agencies would then be obliged to cut five percent more from their regulatory-compliance-cost budgets than they would have had to cut that year under the normal deflator.[168]

This latter method would have two distinct advantages over the former. First, it would maintain the initial global cap, thus preventing Congress from the expedient of undermining the CCC program simply by creating new agencies or granting new remits every time a new regulatory program arises. Second, it would force existing regulatory agencies to be sensitive to the creation of new agencies and new remits, because such regulatory expansion would come at the direct expense of their own authority, threaten their own positions, and at the very least make more work for them in the form of forcing them to find additional compliance-cost-cutting measures or more redundant, obsolete, or inefficient regulations to repeal. At present, this dynamic is entirely absent: existing regulatory agencies have no reason whatsoever to look askance at the creation of new regulatory agencies or remits, and every natural inclination to support each new

168. Of course, if it would be prohibitive to ask agencies for, per this example, a six percent savings in a single year, the program could be made supple enough that the new agency accommodation cuts could be amortized over a certain number of years.

extension of their sphere of the regulatory state.[169]

Eventually, of course, the period of automatic cost-cap deflation would have to end. As noted above, any system that reduced the caps by some fixed percentage of the previous year's caps (however adjusted) would never technically zero out. On the other hand, the deflator will eventually have significant bite: a one percent annual deflator would cut the cap in half after approximately seventy years and would eventually—if left unchanged—result in a cap just a small fraction of its initial size.

This fact raises the questions of how long the deflator should be employed, and what should come afterward. Different plausible answers can certainly arise to the first question. While no one may seriously argue that regulatory regimes currently present optimum efficiency, people of goodwill may surely differ about how much additional efficiency can reasonably be achieved, and therefore about how long the deflator should be employed.

There are fairly simple safety features that could be written into the CCC legislation from the beginning that should assuage fears about troubling out-year effects. First, the factor of deflation should decrease over time. Thus, for example, the deflator might be set at one percent per year for the first ten years of application (to any given regulatory regime), then reduced to three-quarters of a percent for another decade, and further reduced in later years. This shrinking deflator would be consistent with both good economic theory and common sense.

It will be highly likely—well-nigh certain, in fact—that in the early years, regulatory agencies will have significant amounts of outdated, counter-productive, ill-considered, underperforming, inefficient, or otherwise suboptimal regulation to revise or repeal. As the years pass, though, this task should be expected to grow more difficult, the additional efficiency gains relatively smaller.[170] Hence, the deflating deflator makes sense, and should allay concerns about the effect of CCC in the out years. Then,

169. A thing that their representatives, for instance, do in the form of public employee union agitation for constant growth of the regulatory state. *See, e.g.*, Clyde Weiss, *U.S. Supreme Court: Obamacare is Constitutional*, AFSCME BLOG (June 28, 2012), http://www.afscme.org/blog/us-supreme-court-obamacare-is-constitutional ("AFSCME [the public-employees' union] was a leader in championing the health care law. AFSCME members generated hundreds of thousands of phone calls, e-mails and letters to Congress and went door-to-door in nine key states to build a critical mass of public support."); Michael L. Marlow, *Public Sector Unions and Government Size*, 20 APPLIED ECON. LETTERS 466, 469 (2013) (study finding significant empirical relationship between public-sector unionization and the size and cost of state government).

170. As with the initial regulation, the first deregulations will go after the low hanging fruit. *See supra* note 6 and accompanying text.

eventually, either by initial construction of the CCC program or upon an act of Congress, the deflator might be eliminated altogether. What would happen after this period of deflation would depend upon how the program had been constructed in the first place. If the method of adjustment of base for GDP change[171] has been employed, then after reasonable deflation has occurred, the compliance-cost caps will adjust each year so that aggregate regulation takes up no more of the national wealth than it had in the last year in which the deflator was applied. In years of GDP growth, the individual and global caps would grow as well, to account for that GDP expansion. If GDP were to fall, so would caps for the following year. Meanwhile, though, reasonable efficiencies having been wrung, agencies would no longer be obliged to find additional efficiencies in their programs unless either (1) the agencies themselves embarked upon new fields of regulation, and so needed to create additional space under their compliance-cost caps; or (2) Congress created new agencies with new regulatory missions, for which all other agencies would be obliged to create space under the global cap. This GDP-tethered cap growth would allow agencies to begin expanding compliance costs in a controlled and limited way that would continue to provide structural obligations for agencies actively to ward against inefficiently constructed, duplicative, or low benefit yield regulations.

A pair of additional issues arise. First, agencies should be explicitly encouraged to work together to achieve regulatory-compliance-cost savings. Many of the most egregious examples of inefficient and inexcusable compliance costs arise when multiple agencies undertake duplicative regulation, creating additional expense.[172] Even worse cases arise when

171. *See supra* notes 167–168 and accompanying text.

172. *See, e.g.*, Gregory N. Mandel, *Gaps, Inexperience, Inconsistencies, and Overlaps: Crisis in the Regulation of Genetically Modified Plants and Animals*, 45 WM. & MARY L. REV. 2167, 2230–42 (2004) (reviewing instances of "gaps in regulation or regulatory authority; overlaps in regulation or regulatory authority; inconsistencies among agencies in their regulation of similarly situated or identical products; and instances of agencies acting outside of their areas of expertise"); Peter J. Fontaine, *EPA's Multimedia Enforcement Strategy: The Struggle to Close the Environmental Compliance Circle*, 18 COLUM. J. ENVTL. L. 31, 35 (1993) (same); *see also* Mark Sherman, Comment, *Wave New World: Promoting Ocean Wave Energy Development Through Federal-State Coordination and Streamlined Licensing*, 39 ENVTL. L. 1161, 1193–95 (2009) (further example); Kam C. Wong, *Implementing the USA PATRIOT Act: A Case Study of the Student and Exchange Visitor Information System (SEVIS)*, 2006 BYU EDUC. & L.J. 379, 444 (2006) (same); *cf.* SUNSTEIN, *supra* note 1, at 98 (noting failure of regulators to consider systemic effects of regulations); Fontaine, *supra*, at 33–34 ("There is a growing understanding within the environmental community and the EPA that the past and present regulatory efforts to control pollutants in one environmental medium often merely transfer them to other environmental media.").

agencies—who have read their remits so that their authority overlaps with that of another agency—establish contradictory or conflicting regulatory obligations with which they demand citizen compliance.[173] Agencies should be permitted to work together to eliminate both of these types of problematic regulation,[174] by permitting them to divide between themselves the compliance-cost savings achieved by such coordination.[175] Where regulations are conflicting, the benefits of achieving coherence will be obvious. Where regulatory claims overlap, no agency presently wishes to cede turf to any other; overlap continues. Under the CCC program, however, each agency would benefit from ceding the territory to a sister agency.

Somewhat related, agencies should also enjoy the option, in fulfilling their CCC efficiencies, to make savings that are larger than necessary to fulfill their annual obligation, and then to allocate those savings into future

173. *See, e.g.*, Mandel, *supra* note 172, at 2230–42; Fontaine, *supra* note 172, at 35; Sherman, *supra* note 172, at 1193–96; Wong, *supra* note 172, at 444.

174. *See* Ruhl & Salzman, *supra* note 11, at 797 (arguing that "attaining compliance ought to be reasonably within the grasp of regulated entities that strive to be among the" compliers); *id.* at 834 ("After all, if the rule of law means anything, it should mean predictability (that is, perfect compliance should be achievable).").

175. Contradictory regulations in a sense "break" the logic of the Compliance-Cost Cap (CCC) program because they in effect create infinite compliance costs (i.e., a regulated entity simply cannot comply with two contradictory commands at the same time). For that reason they also break any notion of fundamental justice: it is plainly unjust to require regulated entities to do X and not X at the same time, and to punish failures to follow such contradictory dictates. Conflicting regulations, which arise when regulations are not flatly contradictory but simply cannot in reality all be accommodated by the same regulated entity at the same time, present less obvious but perhaps more pernicious problems. *See* Ruhl & Salzman, *supra* note 11, at 803–12 (hypothesizing that adding valid regulation will change the compliance potential of regulated parties regardless of effort and quality of information available). A well-designed CCC program should help to reveal these contradictions and conflicts in the process of "costing" initial and ongoing regulatory burdens, and should include provisions requiring agencies that promulgate contradictory regulations (whether intra-agency or inter-agency) to resolve the contradiction within a very short period of time. The impetuses for speedy compliance with this obligation should be these: *all* contradictory regulations are suspended from the time the contradiction is noted until it is satisfactorily resolved, and after the standard period for contradiction rectification elapses, all agencies involved in creating the contradiction should face substantial (and growing) penalty deflations of their overall compliance-cost caps. These provisions would go some way to making the CCC program an at least partial force for the resolution of the *systemic* problems of pervasive regulation uncovered by Professors Ruhl and Salzman. *See* Ruhl & Salzman, *supra* note 11. Moreover, the constant quest for increasingly efficient (i.e., less compliance-cost generating) regulation engendered by the CCC program should create incentives for agencies to work with other agencies to identify and eliminate systemic problems that generate avoidable compliance costs.

years. Say, for instance, the deflator has been set at one percent. An agency, in finally conducting compliance-cost savings review under the new program, recognizes that a significantly costly regulatory obligation turns out either not to be worth enforcing or amendable to result in much lower compliance costs. In fact, the savings would constitute, say, fully five percent of the agency's whole compliance-cost obligation. Under these circumstances, a well-designed CCC program must permit the agency to make the change by either withdrawing or revising the regulatory obligation, and then to amortize the compliance-cost savings over future years until such savings are "used up," before having to make additional savings (though, of course, the agency would be free to make additional savings during those intervening years and to "bank" those savings as well). Any other rule would discourage agencies from making the biggest and most important withdrawals or revisions because little of the advantage accruing from such big-ticket changes would flow to them, while all of the drawbacks from a significant curtailment of their authority would remain.

V. DEFINING AND CALCULATING REGULATORY-COMPLIANCE COSTS

The broad overview of the CCC program provided in Part IV leaves a set of issues unsettled. As has been discussed, one of the great virtues of the CCC program is that it will require all agencies to undertake a full accounting of the costs that their regulations impose upon all entities, whether directly or indirectly regulated by agencies.[176] In order for this accounting to occur, however, a definitive determination must be made with regard to which costs qualify as regulatory-compliance costs and which do not. Accordingly, Part V.A. distinguishes between regulatory-compliance costs and, respectively, taxes, judicial awards, and costs of service provision.[177] These discussions will reveal another fundamental virtue of the CCC program. The program will increase the transparency of government and voters' ability to monitor and respond to the direction of government by giving Congress a choice: impose costs directly and transparently in the form of taxation or "self-executing" legislation or subject the costs to the CCC program.

Having established the boundaries of regulatory-compliance costs, the discussion proceeds in Part V.B.1 with an extended consideration of how these regulatory costs are to be calculated. The cost-calculation methods endorsed by the Office of Management and Budget for use in CBA could

176. *Cf. supra* note 112 and accompanying text (noting that agencies currently do not calculate the burdens of their regulations).

177. *See infra* Part V.A.

serve as a useful starting point.[178] Because agencies have shown themselves less than fully dedicated to complete application of such analysis, though, and because the agencies will in effect be the party against whom the compliance-cost caps will apply, the agencies can hardly also be the ultimate arbiters setting, adjusting or calculating the caps; this would thoroughly undermine the program.[179] Rather, the task of establishing neutral rules of cost-calculation, and of establishing agencies' compliance-cost caps and their compliance with the caps, should be assigned to an independent review board, or possibly to courts of special jurisdiction attached, perhaps, to the District of Columbia or Federal Circuits.[180] These boards or courts should make their determinations upon evidence submitted by agencies and all interested regulated entities or other interested parties.[181]

As Part V.B.1 reveals, the CCC mechanism provides unique advantages over CBA regimes that have come before. First, the program will be mandatory, and enforced by an independent arbiter. Just as important, though, it matters far less for the CCC program than for CBA exactly how the cost caps are established. This is true both because the initial cap will be a reflection of an amount of actual current spending, rather than a

178. *See supra* notes 9–15 and accompanying text; *see also infra* notes 243–47 and accompanying text. For example, the 2000 and 2003 OMB guidelines suggest that cost is measured by the, "opportunity cost," which includes, "private-sector compliance costs [and] government administrative costs," as well as, "losses in consumers' or producers' surpluses; discomfort or inconvenience; and loss of time." 2000 OMB GUIDELINES, *supra* note 104; 2003 OMB GUIDELINES, *supra* note 104.

179. *See supra* notes 72–84; *see also infra* notes 243–47 and accompanying text.

180. *See infra* notes 224–26 and accompanying text.

181. Creating an independent review board to fulfill this function should not, nearly a century into development of the Fourth Branch, *see infra* note 198, raise any independent constitutional concerns. For good or ill, separation of powers doctrine has long bent before the felt necessities of the regulatory state. *Id.* Constituting a court to undertake CCC review might initially seem to pose greater concern, if only from the novelty of the formulation—with tri-partite power formally coalesced within the judicial, rather than the executive or legislative branches. The objection, and even the novelty, though, would likely recede. The U.S. Court of Federal Claims is itself an Article I court. *See, e.g.*, Philip G. Peters, Jr. *Health Courts?*, 88 B.U. L. REV. 227, 260–61 (2008) (describing Article I courts). Therefore, handing initial review authority to that body would present no separation of powers concerns. Similarly, while the District Courts for the District of Columbia are fully constituted Article III courts, the D.C. Circuit has long served as the special circuit for administrative agency review, which of course would be exactly the purpose of a CCC review court. Remaining concerns could be assuaged, if necessary, by the assignment of initial review responsibilities not to the D.C. District Courts directly, but to Article I tribunals attached to the D.C. Circuit, as bankruptcy courts are attached to all Article III district courts.

projection of likely future costs and benefits, and because future diminutions of the cap are to take the form of percentages of the original cap. So long as the caps are calculated and adjusted using the same objective inputs each time adjustments are necessary, the program should function smoothly.[182]

Part V.B.2 will also explain in detail why the compliance-cost caps are established and adjusted without regard to the benefits created by agency regulation. In this, the CCC program follows the example, and the insights, of other externality-internalizing emissions-cap programs.[183]

A. The Composition of "Regulations" and Compliance Costs

Modern American government—at federal, state, and local levels—is awash in agencies. These agencies take many forms whether as direct extensions of executive authority or as "fourth branch" amalgams of executive, legislative, and judicial power.[184] For the CCC program to work, it will have to coherently and reliably identify, activities that qualify as regulation and costs that count toward compliance with regulation.[185] Other contrasting costs that might arise from government action could include payment of taxes and "judicially" adjudicated fines, penalties or other awards, and direct agency spending on service provision or other nonregulatory spending. Each is considered and distinguished from regulatory-compliance costs below.

1. Regulations Versus Taxes

The question of whether a government imposition qualifies as a tax has become a matter of central national importance and confusion in recent years.[186] Fortunately, a coherent distinction can be drawn between a

182. *See infra* text following note 226.

183. *See id.*

184. Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 950–56 (2000) (quoting Justice Jackson's dissent in FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) ("[A]dministrative bodies . . . have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.")).

185. *Accord* Hahn & Sunstein, *supra* note 1, at 1496, 1531–37 (advocating incorporating independent agencies into CBA requirements).

186. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594–96 (2012) (analyzing whether the "shared-responsibility payment" in the Affordable Care Act is a tax); *see also* United States v. Kahriger, 345 U.S. 22 (1953); Sonzinsky v. United States, 300 U.S. 506, 514 (1937); United States v. Doremus, 249 U.S. 86, 93–94 (1919).

regulation and a tax for CCC purposes without wading too deeply into these controversy-fraught waters. This is true as an initial matter because the distinction drawn between taxes and regulations for CCC purposes need not be consistent with the *National Federation of Independent Businesses v. Sebelius* decision or the precedent on which it is based.[187] In those cases, the federal government was recognized by the courts as lacking the power to impose the cost being imposed unless authority for the levy arose under the taxing power; in other words, if the charge were not found to be a tax, the federal action was unconstitutional. Because such a constitutional dimension does not arise when considering the CCC program (because potential challenges to the CCC do not include a challenge to the government's *imposition* of a fee under the Taxing and Spending Clause) the CCC could be designed to differentiate between taxes and regulations differently than these cases have. As it happens, however, the broad distinctions drawn in these cases provide solid ground upon which to draw the line between taxes and regulatory charges for CCC purposes. For the purposes of the CCC program, the following distinction should be made. A tax:

(1) raises revenue for the government that levies it; and

(2) is initiated explicitly by the legislative power of the government that levies it.

A regulation, on the other hand,

(1) either does not raise any money at all, or

(2) raises money only incidentally as a penalty for failure to comply with agency-directed mandates and as a result of agency-driven, rather than legislatively-driven, decisionmaking.

Consider first, the requirement of raising revenue. If Congress, for instance, requires businesses to pay a special excise to Washington for every smokestack they raise, this constitutes a tax, despite the fact that the requirement will in practical effect cause at least some businesses to raise fewer smokestacks. If, on the other hand, the government, through an executive or independent agency authorized to act, orders relevant regulated entities to double the length of their smokestacks, or to add scrubbers to them, this order—because it will generate no revenue for government—constitutes a regulation, and the costs of compliance with this order will count toward the regulating agency's compliance-cost budget cap.

187. *See Sebelius*, 132 S. Ct. at 2594–96.

This tax versus regulation distinction does not require that revenue raised by any given command of government that goes into the general coffers of government be considered a tax, but it does require that there be revenue that actually flows to the government, rather than to some third party. If the order requires the regulated entity to pay funds to a third party rather than to the government, then what has occurred is regulation, not taxation. So, for instance, imagine that the government levies a special Social Security tax on employers, the revenue from which actually goes into a special Social Security trust fund (rather than the situation today, in which Social Security taxes go into the general till, leaving a "trust fund" not of assets, but of IOUs).[188] This levy would qualify as a tax because it produces revenue for government, regardless of the fact that it is earmarked for some specific purpose. If, on the other hand, some agency of government were instead to order regulated entities to pay the same amount of money directly to their employees or to hold the money and themselves to administer a retirement program for their employees, then those expenses would qualify as regulatory-compliance costs and would count accordingly.

Assume, though, that an order by a regulatory agency *would* bring some money to the government under whose authority the agency acts. The second rule above dictates that, for CCC purposes, the order only be considered to establish a tax—and thus the effects of following the order excluded from the CCC—if the agency's order merely enacts a statutory command to pay money explicitly issued by the legislative body. The power to tax lies with the legislative body, not with agencies. Even the Internal Revenue Service (IRS) merely enforces the tax code established by Congress; it does not set any taxes. Because the power to interpret and apply the tax code lies with the IRS,[189] a good rule of thumb is that if the IRS is not involved, then the agency action in question generates either regulatory-compliance costs or adjudication costs—but not taxes.[190]

This distinction should be fairly easy to apply and difficult to evade. Should Congress declare that all businesses that raise smokestacks will pay $100,000 per year for the privilege, it has (for purposes of the CCC distinction) established a tax, even if one of the purposes of the levy is to discourage smokestacks, and even if, for some reason, Congress were to

188. *See, e.g.*, Allan Sloan, *No Trust for Social Security*, CNNMONEY, (Dec. 21, 2010), http://finance.fortune.cnn.com/2010/12/21/dont-trust-social-securitys-fund/ (noting that the Social Security trust "fund is merely an accounting fiction that has no economic value when it comes to protecting Social Security beneficiaries").

189. *See* 26 U.S.C. § 7805(a) (2012).

190. *See infra* Part V.B. (distinguishing between compliance costs and adjudication costs).

specify that the Environmental Protection Agency (EPA) rather than the IRS should collect the levy. Should, on the other hand, Congress direct the EPA to regulate the emission of pollutants, then whatever commands the EPA gives pursuant to that authority qualify as regulations rather than as taxes, even if the commands might resemble taxes. So, for instance, were the EPA to levy a $100,000 per year fee for the raising of smokestacks, pursuant to its regulatory mandate rather than to a command from Congress to collect a specific levy, the costs of complying with that command would qualify as compliance costs subject to the agency's compliance-cost cap.

It may be argued that this distinction is arbitrary. It is not. It is consistent with long-standing case law as well as with the recent *Sebelius* decision.[191] Writing for the majority in the *Sebelius*, Chief Justice Roberts declared that the levy written into the Affordable Care Act—to be charged against some citizens who fail to purchase government-approved healthcare insurance—qualified as a tax.[192] He wrote:

> The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The "[s]hared responsibility payment," as the statute entitles it, is paid into the Treasury by "taxpayer[s]" when they file their tax returns. It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. . . . The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which—as we previously explained—must assess and collect it "in the same manner as taxes." This process yields the essential feature of any tax: it produces at least some revenue for the Government.
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> The same analysis here suggests that the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty. . . . [T]he individual mandate contains no scienter requirement . . . . [T]he payment is collected solely by the IRS through the normal means of taxation—except that the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution. The reasons the Court in *Drexel Furniture* held that what was called a "tax" there was a penalty support the conclusion that what is called a "penalty" here may be viewed as a

191. 132 S. Ct. at 2566.

192. *Id.* (despite having been called a "penalty" in the Act).

tax.[193]

In other words, the levy in the Affordable Care Act qualified as a tax because, *inter alia*, it was designed to generate revenue, was explicitly authorized by and established in the act itself, and was to be administered by the IRS under normal taxing procedures. These distinctions track the working definition of "tax" relied on in *Drexel Furniture*, cited by the Court, and other previous cases.[194]

Drawing the taxation versus regulation divide this way not only serves the fundamental purposes of the CCC program and the core values of representative democracy, but it bows to practical necessity as well. The central purpose of the CCC program is to import the mechanism of internalizing externalities to a field where externalities abound and internalization mechanisms are lacking. Thus, the CCC program limits its reach to such areas by disclaiming any application to revenue-generating legislation undertaken by Congress directly. The people appear to be fairly well attuned to the tax laws; a vast proportion of our politics is consumed by the question of who should be taxed, in what manner, at what rates, and for what purposes.[195] Additionally, as a practical matter, there could be no point in trying to apply the CCC program to statutory tax enactments. By definition, these statutory provisions will have come from Congress directly, and will represent Congress explicitly doing something that it knows carries a high likelihood of political ramifications. As has been considered above, the CCC program can have no restraining power on direct congressional

193. *Id.* at 2594–96 (emphasis is original).

194. In the 1953 case of *United States v. Kahriger*, 345 U.S. 22 (1953), Congress had directly imposed a special excise upon businesses that took wagers. *See id.* at 25–26. The defendant, who had not paid, argued, *inter alia*, that this levy did not constitute a constitutional tax because "the sole purpose of the statute is to penalize only illegal gambling in the states through the guise of a tax measure," whereas such regulation would have been beyond the federal power as a police regulation if undertaken directly. *See id.* at 28. The Supreme Court disagreed, explaining that "regardless of its regulatory effect, the wagering tax produces revenue." *Id.* Other cases come to similar results. In each, the courts held that tax must raise revenue, and must be levied by Congress expressly, not by a regulatory agency as an optional means of achieving some regulatory goal. *See, e.g.*, Sonzinsky v. United States, 300 U.S. 506, 514 (1937) (a levy counts as a tax if it "is productive of some revenue" and "operates as a tax"); United States v. Doremus, 249 U.S. 86, 93–94 (1919) (taxes must bear "some reasonable relation" to "raising . . . revenue").

195. *See, e.g.*, Neil H. Buchanan, *Why We Should Never Pay Down the National Debt*, 50 U. LOUISVILLE L. REV. 683, 683–87 (2012) (reviewing tax, spending, and borrowing debates of recent years); Neil H. Buchanan, *Good Deficits: Protecting the Public Interest From Deficit Hysteria*, 31 VA. TAX REV. 75, 77 (2011) (same, with relevant quotes from central figures in the debate).

action. If Congress is willing to apply an explicit tax, it will surely also be willing to include in the taxing legislation a clause indicating that "the revenue generated by this tax will not qualify as a cost of regulatory compliance under the relevant CCC legislation.

In comparison to the relatively clean and easy-to-monitor category of congressionally directed revenue generation (e.g., taxation), regulation provides significant challenges to public oversight.[196] The public cannot effectively monitor, nor coherently vote on the basis of, thousands of pages of rulemakings annually.[197] The agency rulemaking process is far removed from the halls of Congress.[198] Agency budgets are far more opaque than the headline budget, revenue, taxation, and deficit figures, and, noted above, there are as of yet no good, current tallies of the total costs of regulatory compliance.[199] Meanwhile, regulations that require some citizens to pay benefits for the benefit of other citizens are designed to provide the latter with a good that elected representatives want that latter group to have, without requiring the elected officials to take responsibility for taxing and spending to provide it.[200] In these instances, the public can do little by way of externality internalization. It is here that the CCC program will do such valuable work. The tax versus regulation distinction established above is consistent with long-standing non-delegation doctrine. The non-delegation doctrine recognizes that:

> In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States." This text permits no delegation of those powers, and so we repeatedly have said that when Congress

196. *See, e.g.*, SUNSTEIN, *supra* note 1, at 101.

197. *See id.*; CROLEY, *supra* note 79, at 134–55 (reviewing the relatively attenuated, and therefore concomitantly unconstrained by voter oversight, nature of agency decisionmaking); REVESZ & LIVERMORE, *supra* note 109, at 13 (noting the same assertion).

198. *See, e.g.*, CROLEY, *supra* note 79, at 241–49 (noting how little power the elected branch has over agency action, once set in train: "even strong congressional criticism and disapproval did not discipline the administrators or their agencies very effectively. In each of the studied cases, the agencies undertook their regulatory initiatives largely uninhibited by adverse congressional reaction."); *see also id.* at 274–83 (further reviewing agency insulation from voter response); Coglianese, *supra* note 9, at 1114–15.

199. *See supra* note 116 and accompanying text.

200. *See, e.g.*, Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1363 (1993) (unfunded mandates permit the federal government to require that certain services be provided, while requiring others to pay for those services (citing JOSEPH E. STIGLITZ, ECONOMICS OF THE PUBLIC SECTOR 550 (1986))).

> confers decisionmaking authority upon agencies *Congress* must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."[201]

The taxing power is a, perhaps the, core legislative power, and hence is vested undelegatably in Congress' hands.[202] The non-delegation doctrine recognizes this. Cases in which Congress delegates any power to raise revenue have required that the power granted be explicit and constrained. In *Federal Energy Administration v. Algonquin SNG, Inc.*,[203] the Court held that Congress' grant of discretion to the Secretary of Treasury to place a levy on imports did not violate the nondelegation doctrine because the power was expressly granted, and could only be invoked when an "article [wa]s being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," and when, upon the application of an explicit set of standards, "he deems [it] necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security."[204]

2. Regulations Versus Adjudications

The next distinction arises at the boundary between regulation and adjudication. For constitutional due process purposes, courts distinguish between regulations that elaborate the burdens and benefits of broad classes of parties, and adjudications that resolve questions for individual parties on individualized grounds.[205] The Administrative Procedure Act (APA) makes

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201. Whitman v. Am. Trucking Ass'ns., Inc., 531 U.S. 457, 472 (2001) (quoting J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) (internal citations omitted).

202. *See id.*; U.S. CONST. art. I, §§ 7–8.

203. 426 U.S. 548, 558–59 (1976).

204. *Id.*; *accord* Pittston Co. v. United States, Civ.A. 01CV2732002, U.S. Dist. Ct. LEXIS 18654, at *22 (E.D. Va. Aug., 20, 2002) (finding the non-delegation doctrine not violated where Congress grants a private entity the power to collect a levy recognized as a tax because "Congress established a specific formula dictating how annual premia paid by assigned operators to the Combined Fund are to be calculated[,]" and thus "Pittston's position that the Trustees and the Combined Fund have some sort of unfettered power to assess taxes is disingenuous[,]" because "the statute clearly establishes a methodology for determining who is taxed and how that tax is determined"); *cf.* Greater Poughkeepsie Library Dist. v. Town of Poughkeepsie, 618 N.E.2d 127 (N.Y. 1993) (finding the delegation of taxing *power*—rather than merely the authority to collect a tax fixed by the legislature—to an administrative agency unconstitutional under the New York State Constitution).

205. *See, e.g.*, 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.2, at 737–44 (5th Ed. 2010) (arguing that the adjudicatory process applies to a government decision that affects an individual "upon individual grounds;" contrasted with the political process, which applies to a government decision that affects "more than a few people" on grounds

a similar distinction.[206]

For the purpose of the CCC program, the focus shifts slightly. Here the key distinction is whether an agency is enforcing its own regulations or is instead either applying rules established by others or applying penalties for noncompliance with rules it has established. Most of the time the difference is obvious: a regulatory agency promulgating and enforcing rules is clearly acting in its regulatory capacity, and the costs generated by compliance with its rules fall under the cost cap. At other times, though, the difference is less clear because the agency is acting through adversarial proceedings that resemble genuine adjudications, and sometimes, some agencies *do* conduct genuine adjudications.

When an agency acts through adjudications, the central issues are those of rule-initiating authority and deference. If an agency is functioning as a court (and thus conducting adjudication for CCC purposes), it will determine the case or controversy before it with regard to some outside body of law established by others.[207] The parties before it will have access to appellate review by Article III courts[208] without needing permission of

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unrelated to an individual. (citing Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); Londoner v. Denver, 210 U.S. 373 (1908)).

206. The Administrative Procedure Act (APA) defines an "adjudication" as an "agency process for the formulation of an order." 5 U.S.C. § 551(7) (2012). It in turn defines an order as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing." *Id.* at § 551(6). It defines a rule (the result of a rulemaking), on the other hand, as

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Id. § 551(4); *see, e.g.*, Sugar Cane Growers Coop. v. Veneman, 289 F.3d 89, 96 (D.C. Cir. 2001) (an agency determination was "a rule 'by any other name'" because it "set forth the bid submission procedures which all applicants must follow, the payment limitations of the program, and the sanctions that will be imposed on participants if they plant more in *future* years than in 2001") (emphasis in original).

207. *See, e.g.*, Peters, *supra* note 181, at 260–61 (describing Article I courts).

208. *See* U.S. CONST. art. III, §§ 1–2; N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 n.23 (1982) (Congress cannot "'withdraw from [Art. III] judicial cognizance *any* matter which, *from its nature*, is the subject of a suit at common law, or in equity, or admiralty'") (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1856) (emphasis added to *Murray's Lessee* in original *Pipeline* opinion)); *id.* at 70 n.23 ("Moreover, when Congress assigns [even] matters [falling within the ambit of the public-rights doctrine] to administrative agencies, or to legislative courts, it has generally

the agency.[209] And those higher courts will pay no deference to any rules, assertions or conclusions of law or policy reached by the agency.[210] Additionally, as will soon be considered, when agencies levy automatically reviewable fines for noncompliance, rather than issuing regulations with which regulated entities must comply, they generate adjudicative rather than regulatory costs.

On the other hand, the mere occurrence of an adjudication (or an adjudication-resembling procedure does not preclude the possibility of

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provided, and we have suggested that it may be required to provide, for Art. III judicial review." (citing Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 455 n.13 (1972))).

209. *See* U.S. CONST. art. III, §§ 1–2; Sackett v. Envtl. Prot. Agency, 132 S. Ct. 1367 (2012). In *Sackett*, which the Supreme Court decided 9-0 against the Environmental Protection Agency (EPA), the Sacketts owned a small residential plot a few lots away from a lake in Idaho. *Sackett*, 132 S. Ct. at 1370. Wishing to build a house, they leveled the lot, filling part of it with dirt and rock. *Id.* A few months later, they were ordered by the EPA to remove the fill (and therefore to lose the value of their property) because, claimed the agency, this non-riparian plot constituted wetlands that were part of the "waters of the United States" under the Clean Water Act. *Id.* at 1371. The EPA began fining the Sacketts $37,500 per day until they complied. *Id.* at 1370. The Sacketts, who disagreed with the EPA's conclusion that their land constituted part of the waters of the United States, sought a hearing with the EPA, but were denied. *Id.* at 1371. They then sought review in U.S. district court—an act of defiance (from the EPA's point of view) that subjected them to a doubled daily fine, and to which they were not entitled. *Id.* at 1373. The EPA's position would effectively have insulated its decision from judicial review, and entirely denied the Sacketts due process of law. *Id.* at 1371, 1373. As the unanimous Court declared, "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction." *Id.* at 1374.

Nor, it appears, was the *Sackett* case an isolated oversight, but rather a demonstration of the explicit mentality of a least some significant portion of EPA officials. *See* John M. Broder, *E.P.A. Official in Texas Quits Over 'Crucify' Video*, N.Y. TIMES,May 1, 2012, http://www.nytimes.com/2012/05/01/us/politics/epa-official-in-texas-resigns-over-crucify-comments.html?smid=pl-share (quoting EPA's Region VI Administrator Al Armendariz, who explained that EPA's philosophy of enforcement is "kind of like how the Romans used to conquer villages in the Mediterranean—they'd go into a little Turkish town somewhere and they'd find the first five guys they saw and they'd crucify them").

210. While Article III appellate courts review conclusions of law from lower courts de novo, for example, McGee v. Arkel Int'l., LLC, 671 F.3d 539, 542 (2012), such courts do pay deference to agency decisions when the agencies make policy determinations within the agencies' regulatory remit. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 258 (2006); Chevron, U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 844–45 (1984); Am. Raisin Packers, Inc. v. U.S. Dep't of Agric., 221 F. Supp. 2d 1209, 1214–15 (E.D. Cal. 2002).

regulation resulting from the proceeding.[211] If adjudication serves merely or additionally to its service as a proper rights-determining adjudication[212] as the forum in which agency-initiated orders are given to one party or the other, then regulatory-compliance costs are generated as a result of the order granted. Here again, the determining factor is whether the agency is functioning merely as a magistrate judge's court, or if instead its legal and policy conclusions are granted deference by higher courts and whether the agency has any power to interfere with such review. If deference is granted, then the agency has acted in a regulatory, rather than a judicial, capacity, and the costs of compliance with its orders are regulatory costs.

Thus, for instance, return again to our hypothetical considering the EPA's regulation of smokestacks. Imagine that the EPA has some leeway in how to undertake its considerations: it could accept comments from all comers, or it could hold a hearing, with proponents of a proposed regulation taking an adversarial position against opponents. The fact of an adversarial forum will not change the result: when the EPA demands additional investment in what it deems to be safer smokestacks, regulation will have occurred. Regardless of the forum, the reviewing courts will defer to this determination.[213] Similarly, though the National Labor Relations Board (the Board) sits to hear cases brought by adversarial labor and management parties, the National Labor Relations Act (NLRA) grants to the board the power "to develop and apply fundamental national labor policy,"[214] which a reviewing Article III court will uphold so long as it is "rational and consistent with the [NLRA] even if [the Court] would have formulated a different rule had [it] sat on the Board."[215] The compliance costs created by these policy decisions will be regulated under a CCC for the Board. In contrast, the benefits and costs created by the Family and

211. *See* Qwest Servs. Corp. v. Fed. Commc'n Comm'n, 509 F.3d 531, 536 (D.C. Cir. 2007) ("There is no such general principle [that rules of general application can come *only* from rulemakings rather than adjudications]. Most norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication, and accordingly agencies have 'very broad discretion whether to proceed by way of adjudication or rulemaking.") (internal citations omitted).

212. *Accord id.* (noting that a single process can split into part rulemaking, part adjudication, unless "a party adversely affected by the adjudication [demonstrated] that the switch deprived it of any right to which it would be entitled in an adjudication").

213. *See, e.g.*, *supra* notes 206–209 and accompanying text.

214. Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500 (1978).

215. NLRB v. Curtin Matheson Scientific, Inc. 494 U.S. 775, 787 (1990) (internal citations omitted). *See generally* Harold J. Datz, *When One Board Reverses Another: A Chief Counsel's Perspective*, 1 AM. U. LABOR & EMP. L.F. 67 (2011) (summarizing the National Labor Relations Board's form and function).

Medical Leave Act (FMLA)[216] are essentially unmediated by the policy decisions of a regulatory agency. Rather, the benefits conveyed expressly in the statute (and no more) are vindicated in federal court directly by affected parties, though the Secretary of Labor is permitted to bring the action on the employee's behalf where considered appropriate.[217] The FMLA does create compliance costs and transfers benefits directly from employers to employees, but the benefits would otherwise either not issue or would be paid for by government. Since these costs and benefits are created entirely and expressly by Congress—and adjudicated by federal courts entirely without independent regulatory agency input—no regulatory-compliance costs are generated. The case would be the same even if the Act set up an Article I court to hear initial FMLA complaints, but gave that Article I court no independent policymaking authority.[218]

The primary practical effects of this distinction are the same as that of the taxation versus regulation distinction. First, the distinction brings under the CCC program acts that are not clearly ascribable to Congress by the public, and thus amenable to voter objection. If Congress changes the law to shift legal obligations between private parties in a way that is self-executing from the vantage point of regulatory agencies—meaning that affected individuals can vindicate their rights directly in court without agency intermediation, or with an agency acting purely as a magistrate court—then Congress has legislated and is acting at maximum transparency and with maximum responsibility potential. Second, this distinction captures under the CCC program all acts, which have the *effect* of regulation, rather than focusing on forms, and thus forecloses the opportunity for agencies to undermine the compliance-cost caps by changing the manner in which they issue regulations.

It is for the latter reason that a regulatory agency cannot avoid counting toward its cap the costs of complying with its regulations merely because a court lawfully has forced its regulatory hand. Imagine, for instance, that the EPA is considering two different versions of a regulation. Version A would cost regulated entities $10 million to comply. Version B would cost

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216. Family and Med. Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601–54 (2012).

217. *See, e.g.*, Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002) (the FMLA establishes benefits which may not be modified by the Department of Labor, because the Act is clear with regard to benefits and enforcement); 29 U.S.C. § 2617(b) (2012).

218. Note that this order from Congress that employers add to employee benefits would not qualify as a tax under the last definition, because it does not enrich any entity of government. It is, nevertheless, not a regulation because the transfer of interests that occurs arises at the direct order of Congress, without any agency having been granted any discretion.

regulated entities $100 million to comply. The EPA decides to employ version A. An independent environmental group sues, seeking to force the EPA to apply version B and is successful.[219] Here, the EPA must count the whole $100 million cost of compliance with version B in its compliance-cost cap. After all, those costs are real. To decide otherwise would be to create opportunities for collusive, or at least opportunistic, behavior by agencies.[220]

A further issue is that of penalties or other levies arising from a failure by regulated entities to follow valid regulations. If all such levies counted as part of the regulatory-compliance-cost budget, agencies could find their budgets—and their ability to regulate expansively—effectively decreased in proportion to the recalcitrance of the entities they regulate. On the other hand, the recent *Sackett v. EPA* decision, heard by the Supreme Court in 2012, demonstrated the shocking disregard with which at least one regulatory agency has treated the due process rights of regulated entities, in an effort to hold such entities hostage to agency mandates without an opportunity for judicial review.[221] Regulatory agencies would be usefully chastened were all such attempts at due process denial counted against the agencies' cost-of-compliance caps.

Thus, any costs that arise from an entity's actual compliance with a regulation must count toward the regulating agency's compliance-cost cap.

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219. *See, e.g.*, Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009). In this case, the EPA set a "national performance standard" to reduce mortality for water animals by 80%–95% from the calculated baseline. *Id.* at 213, 215. Environmental groups and some states sued, demanding that EPA mandate a single specific method that might have saved the creatures up to 98% of the time, but which would have cost nine times more. *Id.* at 216. The Second Circuit agreed with the environmental groups, but the Supreme Court reversed and remanded. *Id.* at 217, 226–27.

220. There is some evidence to suggest that this sort of collusion already occurs to "force" various agencies to issue regulations more aggressive than the law requires, and more aggressive than the agencies' political officers would otherwise permit. *See, e.g.*, MARKUS LEHMANN, GRANTING DISCRETION TO COLLUSIVE AGENCIES: THE ROLE OF THE "STANDING" DOCTRINE 3 (1999), *available at* https://www.coll.mpg.de/pdf_dat/1999_10online.pdf (recognizing that threats of litigation by environmental groups cause regulators to regulate more strictly then the law requires and suggesting that legislatures should lower the standing doctrine); *Regulate Us, Please*, THE ECONOMIST, Jan. 8, 1994, at 67 (considering established industry seeking stricter regulation to create barriers to entry and expansion by newcomers and smaller firms); *cf.* Zywicki, *supra* note 52, at 849, 892–93. The converse, would of course, also be true. Were the EPA here to decide to go with version B, the regulated entities sue, and the courts order the EPA to adopt version A instead, the EPA could count these compliance-cost savings, however forced, in their next CCC annual budget.

221. *See supra* note 208 and accompanying text.

On the other hand, any *noncompliance* fines or penalties assessed against the regulated entity would not count against the compliance-cost cap, but would instead be treated as the fruits of adjudication, even if no Article III court review actually occurred.[222] Where an agency attempts to thwart due process while continuing to levy fines, as in *Sackett*, or otherwise to deny the rule of law to regulated entities, all assessments made during the period after review is requested must count against the regulating agency's compliance-cost cap. This is true even if the regulated entity eventually prevails, and so does not have to pay those assessments because the agency's overaggressive behavior has required the regulated entity to proceed under the shadow of those assessments, a shadow flowing directly from the agency's inappropriate regulatory behavior.[223]

3. Regulations Versus Service Provision

The difference between regulation and service provision presents the most straightforward of these distinctions. The distinction between a regulation and a service is the difference between an order and an offer. If an agency requires a regulated entity to lengthen its smokestacks or to provide healthcare benefits that it would not otherwise have provided, then the entity has been ordered to bear some expense that generates no revenue for the regulating government's coffers, and thus does not constitute a tax; instead, a regulation and concomitant compliance costs have been imposed. If, on the other hand, a government provides some service such as park rangers, or healthcare benefits paid for out of public revenues, or highways, then those are services provided out of tax revenues, rather than costs of regulation.

Spelling out this distinction highlights an opportunity for the government: it may avoid accruing tallies under various regulatory-compliance-cost caps by paying for services directly out of tax revenues. This is of course true and quite revealing. Congress and the President—working together—may take direct responsibility for providing certain services and for levying the taxes to provide those services through

222. This would be the case only so long as regulated agencies were treated with respect, and their liberty and justice interests honored. Prosecutors are said to lose the quest for justice in the miasma of conviction rates. This is a profound injustice. Regulators protecting their decisions and their turf, and bullying the citizenry, by obstructing Article III review or meting out retaliatory penalties commit a less grave—but perhaps thereby even more venal—offense.

223. Similarly, all costs of adjudication should be charged both to the agency and against the agency's compliance-cost cap if the agency should attempt regulations or fines or other assessments the court eventually deems frivolous or arbitrary and capricious.

legislation. However, no regulatory agencies can independently commandeer tax revenues to provide services that would otherwise be provided by regulation and thereby evade their compliance-cost caps. Thus the caps serve their fundamental purpose of forcing efficiency, caution, and constraint—of internalizing the externalities of regulatory-compliance costs—upon individual regulatory agencies. The caps are not designed to—and never could—constrain a general government bent on providing a service directly.[224] But the CCC program would enhance transparency by forcing general governments to be more transparent about how much they are actually taxing the people, and to what ends. As has been considered above, such transparency is absolutely critical to the project of representative government.

B. Calculating Costs of Compliance and the Regulatory-Compliance Costs Budget

Part V.B.1 discusses how to calculate and adjust compliance costs and compliance-cost caps. Part V.B.2 explains why, under the CCC program, the benefits generated by the entity subject to the caps should not be considered in establishing and implementing the externality-internalizing caps.

1. Compliance-Cost Valuations

Effective deployment of CCC will require establishing the initial budgets and caps, calculating how much cost any new regulations will add to the total budget, and determining how much cost elimination or revision of extant regulations might subtract. In order for this process to unfold coherently, the CCC legislation will have to establish a neutral, objective valuation process that first calls on regulatory agencies to make estimates, then allows regulated entities (and other interested parties, including would-be market competitors) to submit counter figures, and finally adjudicates between the various valuations submitted. The agencies should not, of course, be judges in their own case, or receive deference to their valuations, any more than entities regulated under carbon-caps would be permitted to establish their own carbon emissions totals without review or oversight.[225] This would be to allow the fox very much to guard the henhouse.[226]

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224. *See supra* note 168 and accompanying text.

225. *Cf.* Hahn & Sunstein, *supra* note 1, at 1497, 1537–38 (calling for judicial review of CBA).

226. As we have seen in the non-binding context of CBA, the foxes have been, withal, as bad at henhouse guarding as might have been expected. *See supra* notes 9–15; *infra* notes 243–47 and accompanying text.

This recognition, though, leaves the fundamental problem of who should review both valuation methodology and its application in specific instances. One solution would be to establish—presumably in the CCC legislation—a review board specifically designed for the task. The advantages of this option would be that the board could be selected on the basis of expertise in the field of long-term cost appraisal and related disciplines, and that the board's review process could potentially permit the airing of more viewpoints than might otherwise be easily accommodated by a traditional court. The central disadvantage of employing such a board, however, would be that the board would, in the end, simply be another iteration of the regulatory state. Unless the composition, compensation, promotion, and other characteristics likely to influence the behaviors of the board were very carefully designed, the result might simply be to substitute a different fox to mind the hens.

The other plausible option would be to assign the valuation review task to a federal magistrate judge of specialized competence. These judges could be attached to the District of Columbia or Federal Circuits[227] and charged to judge impartially and without special deference. The key disadvantage of putting a judge in the role is that the judge is unlikely to be an expert as this sort of valuation process, even given the heightened specializations that obtain to the District of Columbia and Federal Circuits. The key advantage is that of relative independence from the motivations and hesitancies that animate the bureaucracy.

Regardless of which valuation review process is deemed superior, there is a built-in reason why, so long as the arbiter in valuation proceedings is impartial and not bound by any inappropriate deference obligations, valuation methodology should prove immanently fair: both the regulatory agencies and the regulated entities will regularly find themselves on either side of the valuation issue. Agencies will have a built-in incentive to inflate their regulatory-burden costs initially, to give themselves the highest possible budgets and caps, while regulated entities will wish to minimize these figures. Roles will switch, however, when the time comes to place valuations on the burdens inflicted by new regulations: agencies will have an inherent incentive to lowball, and regulated entities to highball. The roles will switch yet again, though, when it comes time to determine how

227. Assignment to a court specially designated to deal with issues of compliance-cost budget setting would respond to complaints that judicial review generally unduly slows the regulatory process, while still avoiding the untenable situation of setting the agencies in charge of their own caps. *See* Coglianese, *supra* note 9, at 1125–26 (reviewing scholarship worried that a slow, inexpert, and unreliable judicial review process has "ossified" agency rulemaking).

much the regulatory burden is being cut by revising or eliminating old regulations. All of this should create incentive for all parties to create and observe neutral and objective valuation standards, and for magistrate judges to administer them so.

Meanwhile, this valuation process may well prove fairly difficult. It will be no more difficult, though, than the CBA that agencies have been obliged to perform for more than thirty years now.[228] In fact, as considered more fully below, the CCC valuation process will prove much less complex than standard CBA analysis. To the extent that regulatory agencies presently fulfill their duty to regulate competently and in the holistic public interest by conducting CBA,[229] the CCC program will require significantly fewer valuation determinations than does the present regime. A CBA requires agencies explicitly to measure the total cost of their regulations and the total benefits, and to compare the former to the latter.[230] The CCC will require an explicit calculation of the costs of agencies' regulations, but will rely on the inherent structural competencies of regulated agencies to permit them to determine the relative merits of their extant and prospective regulatory programs.[231] Moreover, an argument that it would be too difficult to determine the total regulatory burden inflicted upon the economy, regulated entities, and society generally by regulation would carry, embedded within it, an implicit admission that regulatory agencies cannot reasonably be asked even to determine how much their regulations cost. Such an admission, though, would counsel not for a CCC regime but for a moratorium on—or rollback of—regulation generally while regulatory agencies figure out how to behave as minimally competent social actors.

228. While agencies have often ignored these obligations, the OMB has established thoughtful rules for the conduct of CBA, the cost determination portions of which could serve as a useful starting point model for the courts charged with determining appropriate costing methodologies. *See* 2000 OMB GUIDELINES, *supra* note 104; 2003 OMB GUIDELINES, *supra* note 104. Another useful model might be the way that the government calculates private-polluter damages in Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cases. In such cases, the courts try to award damages to fully account for all costs of clean up and for all lasting damage to natural resources. *See, e.g.*, DAN B. DOBBS, LAW OF REMEDIES 724–30 (2d ed. 1993) (citing, *inter alia*, the CERCLA, 42 U.S.C. § 9601 *et seq.*). These damage measures represent an attempt to quantify all of the externalities that have arisen against all parties as a result of the pollution, and to charge those damages against the polluter (or the polluter's successor in interest). These could serve as at a least partial model by which to quantify all of the externalities that arise against all parties as a result of regulation, and to use them in establishing and then modifying the responsible agency's compliance-cost cap.

229. *See supra* notes 98–100 and accompanying text.

230. *See id.* (describing nature of CBA).

231. *See infra* note 241 and accompanying text.

After all, how might it ever be determined if any given regulation were "worth it" if regulators lack the ability to figure out the actual benefits and costs of the regulation?[232]

2. Ignoring Regulatory Benefits in Making Cost-Cap Determinations

It might seem odd to take no account of the benefits created by regulation in establishing or administering this CCC program, but in fact this too represents a straightforward application of emission-cap principles. In both cases, what is being capped are the unwanted externalities created in the process of making a good thing. Regulated entities do not get an offset from their carbon budgets because they are creating a good such as energy, rather, the whole point is to require the regulated entities to create the good while minimizing the negative-externality cost (i.e., the emissions).[233] Similarly, regulatory agencies should not get an offset because they are creating a good such as a cleaner environment.

Much of the purpose of regulation is to internalize externalities created by regulated entities. Thus, some of the costs created by regulatory agencies are not bureaucratically created costs of compliance, but are rather attributable to the costs associated with internalizing externalities. Imagine, for instance, a scenario in which an electricity generation plant produced, as a byproduct, cakes of arsenic. It disposed of these cakes by traveling to the edge of its property and dumping the cakes into a nearby stream. The relevant regulator forbade this activity. Some of the costs that the power plant faced as a result of the regulation, such as paperwork, compliance, and inspections, would be directly and completely attributable as regulatory-compliance costs, and would vary greatly depending upon the regulatory regime that the regulatory agency imposed. *Some* part of the cost of doing something else with the arsenic, meanwhile, would at least partly represent a cost generated by internalizing an externality—but, vitally, not all of it. Rather, the "internalization of externalities" cost component would *also* vary greatly depending upon the content of the regulatory agency's preferred regulatory regime. In other words, a more efficient regulation, one that allowed regulated entities flexibility in how they externalized the externalities, for instance, would lower costs that could, if agencies were free to distinguish between "real" regulatory costs and "internalization" costs, be attributed to internalization costs, and thus removed from the constraints and the efficiency-creating pressures of the CCC program. This suggests that *all* costs of regulatory compliance should

232. *See supra* note 110.

233. *See supra* Part II (emissions-cap overview).

be included in the calculation of a regulatory agency's initial regulatory cap, not just those not attributed by the agency to internalization of externalities.

Were internalization costs immutable, it would not much matter whether those internalization costs were knocked off the CCC budget or not. If they were knocked off-budget, then the regulatory agency's total compliance-cost budget would be accordingly lower; if not, accordingly higher. But the same amount of non-internalizing costs would be included in the budget either way, and the regulators would have to constrain those. In such a world, there would be only one sense in which the issue of whether to count the internalization costs would matter: if agencies were required to comply with a cap that were annually, say, one percent lower than their previous year's total; then having the costs of internalizing externalities included in the total would, by inflating the base, also inflate the one percent reduction mandates, and thus make it harder to reach that one percent reduction through regulatory efficiencies. This might counsel for excluding such costs.

As already suggested, however, "internalization" compliance costs are not and cannot be made immutable; they are costs that must be subject to review and to the efficiency forcing mandate. First, deciding whether a regulation does in fact internalize an externality, or instead creates a non-internalizing cost of regulation, will far too often present a classic case of question begging. One only creates a negative externality (the only type appropriately the subject of regulation) if (1) one is actually responsible for producing the purportedly negative thing and (2) that thing is actually negative. Recall the energy producer contemplated above, for instance, who was producing cakes of pure arsenic, then "externalizing" those cakes into a stream. This is obviously an externalization of costs. Cases are seldom so clear. Usually, the question of whether the act being regulated represents a genuine negative externality properly attributable to the regulated entity is exactly the sort of question that the regulatory agency has already, to its own purposes, answered in the affirmative, whether that answer is the indisputably correct one. This effect will merely be exacerbated if the agency can take some significant portion of compliance costs "off-budget," and thereby exclude those costs from the salutary effects of the cap, simply by labeling those costs "externality internalizations." Significant dispute could arise with regard to whether vast swathes of modern regulation should be considered internalizations of externalities.[234]

234. *See, e.g.*, WILLIAM J. BAUMOL & WALLACE E. OATES, THE THEORY OF ENVIRONMENTAL POLICY 14–18 (2d ed. 1988) (providing extended definition of "externality," and considering some potential wrinkles); Harold Demsetz, *Toward a Theory of*

Regulations that require employers to provide healthcare benefits to spouses and dependents of employees, for instance, can only qualify as the internalization of externalities under a theory of society that renders employers comprehensively responsible for the lives and well-being of everyone they employ—a theory that would create deep controversy and strenuous disagreement in modern America. There can be no doubt, though, that agencies empowered to create and enforce dependent healthcare coverage regulation would seek to label the costs of compliance with such regulation "externality internalization" if such a label would increase their scope for additional regulation.

Additionally, even if a cost is recognized as a cost arising from internalizing an externality, this conclusion does not carry with it the corollary conclusion that the regulatory agency has imposed the most efficient regulations with regard to how to internalize the externality. Should the agency require the arsenic-producing power plant to store the arsenic cakes in a lead-lined shelter? To revamp its production at great expense? To shut down entirely?[235] If the regulatory agency is not held to high structural standards of efficiency in these decisions as well—as they would not be if "internalization" costs were distinguished from "compliance" costs and excluded from the regulatory-burden caps—then much of the benefit to be derived from CCC would be lost. It is, in fact, one of the great strengths of emissions-cap regimes that they recognize and respond to this very fact. Under command-and-control style regulatory regimes, regulatory agencies order regulated entities to achieve regulatory purposes such as lower emissions in certain specific ways.[236] This sort of regulation tends to be inefficient, because the regulators are unlikely to know the highest value, least cost way to achieve their regulatory goals, and there will often not be a single best, one-size-fits-all method available.[237] In contrast, emissions-cap programs require regulated entities to cut their emissions, but leave it up to the entities to figure out how—thus harnessing the entities' inherent desire to find the most-efficient and least-cost means of

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Property Rights, 57 AM. ECON. REV. 347, 347–50 (1967) (considering internalization of externalities as an attempt to force actors to recognize the full costs of their social interactions); Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (a seminal work on the subject).

235. *See, e.g.*, Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 213–17 (2009) (describing a situation in which the EPA faced such a decision).

236. *See, e.g.*, Stavins, *supra* note 129, at 297, 344–48; Huber, *supra* note 131, at 60–61, 66–67; Carlson, *supra* note 131, at 1144–45.

237. *See, e.g.*, Stavins, *supra* note 129, at 297, 344–48; Huber, *supra* note 131, at 60–61, 66–67; Carlson, *supra* note 131, at 1144–45.

cutting emissions while still maintaining high output.[238] The costs associated with command-and-control regulation could largely have been subsumed under the head of "internalization" costs, but if they were, they would improperly have been protected from the workings of the cap, as less controlling directives would have resulted in lower internalization costs.

Similarly, consider that regulations in effect before the CCC budget is established permit emission of some particulate at a level of two parts per billion. Should the regulation be tightened to permit only emissions of one part per billion? Assuming that there are any negative attributes of the particulate, then it could be argued that reducing the incidence of its emission will, at least to some minimal degree, "improve the environment." But that is not the right question to ask. The right question to ask is whether the notional ecological improvements are worth the increased regulatory burden.[239] Regulatory agencies will only properly face that question if they are obliged fully to consider the costs that their regulations impose, thereby implicitly considering the drag on economic development created by their regulations.[240] In the specific context of the CCC program, agencies will only face the structural constraints that will enable and require them to ask the right questions and regulate in the most efficient manner to the appropriate extent if all of the regulatory burdens they impose are included within their budget, subject to their cap. Then they can decide which regulations are "worth it," and will presumably select those that have a high payoff in genuine internalization of externalities for the costs imposed.[241]

The CCC program fundamentally leaves this last question (i.e., which regulations will be worth it, which not) in the hands of regulators, because it is a question structurally within the regulators' wheelhouse. The program places trust in agencies to effectively determine and rank benefits flowing from various regulatory measures—just as emissions-cap regimes rely on the natural inclinations and competencies of regulated entities to continue to maximize production of their social good so far as is possible given the constraints of the emissions cap.[242] As considered above, if regulators

238. *See, e.g.*, Stavins, *supra* note 129, at 297–98; Huber, *supra* note, 131 at 60–61, 66–67; Carlson, *supra* note 131, at 1144–45.

239. *See supra* note 110 (recognizing the need to do comparative analysis).

240. *See id.*

241. Also note that regulation does not supplant the common law of nuisance. If an industry is creating a nuisance by creating externalities that ought not to occur at all, then citizens may sue them in nuisance seeking either an injunction against further externalization, or, if doctrine directs, make whole damages.

242. This is an illustration of the ways in which the CCC program relies not on strict

cannot be trusted to be motivated by good faith desire, twinned with competent ability, to act in the interest of the general public when faced with coherent incentives to do so, then the entire premise of the regulatory state is irreducibly flawed.[243]

Thus, the CCC program responds to some of the critiques of CBA and would deliver an improved product. The objections to CBA are quite substantial. Some have claimed that the analysis does not properly deal with the wealth effect, and that it does not account for the fact that people are bad at valuing low probability versus high consequence risks or future and hypothetical events.[244] Others have argued that the cost-benefit formulae used are biased against regulation.[245] At their most aggressive, critics entirely reject the notion that the values involved can meaningfully be translated into dollar figures.[246] The CCC program responds at least in part to all of these concerns. First, it requires an accounting only on the compliance-cost side, while allowing regulatory agencies to determine which benefits are most worth achieving, given the available budget and compliance-cost savings that are available. As Professor Sunstein has noted, calculation of benefits proves particularly difficult.[247] Second, under the CCC program, the compliance-cost figures established have value only comparatively: a compliance-cost baseline is established, and then reduced somewhat each year. Because the important consideration is really comparative cost, it matters much less what raw numbers are placed upon any speculative costs, such as units of life or economic opportunity lost to a regulation, so long as those speculative costs are always calculated the same way.[248]

There will, of course, be some irreducible costs of externality internalization. No matter what, doing something with that arsenic cake

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material self-interest calculations, but on the recognition that regulators are motivated by public spiritedness (as they define that term) as well as by private interests. *See supra* notes 77–90 and accompanying text.

243. *See supra* text following note 159.

244. *See, e.g.*, Bronsteen et al., *supra* note 9.

245. *See, e.g.*, REVESZ & LIVERMORE, *supra* note 109.

246. *See* ACKERMAN & HEINZERLING, *supra* note 109, at 9, 211–16.

247. *See* SUNSTEIN, *supra* note 1, at 76.

248. For example, an agency could put a value of $14 trillion dollars on each hour of life or liberty lost due to regulatory compliance, if it wished, so long as it calculated all future adjustments to its cap and future "expenditures" of its budget in the same manner. In fact, there is no obvious reason why the accounting metric might not skip the monetization stage entirely, and simply keep a separate account of monetary compliance costs, worker hours required for compliance, and so forth, and make future adjustments in the same "currency."

other than throwing it in the river will cost more (at least initially) than throwing it in the river, else the energy manufacturer would already have been doing that cheaper thing. But this fact is well accounted for in the internal mechanisms of the CCC program. The program is not designed to push compliance costs to zero (i.e., to leave no room for any genuine externality-internalization costs). Rather, it merely works during the deflator years to enforce some long-required economies, and then later to constrain compliance-cost growth to maintain equally long needed discipline to the enlargement of regulatory-compliance costs. These mechanisms account for the fact that externality internalization is genuinely not costless.

CONCLUSION

No party can be permitted, without effective check or hindrance, to impose negative externalities on the rest of society. The problem becomes more than academic when the externalities imposed are large and have significant negative effects. This is, ever increasingly, the case with the negative externality of compliance costs produced by regulatory agencies. While such agencies' regulations can do much good, the compliance-cost byproducts of that regulation do much harm. These costs must be contained and minimized.

The checks that have been attempted thus far have proven inadequate. Their exemplar, CBA, has no teeth, and is administered by the very parties it is meant to constrain. This is not a recipe for success. As it happens, though, a solution is at hand; it takes the form of emissions-cap programs. Emissions caps force goods producers to attend to the negative externalities they create and to become more efficient at creating the goods they produce, all while generating fewer externalities. This is a model tailor-made for the problem of out-of-control compliance costs, and inefficient regulations. The CCC program employs this model, and thus presents a mechanism to enforce real and effective efficiencies on regulatory agencies while preserving the efficient goods that such agencies produce.

COMMENTS

RUBBER-STAMPING: LEGISLATIVE, EXECUTIVE, AND JUDICIAL RESPONSES TO CRITIQUES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT ONE YEAR AFTER THE 2013 NSA LEAKS

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INTRODUCTION

> The Constitutional system of checks and balances has not adequately controlled intelligence activities. Until recently the Executive branch has neither delineated the scope of permissible activities nor established procedures for supervising intelligence agencies. Congress has failed to exercise sufficient oversight, seldom questioning the use to which its [appropriations] were being put. Most domestic intelligence issues have not reached the courts, and in those cases when they have reached the courts, the judiciary has been reluctant to grapple with them.
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> —Church Committee Reports, 1976[1]

In the summer of 2013, the most expansive and comprehensive system of American foreign and domestic surveillance programs was propelled into the public spotlight by the revelations and disclosures of a National Security Agency (NSA) contractor named Edward Snowden. Snowden brought the constitutional implications of the programs to the forefront of the American political and social debate, with many politicians calling for a complete overhaul of the intelligence and surveillance programs. At the center of the debate were the Foreign Intelligence Surveillance Act (FISA)[2] and the court that it established, the Foreign Intelligence Surveillance Court (FISC).[3]

On June 5, 2013, *The Guardian* reported that "The National Security Agency is currently collecting the telephone records of millions of U.S. customers of Verizon . . . under a top secret court order issued in April."[4] The Order referred to was the Secondary Order issued by the FISC on April 25, 2013[5] that required that Verizon's Custodian of Records provide the NSA with "telephony metadata" from communications between the

1. INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, FINAL REP. OF THE SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, Book II, at 6 (1976) [hereinafter CHURCH COMMITTEE REPORTS].

2. Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C. (2006)).

3. *See id.* § 1803.

4. Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN, June 5, 2013, http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order?CMP=twt_fd.

5. Foreign Intelligence Surveillance Court (FISC) Secondary Order, BR 13–80, Judge Roger Vinson (Apr. 25, 2013), *available at* http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order.

United States and abroad and completely within the United States.[6] The article immediately sparked fears in the American people by describing how the collection of such data "would allow the NSA to build easily a comprehensive picture of who any individual contacted, how and when, and possibly from where, retrospectively."[7]

A few days after the release of the original *Guardian* article, the source of the documents concerning the NSA surveillance programs was revealed to be twenty-nine-year-old Snowden, a former technical assistant for the Central Intelligence Agency (CIA) and an employee of Booz Allen Hamilton, a NSA defense contractor.[8] Snowden claimed that his motivation behind the leaks was to expose the "surveillance state," with his goal being transparency.[9] He feared that if he had gone through the internal reporting mechanisms, "his efforts 'would have been buried forever,' and he would 'have been discredited and ruined.'"[10]

In the aftermath of the leaks that shocked both the American and global conscience,[11] numerous reforms were proposed in both the U.S. Senate and

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6. *Id.* at 2. The Secondary Order stated that telephony metadata included "comprehensive communications routing information, including but not limited to session identifying information . . . trunk identifier, telephone calling card numbers, and time and duration of call." *Id.* The order specifically stated that telephony metadata did not include the substantive content of any of the communications of the Verizon customers or any personal information from the customers. *Id.*

7. Greenwald, *supra* note 4.

8. *See* Glenn Greenwald et al., *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, THE GUARDIAN, June 9, 2013, http://www.theguardian.com/world/2013/jun/09/ edward-snowden-nsa-whistleblower-surveillance. Snowden never actually worked for the American government.

9. Barton Gellman & Jerry Markon, *Edward Snowden Says Motive Behind Leaks Was to Expose 'Surveillance State'*, WASH. POST, June 9, 2013, http://www.washingtonpost.com/politics/edward-snowden-says-motive-behind-leaks-was-to-expose-surveillance-state/2013/06/09/aa3f0804-d13b-11e2-a73e-826d299ff459_story.html. Edward Snowden included a note with the first set of documents he handed over to the media, stating: "As I advanced and learned the dangerous truth behind the U.S. policies that seek to develop secret, irresistible powers and concentrate them in the hands of an unaccountable few, human weakness haunted me. . . . As I worked in secret to resist them, selfish fear questioned if the stone thrown by a single man could justify the loss of everything he loves. I have come to my answer." *Id.*

10. James Risen, *Snowden Says He Took No Secret Files to Russia*, N.Y. TIMES, Oct. 17, 2013, http://www.nytimes.com/2013/10/18/world/snowden-says-he-took-no-secret-files-to-russia.html?hp&_r=0%20.

11. For a far-reaching chronicling of the Snowden NSA disclosures, see *Catalog of the Snowden Revelations*, LAWFARE, http://www.lawfareblog.com/catalog-of-the-snowden-revelations/#at_pco=tcb-1.0&at_tot=5&at_ab=-&at_pos=1 (last visited May 9, 2014); *Foreign Intelligence Surveillance Act: 2013 Leaks and Declassifications*, LAWFARE (Oct. 1, 2013, 4:13 PM), http://www.lawfareblog.com/wiki/nsa-papers/#.Uwf4IvldU6Y.

House of Representatives with the goal of gaining control over the surveillance programs through legislative amendments to FISA. The amendments were structured to change the way the NSA and the other intelligence agencies conducted surveillance, as well as the structure of the FISC. The proposed reforms attempted to achieve greater oversight of the intelligence agencies in conducting their surveillance and to reel in what the media portrayed as the "kangaroo court,"[12] known as the FISC. In the midst of the proposed reforms, the House of Representatives narrowly voted against ending the blanket collection of records under the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act).[13]

A number of modest proposals to amend FISA were introduced in Congress in the first few months following the Snowden leaks, with some calling for new procedures to appoint the FISC judges,[14] some calling for the declassification of FISC orders and opinions,[15] and others pushing for the inclusion of a privacy advocate before the FISC proceedings.[16] The Obama Administration also recommended its own reforms.[17] At the

12. Spencer Ackerman, *FISA Chief Judge Defends Integrity of Court over Verizon Records Collection*, THE GUARDIAN, June 6, 2013, http://www.theguardian.com/world/2013/jun/06/fisa-court-judge-verizon-records-surveillance (quoting former National Security Agency (NSA) analyst Russell Tice).

13. *See* 159 CONG. REC. H5023–29 (daily ed. July 24, 2013). The Amendment, proposed by Rep. Amash, R-Mich., failed by a vote of 205–207.

14. *See, e.g.*, FISA Court Accountability Act, H.R. 2586, 113th Cong. (2013) (allowing the FISC judges to be appointed as follows: three appointed by the Chief Justice and two each appointed by the Speaker of the House, the Senate Majority Leader, and the Minority Leaders of the House and Senate; the judges of the FISA Court of Review would be selected by Congress) (proposed by Rep. Cohen, D-Tenn.); Presidential Appointment of FISA Court Judges Act, H.R. 2761, 113th Cong. (2013) (requiring that the FISC judges be nominated by the President and confirmed by the Senate) (proposed by Rep. Schiff, D-Cal.).

15. *See, e.g.*, House Ending Secret Law Act, H.R. 2475, 113th Cong. (2013) (requiring the Attorney General to declassify significant FISC opinions) (proposed by Reps. Schiff, D-Cal., & Rokita, R-Ind.); Senate Ending Secret Law Act, S. 1130, 113th Cong. (2013) (same) (proposed by Sen. Merkley, D-Or.). Senator Merkley proposed very similar legislation in December 2012 during the debate over the reauthorization of the FISA Amendments Act of 2008; the Senate failed to pass the amendment. *See* Press Release, Sen. Jeff Merkley, Merkley: We Must Put an End to "Secret Law" (Dec. 27, 2012), *available at* http://www.merkley.senate.gov/newsroom/press/release/?id=d4f492e5-1a19-4060-b6aa34acb889577d.

16. *See, e.g.*, Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. (2013) (injecting nongovernmental attorneys into FISC proceedings to participate as Public Interest Advocates) (proposed by Rep. Schiff, D-Cal.).

17. *See* Scott Wilson & Zachary A. Goldfarb, *Obama Announces Proposals to Reform NSA Surveillance*, WASH. POST, Aug. 9, 2013, http://www.washingtonpost.com/politics/obama-

beginning of August 2013, Senator Richard Blumenthal of Connecticut proposed the most comprehensive legislation intended to substantially overhaul the FISC and its proceedings.[18] Senator Blumenthal's proposed amendments combined many aspects of the prior proposed legislation into two more expansive bills. Additionally, reforms concentrating jointly on the NSA surveillance programs and the proceedings before the FISC were proposed in September and October 2013. These reforms, however, did not address how FISC judges are appointed, but rather focused on the NSA bulk collection methods and the creation of a special advocate to represent privacy interests before the FISC.[19]

As the Legislative Branch was submitting its proposals during the summer and fall of 2013, the other branches and government actors were playing their own parts. President Obama authorized the creation of a new

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to-announce-proposals-to-reform-nsa-surveillance/2013/08/09/ee3d6762-011a-11e3-9711-3708310f6f4d_story.html (discussing how President Obama announced his intentions to work with Congress to include an adversarial voice to the FISC proceedings, to make changes to § 215 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), and to create a panel of outsiders to review the surveillance programs).

18. *See* Press Release, Sen. Richard Blumenthal, Blumenthal Unveils Major Legislation to Reform FISA Courts (Aug. 1, 2013), *available at* http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-unveils-major-legislation-to-reform-fisa-courts.

19. *See, e.g.*, Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (2013) (prohibiting bulk collection of Americans' records and installing a constitutional advocate to argue before the FISC in significant cases) (proposed by Sens. Wyden, D-Or., Udall, D-Colo., Blumenthal, D-Conn., & Paul, R-Ky.); Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-collection, and Online Monitoring Act (USA FREEDOM Act), H.R. 3361, 113th Cong. (2013) (ending the dragnet collection of phone records under the USA PATRIOT Act and providing for the creation of a Special Advocate) (proposed by Rep. Sensenbrenner, R-Wis., & Sen. Leahy, D-Vt.). Interestingly, Representative Sensenbrenner was one of the co-authors of the USA PATRIOT Act in 2001. *See* Dan Roberts, *Patriot Act Author Prepares Bill to Put NSA Bulk Collection 'Out of Business'*, THE GUARDIAN, Oct. 10, 2013, http://www.theguardian.com/world/2013/oct/10/nsa-surveillance-patriot-act-author-bill. On October 31, 2013, the Senate Intelligence Committee approved, by a vote of 11–4, the FISA Improvements Act, which, among other provisions, would prohibit the collection of bulk communication records and the bulk collection of the content of communications, and would prohibit the review of bulk communication records unless there is reasonable articulable suspicion that an association with international terrorism exists. *See* S. 1631, 113th Cong. (2013) (proposed by Sen. Feinstein, D-Cal.); *see also* Press Release, Sen. Dianne Feinstein, Senate Intelligence Committee Approves FISA Improvements Act (Oct. 31, 2013), *available at* http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=3aa4ed70-e80b-4c2b-afd6-dc2e5bc75a7b. The Act would also allow the FISC to designate amicus curiae "to provide independent perspectives and assist the court in reviewing matters that present a novel or significant interpretation of the law." *Id.*

review body to determine what changes needed to be made to the govevernment surveillance programs and to the proceedings and operations of the FISC. As this presidential review was taking place, another independent reviewing body, led by an Executive Branch agency under the auspices of Congress, was appraising the reform proposals and making its own recommendations. In the midst of these reviews, members of the judiciary gave their own perspective on the reforms and the implications for the functioning of the FISC. By the end of 2013 and the beginning of 2014, President Obama, after assessing the reviewing bodies' conclusions, was prepared to offer the Executive Branch's own initiative to address the best way to curtail the government surveillance programs and reform the FISC.

Part I of this Comment provides background on the history of FISA and its subsequent amendments. Part II examines the criticism of the FISC and concludes that the FISC is not simply a rubber stamp that allows the American government to spy on its own citizens or citizens from around the world. Part III then takes a deeper look into some of the reforms that were proposed by the Legislative Branch following the leaks, with particular emphasis on the bills introduced by Senator Richard Blumenthal,[20] and discusses some of the drawbacks of such reforms. Part IV analyzes the President's Review Group Report on the reform proposals, which was released in December 2013. Part V then evaluates the Privacy and Civil Liberties Oversight Board's January 2014 independent review of the surveillance programs. Part VI investigates the role of the Judicial Branch in the saga by considering its practical thoughts on reforming the FISC. Part VII then questions where we stand with the reforms to the government surveillance programs and the FISC by examining President Obama's speech from January 2014. Finally, Part VIII concludes by suggesting that, although reforming FISA and the FISC are potentially viable methods for curtailing the extent of government surveillance, the proposed reforms may not be the perfect means of doing so and it is unclear in which direction the government will proceed.

An ongoing, and likely larger and more well-known, debate on this topic concerns the actual legality (or illegality) of the government surveillance programs. Although the extent of this aspect of the NSA controversy is

20. The bills proposed by Senator Blumenthal will be the focus since they were the first all-encompassing reform proposals for the FISC. The more recent reform proposals are more comprehensive and include reforms to the proceedings before the FISC and the authorizations for the NSA surveillance programs under FISA, but they do not contain provisions for reforming the selection of FISC judges. *See supra* note 19 (describing the proposals announced in September and October 2013).

beyond the scope of this Comment, it is important to understand that, as it currently stands, the NSA surveillance programs have been declared illegal by one district court[21] and legal by another district court.[22] It is yet to be seen which one of these post-Snowden interpretations of FISA and Fourth Amendment jurisprudence will dominate this legal arena and whether the Supreme Court will address the controversy.

I. HISTORY OF FISA AND STRUCTURE OF THE FISC[23]

A. The Origins of FISA—Pre-1978

The United States Supreme Court held in 1967 in *Katz v. United States*[24] that the Fourth Amendment provisions concerning unreasonable searches and seizures applied to electronic surveillance, were not limited to physical trespass, and warrantless searches were "per se" unreasonable,[25] overturning prior Supreme Court precedent.[26] The Court explicitly

21. *See* Klayman v. Obama, No. 13–0881(RJL), 2013 WL 6598728 at *25 (D.D.C. Dec. 16, 2013). The Honorable Richard J. Leon entered an order "(1) bar[ring] the Government from collecting, as part of the NSA's Bulk Telephony Metadata Program, any telephony metadata associated with [the plaintiffs'] personal Verizon accounts and (2) requir[ing] the Government to destroy any such metadata in its possession that was collected through the bulk collection program." *Id.* Judge Leon, however, "in light of the significant national security interests at stake in this case and the novelty of the constitutional issues," stayed his order pending appeal. *Id.* at *26.

22. *See* American Civil Liberties Union (ACLU) v. Clapper, 959 F.Supp. 2d 724, 757 (S.D.N.Y. 2013). The Honorable William H. Pauley III concluded, in granting the government's motion to dismiss, that "There is no evidence that the Government has used any of the bulk telephony metadata it collected for any purpose other than investigating and disrupting terrorist attacks. . . . [T]he bulk telephony metadata collection program is subject to executive and congressional oversight, as well as continual monitoring by a dedicated group of judges who serve on the [FISC]. . . . For all of these reasons, the NSA's bulk telephony metadata program is lawful." *Id.*

23. This section is not intended to be an exhaustive analysis of all of the mechanisms that contributed to the adoption of FISA and its subsequent amendments. It is also not intended to be a complete examination of all of FISA's provisions or a detailed description of the government surveillance programs. For more comprehensive and thoughtful discussions of FISA's structure, see generally DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS §§ 4:1–19:15 (2d ed. 2012).

24. 389 U.S. 347, 357 (1967).

25. *Id.* at 353 ("[T]he Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass . . . .' [T]he Fourth Amendment protects people—and not simply 'areas.'") (citation omitted).

26. *See* Olmstead v. United States, 277 U.S. 438, 469 (1928) (holding that the use as evidence of private telephone conversations that have been acquired through wiretapping

declined to extend its holding to the national security realm.[27]

The *Katz* decision led Congress to enact legislation in 1968 regulating wiretapping and electronic surveillance use in criminal but not national security investigations.[28] Section 2511(3) of the legislation recognized the President's authority "to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, [and] to protect national security information against foreign intelligence activities," as well as the President's power "to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government."[29] The first sentence of this provision "covered the President's power to deal with foreign threats to national security," and the second sentence "cover[ed] the President's power to deal with domestic threats to national security."[30]

Two major events provided the impetus for the enactment of FISA: the Supreme Court's decision in *United States v. United States District Court for the Eastern District of Michigan* (*Keith*)[31] in 1972 and the findings of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activites (the Church Committee) in 1976. The Supreme Court addressed the use of electronic surveillance in national security for the first time in *Keith*.[32] In *Keith*, the defendants were involved in a plot to bomb a CIA office in Ann Arbor, Michigan, and during pretrial proceedings, the defendants sought to obtain electronic surveillance information that the government intended to use against them.[33] The

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does not violate the Fourth Amendment); Goldman v. United States, 316 U.S. 129 (1942).

27. *Katz*, 389 U.S. at 358, n.23 ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.").

28. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified as amended at 18 U.S.C. §§ 2510–2522 (2012)). Title III relating to Wiretapping and Electronic Surveillance gave the government the authority to conduct wiretapping for use in criminal investigations.

29. *Id.* § 802, 82 Stat. at 214 (codified at 18 U.S.C. § 2511(3)), *repealed by* FISA, Pub. L. No. 95-511, § 201(c), 92 Stat. 1797.

30. Richard Henry Seamon & William Dylan Gardner, *The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 HARV. J.L. & PUB. POL'Y 319, 330–31 (2005).

31. 407 U.S. 297 (1972).

32. *Id.*

33. *Id.* at 299–300.

government argued that § 2511(3) allowed the President to conduct warrantless domestic surveillance.[34] The Court, however, rejected this argument, stating that the national security provisions of § 2511(3) were "neutral" and "merely provide[d] that [Title III] shall not be interpreted to limit or disturb such power as the President may have under the Constitution."[35] Thus, no new powers were conferred on the President through § 2511(3). The Court held that prior judicial approval pursuant to the Fourth Amendment is required for domestic security surveillance.[36]

Though *Keith* only involved domestic security surveillance, the Court made some explicit distinctions between the standards that may be appropriate for different types of surveillance. The Court acknowledged that the Fourth Amendment warrant requirements for domestic security surveillance may be different than for more "ordinary crimes."[37] Additionally, the Court limited its holding to "the domestic aspects of national security," stating that "[w]e have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents."[38] The Court, therefore, appeared to recognize three levels of surveillance requirements: the strictest procedures for electronic surveillance of ordinary domestic crimes (under Title III), less strict standards for surveillance for domestic threats to national security, and the least strict standards for foreign threats to national security.[39] A warrant application for domestic security purposes could, in turn, "vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection," and authorization for such a warrant could "be made to any member of a specially designated court."[40]

Following the Court's decision in *Keith*, and around the same time as the enactment of FISA, a handful of federal circuit courts addressed the issue of electronic surveillance of foreign powers, with the majority of them finding that such foreign intelligence surveillance constituted an exception to the general warrant requirement.[41]

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34. *Id.* at 303.
35. *Id.*
36. *Id.* at 323–24.
37. *Id.* at 322–23.
38. *Id.* at 321–22.
39. *See* Seamon & Gardner, *supra* note 30, at 332.
40. *Keith*, 407 U.S. at 323.
41. *See, e.g.*, United States v. Truong Dinh Hung, 629 F.2d 908, 912–16 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982); United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977), *cert. denied*, 434 U.S. 890 (1977); United States v. Butenko, 494 F.2d 593, 605–06 (3d Cir. 1974), *cert. denied*, 419 U.S. 881 (1974); United States v. Brown, 484 F.2d 418, 425–26 (5th Cir. 1973) (relying on the Fifth Circuit's decision in United States v. Clay, 430 F.2d 165 (5th

The second major incident that contributed to the enactment of FISA was the 1976 Report of the Church Committee. The Church Committee, named after its Chairman Frank Church, a Democratic senator from Idaho, was established in the wake of the Watergate scandal. After reviewing forty years of domestic surveillance, the committee concluded that: "Too many people have been spied upon by too many Government agencies and to [sic] much information has beeen [sic] collected. . . . Investigations have been based upon vague standards whose breadth made excessive collection inevitable."[42] Additionally, though the agencies were pressured by the Executive Branch to serve their political objectives, "they also occasionally initiated improper activities and then concealed them from officials whom they had a duty to inform."[43] The report detailed vast domestic surveillance over the prior four decades by the Federal Bureau of Investigation, the CIA, the NSA, the Army, and the Internal Revenue Service.[44] Based upon these findings, the Church Committee "recommended a strict and careful separation of domestic and foreign intelligence gathering."[45]

B. The Foreign Intelligence Surveillance Act of 1978

FISA was the result of a compromise between the branches of government.[46] Until 1978, "no president had ever conceded that the Congress could interpose any set of procedures to confine the constitutional discretion of the president to engage in electronic surveillance to protect the national security."[47] With the Supreme Court's recognition in *Katz* of a limit on warrantless electronic surveillance and the Church Committee's revelations, however, changes had to be made "to assure Americans that

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Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971)), *cert. denied*, 415 U.S. 960 (1974). The U.S. Court of Appeals for the District of Columbia Circuit questioned whether a foreign intelligence exception existed in Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). For a more in-depth discussion of these circuit court cases, see Americo R. Cinquegrana, *The Walls (And Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 803–05 (1989) (stating, in discussing *Zweibon*, that "the depth and force of this bold insinuation that no national security exception should exist provided the executive branch and Congress with a substantial basis for reconsidering the state of the law in this area").

42. CHURCH COMMITTEE REPORTS, *supra* note 1, at 5.

43. *Id.*

44. *See* William C. Banks, *Symposium, 9/11 Five Years On: A Look at the Global Response to Terrorism: The Death of FISA*, 91 MINN. L. REV. 1209, 1226–27 (2007).

45. *Id.* at 1226.

46. *See id.* at 1211.

47. *Id.*

past abuses would not be repeated."[48]

FISA authorizes electronic surveillance[49] under two scenarios: without a court order and with a court order. FISA grants the President, through the Attorney General, the power to "authorize electronic surveillance without a court order . . . to acquire foreign intelligence information for periods of up to one year."[50] To do so, the Attorney General must certify under oath that the electronic surveillance is done for the purpose of obtaining the content of communications solely between foreign powers or acquiring the technical intelligence from the property of a foreign power.[51] Additionally, the Attorney General must certify that "there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party"[52] and the Attorney General must employ minimization procedures[53] designed to prevent or minimize the collection, retention, and dissemination of information "concerning unconsenting United States persons."[54]

The Attorney General is also required to report the minimization procedures and a compliance assessment to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence.[55] Moreover, the Attorney General is required to issue a report on a semiannual basis to the Select Committees on Intelligence and the

48. *Id.* at 1212.

49. Under the original 1978 Act, "electronic surveillance" encompassed four components: (1) "the acquisition . . . of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person"; (2) "the acquisition . . . of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States"; (3) "the intentional acquisition . . . of the contents of any radio communication . . . if both the sender and all intended recipients are located within the United States"; and (4) "the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication." 50 U.S.C. § 1801(f)(1)–(4) (2006). Each component, besides the second, is defined "under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes." *Id.*

50. *Id.* § 1802(a)(1). "Foreign intelligence information" is defined as information that relates to the ability of the United States to protect itself against "actual or potential attack," "sabotage or international terrorism," or "clandestine intelligence activities" of a foreign power, as well as information that relates to "the national defense or the security" or "the conduct of the foreign affairs" of the United States. *Id.* § 1801(e)(1)–(2).

51. *Id.* § 1802(a)(1)(A)(i)–(ii).

52. *Id.* § 1802(a)(1)(B).

53. *Id.* § 1802(a)(1)(C).

54. *Id.* § 1801(h)(1). *See generally id.* § 1801(h).

55. *Id.* § 1802(a)(1)(C), (a)(2).

Committee on the Judiciary of the Senate.[56]

Electronic surveillance can also be authorized by the issuance of a court order upon an application to the FISC by a federal officer with the approval of the Attorney General.[57] An application to the FISC for an order for electronic surveillance must contain, among other requirements, the identity of the target of the surveillance, a statement of the facts that justify the belief that the target is a foreign power or agent of a foreign power, a statement of the minimization procedures, a description of the information sought and the communications that are the subject of the surveillance, and a certification that the information sought is foreign intelligence information and that the acquisition of foreign intelligence information is a significant purpose[58] of the surveillance.[59]

In addition to the FISC, which "hear[s] applications for and grant[s] orders approving electronic surveillance,"[60] FISA also created the Foreign Intelligence Surveillance Court of Review (FISA Court of Review), which has "jurisdiction to review the denial of any application."[61] The FISA Court of Review is composed of three federal district court or court of appeals judges who are designated by the Chief Justice.[62]

C. Major FISA Amendments

1. USA PATRIOT Act of 2001

The first major amendment to FISA came in 2001, in the wake of the events of September 11, with the passing of the USA PATRIOT Act.[63]

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56. *Id.* § 1808(a)(1). The report must include (1) the number of applications for and extensions of orders that approved electronic surveillance if "the nature and location of each facility or place at which the electronic surveillance will be directed is unknown," (2) the criminal cases wherein information acquired through electronic surveillance will be used at trial, and (3) the number of approved and denied emergency orders for electronic surveillance. *Id.* § 1808(a)(2)(A)–(C). Emergency orders for electronic surveillance are authorized under § 1805(f).

57. *See generally id.* §§ 1804–1805.

58. *See infra* note 64 (discussing the "significant purpose" requirement under the USA PATRIOT Act).

59. *See generally* § 1804(a)(1)–(11) (enumerating the required elements for an application for electronic surveillance).

60. *Id.* § 1803(a). For a discussion of the structure of the FISC, see *infra* Part III.B (comparing the current makeup of the FISC to Senator Blumenthal's proposal under the FISA Judge Selection Reform Act).

61. *Id.* § 1803(b).

62. *Id.*

63. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

The most significant provision changed the language of § 1804(a)(7)(B), formerly requiring the government to show that "the purpose" of the surveillance was to obtain foreign intelligence information, to now requiring that the government only show that "a significant purpose" of the surveillance was to obtain foreign intelligence information.[64] Validated by the FISA Court of Review,[65] the change in language essentially dismantled the "wall" between law enforcement officials and intelligence officials, which was "designed to protect against using the secretive foreign intelligence collection process in order to build a criminal case."[66]

2. Protect America Act of 2007

The next substantial amendment to FISA came in 2007 when Congress passed the Protect America Act.[67] Section 105A of the Act established that "Nothing in the definition of electronic surveillance . . . shall be construed to encompass surveillance directed at a person reasonably believed to be located outside of the United States."[68] Section 105B authorized the Attorney General and the Director of National Intelligence (DNI) to obtain

64. *See* 50 U.S.C. § 1804(a)(7)(B). For an extensive analysis of the "significant purpose" requirement, see Scott J. Glick, *FISA's Significant Purpose Requirement and the Government's Ability to Protect National Security*, 1 HARV. NAT'L SEC. J. 87, 102–15 (2010).

65. In re Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002), *cert. denied*, ACLU v. United States, 538 U.S. 920 (2003) (denying a motion by the ACLU for leave to intervene to file a petition for writ of certiorari and denying a motion of the Bar Association of San Francisco for leave to file a brief as amicus curiae). Professor Banks describes the FISA Court of Review decision as "gutt[ing] th[e] central premise of FISA when it upheld the [Department of Justice's] new procedures permitting the use of FISA even when the primary objective of the planned surveillance is to find evidence to support a prosecution." Banks, *supra* note 44, at 1213.

66. Banks, *supra* note 44, at 1265. For further discussion of the FISA "wall," see William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147 (2003); David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL'Y REV. 487 (2006).

67. Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007). Congress amended FISA "based on the Bush Administration's arguments that FISA was inadequate to fight the war on terror." Stephanie Cooper Blum, *What Really Is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform*, 18 B.U. PUB. INT. L.J. 269, 295 (2009). The Protect America Act of 2007 and the FISA Amendments Act of 2008, *see* discussion *infra* Part I.C.3, grew out of the realization that the Bush Administration, following the events of September 11, 2001, had granted the NSA the authority to secretly wiretap Americans without FISA warrants. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, http://www.nytimes.com /2005/12/16/politics/16program.html. The wiretapping was known as the Terrorist Surveillance Program (TSP). *See* Blum, *supra*, at 269.

68. Protect America Act of 2007, § 105A (codified at 50 U.S.C. § 1805(a)).

foreign intelligence information "concerning persons reasonably believed to be outside the United States" for up to one year.[69] The Protect America Act was considered quite controversial and was thus limited to a six-month timeframe, which expired in February 2008.[70]

3. FISA Amendments Act of 2008

After the expiration of the Protect America Act, Congress passed the FISA Amendments Act of 2008 in July 2008.[71] Section 702 grants the Attorney General and the DNI the authority to approve "the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information."[72] An authorization under § 702 is subject to a set of limitations.[73] Before implementing an authorization under § 702(a), the Attorney General and the DNI, must provide the FISC with a written certification and affidavits indicating that, among other requirements, the procedures for the targeting are designed to ensure that only persons reasonably believed to be outside the United States are targeted and to prevent the communications of persons in the United States from being obtained.[74] The FISC then reviews the certification within thirty days after its submission and can then make amendments to the certification[75] before granting an order approving the use of the procedures.[76]

II. Criticisms of the FISC

FISA is a complicated statute that grants the government substantial

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69. *Id.* § 105B(a).

70. *See* Blum, *supra* note 67, at 297.

71. FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified as amended in scattered sections of 50 U.S.C.).

72. 50 U.S.C. § 1881a(a) (Supp. V 2012).

73. The acquisition:

> (1) may not intentionally target any person known at the time of acquisition to be located in the United States; (2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States; (3) may not intentionally target a United States person reasonably believed to be located outside the United States; (4) may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; and (5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States." *Id.* § 1881a(b).

74. *Id.* § 1881a(g)(1)(A), (2)(A)(i).

75. *Id.* § 1881a(i)(1)(A)–(C).

76. *Id.* § 1881a(i)(3)(A).

authority to conduct its surveillance programs. After the Snowden leaks revealed the extent of this authority, the FISC, once a rather secretive court, was propelled into the open and, due to its power to grant government surveillance orders, became one of the scapegoats for the perceived illegal and far-reaching authority that the government possesses under FISA.

Many criticisms of the FISC emerged in the aftermath of the leaks: that the court is non-adversarial, that there is a lack of transparency in its process and its decisions, and that the judge selection process is flawed. All of these critiques, however, stem from one overarching public perception of the court—that it is simply a pawn for constitutional abuses by the government through its surveillance programs and intelligence agencies. The rhetoric proceeds in this way: that the FISC is "a radical perversion of the judicial process,"[77] that the court "rubber-stamp[s] virtually anything and everything the government wants to do" in a "mindless" fashion,[78] that the court "plays no role whatsoever in reviewing whether the procedures it approved are actually complied with,"[79] that the "entire process is a fig leaf, 'oversight' in name only,"[80] that the court is "broken,"[81] and that what it does "is not adjudication, but approval."[82]

Are such characterizations of the FISC justified? At first glance, it may appear that they are—as widely available statistics about the FISC's approval rate suggest. The court has denied only eleven of 20,000 government applications in its thirty-four year history, all in the past decade.[83] Over the last couple of years especially, it would seem that the FISC almost blindly approves government applications for electronic

77. Glenn Greenwald, *The Bad Joke Called 'the FISA Court' Shows How a 'Drone Court' Would Work*, THE GUARDIAN, May 3, 2013, http://www.theguardian.com/commentisfree/2013/may/03/fisa-court-rubber-stamp-drones.

78. *Id.*

79. Glenn Greenwald, *FISA Court Oversight: A Look Inside a Secret and Empty Process*, THE GUARDIAN, June 18, 2013, http://www.theguardian.com/commentisfree/2013/jun/19/fisa-court-oversight-process-secrecy.

80. *Id.*

81. Senator Richard Blumenthal, *FISA Court Secrecy Must End*, POLITICO.COM, July 14, 2013, http://www.politico.com/story/2013/07/fisa-court-process-must-be-unveiled-94127.html.

82. Dan Roberts, *US Must Fix Secret FISA Courts, Says Top Judge Who Granted Surveillance Orders*, THE GUARDIAN, July 9, 2013, http://www.theguardian.com/law/2013/jul/09/fisa-courts-judge-nsa-surveillance (quoting the Honorable James Robertson, a retired judge for the U.S. Court of Appeals for the District of Columbia Circuit who sat on the FISC from 2002 to 2005).

83. *See* Greenwald, *supra* note 77.

surveillance. In 2012, of 1,789 electronic surveillance applications, only one was withdrawn by the government, and the FISC did not deny any applications.[84] Similarly, in 2011, of 1,676 applications to conduct electronic surveillance, the government only withdrew two, and the FISC again did not deny any applications.[85]

Even though the media commonly uses these numbers to portray the FISC as a rubber stamp, these statistics do not tell the whole story. In fact, the court did make modifications to forty electronic surveillance applications in 2012 and to thirty applications in 2011.[86] Additionally, even though the court did not deny any of the 212 government applications for business records in 2012, the court made modifications to 200 of them; similarly, of the 205 applications for business records in 2011, of which the court denied none, the court made modifications to 176.[87] The character and substance of these modifications are not included in the press reports, however.

Even more enlightening to the process of FISC approval of government applications for electronic surveillance is an unclassified letter from the Honorable Reggie B. Walton, presiding judge of the FISC from February 2013 to May 2014, to Senator Patrick J. Leahy, the Chairman of the Senate Judiciary Committee, dated July 29, 2013, sent in response to inquiries made by Senator Leahy concerning the court's operations.[88] The first question posed to the court concerned the court's process for considering applications for orders of electronic surveillance (Title I), orders for access to business records (Title V), and submissions under § 702 of FISA.[89] Judge Walton described in detail the process that applications go through before they are approved. After a proposed application is submitted to the FISC, a member of the court's legal staff reviews it to determine "whether it meets the legal requirements under the statute"; as part of this determination, a court attorney will routinely seek additional

84. *See* 2012 FISA Annual Report to Congress, Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, to Harry Reid, Sen. Majority Leader (Apr. 30, 2013), *available at* http://www.fas.org/irp/agency/doj/fisa/2012rept.pdf.

85. *See* 2011 FISA Annual Report to Congress, Letter from Ronald Weich, Assistant Attorney General, to Joseph R. Biden, Jr., Sen. Pres. (Apr. 30, 2012), *available at* http://www.fas.org/irp/agency/doj/fisa/2011rept.pdf.

86. *See* 2012 and 2011 FISA Annual Reports to Congress, *supra* notes 84–85.

87. *See id.*

88. *See* Letter from the Honorable Reggie B. Walton, Presiding Judge of the FISC, to Patrick J. Leahy, Chairman of the Sen. Comm. on the Judiciary (July 29, 2013) [hereinafter Walton July 29, 2013 Letter], *available at* http://www.uscourts.gov/uscourts/courts/fisc/honorable-patrick-leahy.pdf.

89. *Id.* at 1.

information or raise concerns with the government.[90] A court attorney then provides a written analysis to the judge, including "an identification of any weaknesses, flaws, or other concerns."[91] The judge then reviews the application and the analysis and makes a preliminary determination, including whether to approve the application, whether to impose conditions on approval, whether additional information is needed, and whether a hearing should be held to discuss the application.[92] The government will then submit a final application upon which the judge makes a final determination, sometimes including a reporting requirement in a Supplemental Order.[93] If the judge decides to decline a final application, the court prepares a statement explaining its reasoning.[94] Thereafter, the government may decide to withdraw a final application before the application is declined; the government may also decide not to submit a final application if it knows that the judge is likely to decline the application.[95]

Judge Walton then provided crucial insight concerning the 99% approval rate that is touted in the media. He stated that this number represents "only the number of *final* applications submitted to and acted on by the Court. *These statistics do not reflect the fact that many applications are altered prior to final submission or even withheld from final submission entirely*, often after an inclination that a judge would not approve them."[96] In a footnote, Judge Walton then made a comparison to applications under the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), pointing out that the approval rate of wiretap applications under Title III is actually higher than the approval rate for FISA applications: only five out of 13,593 were declined from 2008–2012.[97]

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90. *Id.* at 2.
91. *Id.*
92. *Id.* at 2–3.
93. *Id.* at 3.
94. *Id.*
95. *Id.*
96. *Id.* (second emphasis added).
97. *Id.* at n.6 (citing ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WIRETAP REPORT 2012, TABLE 7, http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2012/Table7.pdf). Commentators disagree over the relevance of this comparison of Title III warrant applications to FISA applications. *Compare* Joel Brenner, *The Data on FISA Warrants*, LAWFARE (Oct. 17, 2013, 6:08 PM), http://www.lawfareblog.com/2013/10/the-data-on-fisa-warrants/ ("[T]he FISA Court looks tough when compared to the way federal district courts handle wiretap applications under Title III. . . . Even if you stick with the misleading 99 percent figure [for FISA application approval], the approval rate for Title III wiretaps is higher. . . . But you won't find [this comparison] in the New York Times, the Wall Street Journal, the Washington Post, or any other news outlet. Bashing the FISA court

FISA Title V applications for bulk collection of phone call metadata records follow the same process as described, but it is "more exacting," with both the court attorney and the judge spending more time reviewing such applications than individual applications under Title I.[98] For § 702 applications (relating to the targeting of persons reasonably believed to be located outside the United States other than United States persons), the judge must determine whether the applications meet the targeting and minimization requirements of 50 U.S.C. § 1881a(d) and (e) and the requirements of the Fourth Amendment; then the judge approves the application and also issues an opinion in support, as required by the statute.[99]

One critique of the FISC process relates to the orders that the court gives pertaining to the requests for collection from the Attorney General. The critique belabors a very insignificant, and quite misleading, aspect of the orders: that they are very short.[100] Such an argument is deceptive. In the official FISC order to which this critique refers, Judge John D. Bates, in the first sentence of the order, states: "For the reasons stated in the Memorandum Opinion issued contemporaneously herewith."[101] This first sentence expressly states that, alongside the "one-paragraph form order," a complete Memorandum Opinion has also been issued that sets forth the reasoning behind the FISC's decision to approve the government's request. Such a short court order, which accompanies a longer opinion establishing the reasoning of the court, is the standard in the court system and does not

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is too much fun to let numbers get in the way."), *with* Stephen Vladeck, *Two FISA Data Questions for Joel Brenner*, LAWFARE (Oct. 18, 2013, 7:35 AM), http://www.lawfareblog.com/2013/10/two-fisa-data-questions-for-joel-brenner/ ("How many of the 'ordinary' warrants issued by federal district courts *ex parte* and *in camera* are subsequently subjected to vigorous judicial review (and invalidated) in the context of motions to suppress in criminal cases and/or civil suits for damages for unlawful surveillance? In the FISA context, we know the answer: 0.").

98. Walton July 29, 2013 Letter, *supra* note 88, at 3–4.

99. *Id.* at 5; 50 U.S.C. § 1881a(i)(3)(C).

100. *See, e.g.*, Glenn Greenwald, *FISA Court Oversight: A Look Inside a Secret and Empty Process*, THE GUARDIAN, June 18, 2013, http://www.theguardian.com/commentisfree/2013/jun/19/fisa-court-oversight-process-secrecy ("[T]he [FISC] judge then issues a *simple order* approving those guidelines. The court endorses a *one-paragraph form order* stating that the NSA's process 'contains all the required elements and . . . [the] minimization procedures . . .'are consistent with the requirements of [50 U.S.C. § 1881a(e)] and with the fourth amendment to the Constitution.'") (final brackets in original) (emphases added) (internal quotation marks removed).

101. FISC Order 702(i)–08–01, Judge John D. Bates (Aug. 19, 2010), *available at* http://www.theguardian.com/law/interactive/2013/jun/21/fisa-court-warrant-full-document.

speak to any lack of thought or consideration on the part of the FISC judge that this type of critique implies.

The government does not simply come to the FISC with an application for electronic surveillance followed by a judge blindly preparing a form order approving the surveillance. A back-and-forth exchange exists during which the court and the government communicate and the applications are reformulated in order to satisfy the requirements of the judges and FISA. In fact, on October 11, 2013, Judge Walton reported new statistics concerning the applications that are submitted to the FISC, based on new statistics the FISC began collecting in July 2013 on the rate of modifications made to electronic surveillance applications.[102] Between July 1, 2013 and September 30, 2013, 24.4% of applications that were submitted to the FISC "ultimately involved substantive changes to the information provided by the government or to the authorities granted as a result of Court inquiry or action."[103] Judge Walton believed that the modification rate during this three-month period was typical, but he stated that the FISC would continue to monitor these statistics to determine if it was out of the ordinary.[104] Thus, the over 99% approval rate that the media portrays does not tell the whole story. The statistics that the public sees are misleading and the press uses these numbers to wrongfully portray the FISC as a rubber stamp for the government's desires.[105] Indeed, as would

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102. *See* Letter from the Honorable Reggie B. Walton, Presiding Judge of the FISC, to Patrick J. Leahy, Chairman of the Sen. Comm. on the Judiciary, at 1 (Oct. 11, 2013) [hereinafter Walton Oct. 11, 2013 Letter], *available at* http://www.uscourts.gov/uscourts/courts/fisc/chairman-leahy-letter-131011.pdf.

103. *Id.*

104. *Id.*

105. Others dispute that Judge Walton's statistics are significant in proving that the FISC is a legitimate check on the applications that the government submits. *See, e.g.*, Jaikumar Vijayan, *Jury Still out on FISA Court*, COMPUTERWORLD.COM, Oct. 18, 2013, 5:00 PM, http://www.computerworld.com/s/article/9243351/Jury_still_out_on_FISA_court_?source=rss_keyword_edpicks&google_editors_picks=true ("The data alone is practically useless without a deeper sense of the nature of the push back the FISA Court is undertaking. And I, for one, am skeptical that it's as forceful as we might like it to be.") (quoting Professor Stephen Vladeck). *But see* Brenner, *supra* note 97 (Joel Brenner, former Inspector General and Senior Counsel at the NSA, stating, "Those of us with inside knowledge have long known, and publicly said, that the FISA court scrutinizes the government's applications with special care, but the data to prove it have been missing. Now we have them."). *Compare id.*, *with* Vladeck, *supra* note 97 ("[I]n assessing the significance of the 24.4% figure, shouldn't the *nature* of the substantive changes to 'the information provided by the government or the authorities granted' be relevant to any conclusions about what this data tells us re: the meaningfulness of the FISA Court's review?" (quoting Walton Oct. 11, 2013 Letter, *see supra* note 102, at 1)).

be expected, a number of FISC judges have publicly defended the work of the court.[106] This seems to raise the question: who would know whether the FISC is a rubber stamp for the government better than the judges that have actually presided over its proceedings? The judges are the experts on FISA and have analyzed, modified, and approved countless applications; they thus would know better than anyone else the extent and degree of FISC approval.

More evidence showing that the FISC is not simply a rubber stamp for the government's surveillance programs can be found in the actual orders and accompanying opinions of the FISC that have been released by the Office of the Director of National Intelligence (ODNI).[107] For example, on September 10, 2013, the ODNI released a series of FISC opinions and orders that were issued between 2008 and 2009. In December 2008, the FISC authorized the government to acquire tangible things pursuant to one of its applications to the FISC.[108] In January 2009, the government notified the FISC that it had been acquiring business records contrary to the

106. *See, e.g.*, Spencer Ackerman, *FISA Chief Judge Defends Integrity of Court over Verizon Records Collection*, THE GUARDIAN, June 6, 2013, http://www.theguardian.com/world/2013/jun/06/fisa-court-judge-verizon-records-surveillance (quoting Judge Walton, stating: "The perception that the court is a rubber stamp is absolutely false. . . . There is a rigorous review process of applications submitted by the executive branch, spearheaded initially by five judicial branch lawyers who are national security experts and then by the judges, to ensure that the court's authorizations comport with what the applicable statutes authorize."); Carrie Johnson, *Ex-FISA Court Judge Reflects: After 9/11, 'Bloodcurdling' Briefings*, NPR.ORG, July 3, 2013, http://www.npr.org/2013/07/11/198329788/fisa-court-judge-reflects-after-sept-11-bloodcurdling-meetings-and-briefings (quoting Judge Lamberth, presiding judge of the FISC from 1995 to 2002, stating: "What I found that bothered me is the notion that the court was a rubber stamp because we're approving so much. . . . We're approving it because it should be approved, because it's valid, because what the government's doing here is the kinds of things we should be doing."); Carol D. Leonnig et al., *Secret-Court Judges Upset at Portrayal of 'Collaboration' With Government*, WASH. POST, June 29, 2013, http://www.washingtonpost.com/politics/secret-court-judges-upset-at-portrayal-of-collaboration-with-government/2013/06/29/ed73fb68-e01b-11e2-b94a-452948b95ca8_story.html (quoting Judge Kollar-Kotelly, presiding judge of the FISC from 2002 to 2009, stating, in response to a leaked Inspector's General Report describing her as "amenable" by the government: "I participated in a process of adjudication, not 'coordination' with the executive branch.").

107. *See generally* IC ON THE RECORD, http://icontherecord.tumblr.com/ (last visited May 9, 2014) (providing FISC orders and opinions).

108. FISC Order Regarding Preliminary Notice of Compliance Incident Dated January 15, 2009, No. BR 08–13, Judge Reggie B. Walton, at 1 (Jan. 28, 2009), *available at* http://www.dni.gov/files/documents/section/pub_Jan%2028%202009%20Order%20Regarding%20Prelim%20Notice%20of%20Compliance.pdf.

corresponding FISC order.[109] Judge Walton subsequently ordered the government to supply the FISC with a brief to aid the court in determining "whether the Orders issued in this docket should be modified or rescinded; whether other remedial steps should be directed; and whether the Court should take action regarding persons responsible for any misrepresentations to the Court or violation of its Orders."[110] The court also required the government to answer a series of questions concerning the noncompliance.[111] In response to the government's subsequent brief to the FISC, the court on a number of occasions rebuked the government for misinterpreting the FISC's orders;[112] for "repeatedly submitting inaccurate descriptions" of its procedures to the FISC;[113] for preventing, "for more than two years, both the government and the FISC from taking steps to remedy daily violations of the minimization procedures set forth in FISC orders";[114] and for "frequently and systematically violat[ing]" the government's minimization procedures.[115] This noncompliance led the court to "no longer ha[ve] . . . confidence" that the government was fully complying with the FISC's orders.[116] The court, therefore, prohibited the government from accessing the metadata it was collecting until remedial measures had been put in place "to protect the privacy of U.S. person information acquired and retained."[117] Subsequent FISC orders and opinions from later in 2009 show the ongoing concern of the noncompliance within the government, and particularly within the NSA, with the FISC's prior requirements.[118]

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109. *See id.* at 2.

110. *Id.*

111. *Id.* at 2–4.

112. FISC Order, No. BR 08–13, Judge Reggie B. Walton, at 5 (Mar. 2, 2009), *available at* http://www.dni.gov/files/documents/section/pub_March%202%202009%20Order%20from%20FISC.pdf ("That interpretation of the Court's Orders strains credulity."). *But see* Stewart Baker, *FISA—The Uncanny Valley of Article III*, VOLOKH CONSPIRACY (Sept. 11, 2013, 12:19 AM), http://www.volokh.com/2013/09/11/fisa-uncanny-valley-article-iii/ ("[Judge Walton's] opinion dismisses the possibility that this could possibly be a good-faith misunderstanding. It's an outrage, he fumes, and efforts to explain it 'strain credulity.' Frankly, if anything strains credulity in this case, it's that line in the opinion.").

113. FISC Order, No. BR 08–13, Judge Reggie B. Walton, supra note 112, at 6.

114. *Id.* at 8–9.

115. *Id.* at 11.

116. *Id.* at 12.

117. *Id.* at 17.

118. *See e.g.*, FISC Supplemental Opinion and Order, No. BR 09–15, Judge Reggie B. Walton (Nov. 5, 2009), *available at* http://www.dni.gov/files/documents/section/pub_Nov%205%202009%20Supplemental%20Opinion%20and%20Order.pdf; FISC Order Regarding Further Compliance Incidents, BR 09–13, Judge Reggie B. Walton (Sept. 25,

These opinions and orders are further evidence that the FISC is not a simple pawn for the government. Not only do they show that the FISC is concerned about, and is not going to tolerate, noncompliance with the government, but they also show how the FISC requires that the government make the requisite changes to meet certain criteria, as mandated by the minimization procedures, to continue conducting its surveillance and using the data the NSA acquires. On the other hand, the declassified opinions demonstrate how the FISC is not able to completely control the government. The opinions make clear how the government has routinely made misrepresentations to the FISC on a number of occasions. This fact, however, does not establish that the FISC is a rubber stamp; it merely exhibits that the FISC cannot be an exhaustive check on the government and the NSA.[119] Such a distinction speaks to the relative oversight capabilities of the FISC, not to the neutrality of the court and its judges.

III. A LEGISLATIVE PROPOSAL

Arguing that the FISC is not a rubber stamp for the government does not mean, however, that the court and the entire process are perfect. Presiding Judge Walton, a strong supporter of the notion that the FISC does not simply do the government's bidding,[120] recognized this fact: "'The

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2009), *available at* http://www.dni.gov/files/documents/section/pub_Sept%2025%202009%20Order%20Regarding%20Further%20Compliance%20Incidents.pdf; FISC Order, BR 09–06, Judge Reggie B. Walton (June 22, 2009), *available at* http://www.dni.gov/files/documents/section/pub_Jun%2022%202009%20Order.pdf. *See also* FISC Memorandum Opinion, Judge John D. Bates, at 16 n.14 (Oct. 3, 2011), *available at* http://www.dni.gov/files/documents/October%202011%20Bates%20Opinion%20and%20Order%20Part%202.pdf ("The Court is troubled that the government's revelations regarding NSA's acquisition of Internet transactions mark the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program.").

119. *Compare* Carrie Cordero, *Initial Observations on Newly Declassified FISA Documents*, LAWFARE (Aug. 22, 2013, 12:01 PM), http://www.lawfareblog.com/2013/08/initial-observations-on-newly-declassified-fisa-documents/ (stating that the newly released FISC opinions show "[a] court that had the authority, ability and willingness to the [sic] direct the government to correct its actions. A Court that told the government that it could do better, and insisted that it do so."), *with* Stephen Vladeck, *Carrie Cordero Misses the Point (Again) on FISA Reform*, LAWFARE (Aug. 22, 2013, 9:01 PM), http://www.lawfareblog.com/2013/08/carrie-cordero-misses-the-point-again-on-fisa-reform/ ("[W]hy should we have *any* faith that the FISA Court is in a position to meaningfully review what the government is up to in cases *other than* those in which the government comes clean and admits that it materially misrepresented the NSA's activities to the FISA Court?").

120. *See* Ackerman, *supra* note 106.

FISC is forced to rely upon the accuracy of the information that is provided to the Court.' . . . 'The FISC does not have the capacity to investigate issues of noncompliance, and in that respect the FISC is in the same position as any other court when it comes to enforcing [government] compliance with its orders.'"[121] But just because the process is not completely perfect, does that mean that it must be reformed? Do reasonable means exist to make this necessarily secretive process better?

Numerous legislative proposals to reform the structure and process of the FISC were submitted in the months following the Snowden disclosures. On August 1, 2013, Senator Blumenthal introduced two bills that would change both the way the FISC operates and how the judges of the FISC are selected.[122] The two proposed bills were the FISA Court Reform Act of 2013[123] and the FISA Judge Selection Reform Act of 2013.[124]

A. FISA Court Reform Act of 2013

The purpose of the FISA Court Reform Act is "To establish the Office of the Special Advocate to provide advocacy in cases before courts established by [FISA]."[125] The proposed amendment would allow the presiding judge of the FISA Court of Review to appoint a Special Advocate from a list of candidates, which would be submitted by the Privacy and Civil Liberties Oversight Board (PCLOB or the Board).[126] The Special Advocate would be appointed for a five-year term,[127] would not be limited in the number of consecutive terms he or she could serve,[128] and could be

121. Carol D. Leonnig, *Court: Ability to Police U.S. Spying Program Limited*, WASH. POST, Aug. 15, 2013, http://www.washingtonpost.com/politics/court-ability-to-police-us-spying-program-limited/2013/08/15/4a8c8c44-05cd-11e3-a07f-49ddc7417125_story.html (alteration in original) (quoting Judge Reggie B. Walton).

122. *See* Press Release, Sen. Richard Blumenthal, *supra* note 18. For a discussion of the reasoning behind the selection of Senator Blumenthal's proposals for more in-depth analysis, see *supra* note 20.

123. S. 1467, 113th Cong. (2013).

124. S. 1460, 113th Cong. (2013).

125. S. 1467 Preamble.

126. *Id.* § 3(b)(2)(A)–(B). The Privacy and Civil Liberties Oversight Board (PCLOB or the Board) is an independent agency within the Executive Branch with the authority "To review and analyze actions the executive branch takes to protect the Nation from terrorism, ensuring the need for such actions is balanced with the need to protect privacy and civil liberties." PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, http://www.pclob.gov/ (last visited May 9, 2014).

127. S. 1467 § 3(b)(2)(D).

128. *Id.* § 3(b)(2)(E).

removed only for good cause.[129]

The Special Advocate would be tasked with "protect[ing] individual rights by vigorously advocating before the [FISC] . . . in support of legal interpretations that minimize the scope of surveillance and the extent of data collection and retention."[130] The Special Advocate would review every application to the FISC submitted by the government;[131] would review each FISC decision in "a complete, unredacted form";[132] would participate in any proceedings before the FISC, either by request or if appointed by the FISC;[133] and would be permitted to request reconsideration of a FISC decision and participate in any appeal or review.[134] The Special Advocate would be given the authority to designate an outside counsel who would be allowed to participate in matters before the FISC, the FISA Court of Review, or the Supreme Court,[135] and who would be given access, along with the Special Advocate, to any documents before the court.[136]

The amendment grants standing to the Special Advocate to participate in a proceeding before the FISC, an appeal before the FISA Court of Review, or the Supreme Court.[137] Additionally, amici curiae would be permitted to participate in any proceedings, including participation in oral argument, either through a motion filed by the Special Advocate with the FISC or sua sponte by the FISC itself.[138]

The Act would require the Attorney General to disclose all significant FISC and FISA Court of Review decisions made after July 10, 2003, any decision of the FISC that the Special Advocate appealed, and any FISA Court of Review decision.[139] The Attorney General could satisfy the disclosure requirements by releasing a decision either in its entirety or

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129. *Id.* § 3(b)(2)(D). Good cause would include the inability of the appointed Special Advocate to qualify for the requisite security clearance. *Id.*

130. *Id.* § 3(d)(2).

131. *Id.* § 3(d)(1)(A).

132. *Id.* § 3(d)(1)(B).

133. *Id.* § 3(d)(1)(C)–(E).

134. *Id.* § 3(d)(1)(F)–(H).

135. *Id.* § 3(d)(3)(A).

136. *Id.* § 3(d)(4).

137. *Id.* §§ 4(a)(1)–(2), 5(a)(2), 5(b)(2).

138. *Id.* § 4(c)(1)–(2).

139. *Id.* § 6(a)(1)–(3) (providing an exception for national security). Decisions made after July 10, 2003 must be released within 180 days of the enactment of the Act; FISC decisions appealed by the Special Advocate must be disclosed within 30 days of the appeal; FISA Court of Review decisions appealed by the Special Advocate must be released within 90 days of the appeal. *Id.* § 6(e).

redacted, by releasing a summary of a decision, or by releasing a FISC application and any briefs filed in their entirety or redacted.[140]

Many commentators have recommended and applauded proposals to create a Special Advocate, like the FISA Court Reform Act, with an eye toward making proceedings before the FISC more adversarial.[141] The proposed amendment, nonetheless, raises a number of substantial concerns from administrative or constitutional law and national security perspectives. Concerns include: the provisions for appointment and removal of the Special Advocate, the status of the Special Advocate's standing before the FISC and during the appeals process, and the effectiveness of the disclosure requirements.

Appointment and Removal. The Appointments Clause grants the President the power to nominate "Officers of the United States" with the advice and consent of the Senate, and Congress the power to "vest the Appointment of such inferior Officers, . . . in the President alone, in the Courts of Law, or in the Heads of Departments."[142] An officer is "any appointee exercising significant authority pursuant to the laws of the United States."[143]

The FISA Court Reform Act grants the presiding judge of the FISA Court of Review the power to appoint the Special Advocate from a list of candidates submitted by the PCLOB.[144] Whether the appointment of the Special Advocate under this scheme is constitutional turns first on whether the Special Advocate is an officer of the United States. Because the Special Advocate would have "wide, significant, and permanent authority to

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140. *Id.* § 6(c)(1)–(3).

141. *E.g.*, James G. Carr, *A Better Secret Court*, N.Y. TIMES, July 22, 2013, http://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html?_r=0; Orin Kerr, *A Proposal to Reform FISA Court Decisionmaking*, VOLOKH CONSPIRACY (July 8, 2013, 1:12 AM), http://www.volokh.com/2013/07/08/a-proposal-to-reform-fisa-courtdecisionmaking/. *But see, e.g.*, Stewart Baker, *Critiquing FISA Reforms*, VOLOKH CONSPIRACY (Aug. 1, 2013, 5:54 AM), http://www.volokh.com/2013/08/01/critiquing-fisa-reforms/ ("There may be a dozen offices that think their job is to act as a check on the intelligence community's use of FISA. . . . To that army of second-guessers, are we really going to add yet another lawyer, this time appointed from outside the government?"); Carrie Cordero, *Thoughts on the Proposals to Make FISA More Friendly*, LAWFARE (Aug. 12, 2013, 1:17 PM), http://www.lawfareblog.com/2013/08/thoughts-on-the-proposals-to-make-fisa-more-friendly/ ("Adding a special advocate to evaluate surveillance activities for civil liberties issues actually duplicates the work that dozens of lawyers currently perform in the FISA process.").

142. U.S. CONST. art. II, § 2, cl. 2.

143. Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam). Not all employees of the United States are considered officers: "Employees are lesser functionaries subordinate to officers of the United States." *Id.* at 126 n.162.

144. S. 1467, 113th Cong. § 3(b)(2)(A)–(B) (2013).

litigate on behalf of the privacy and civil liberties interests of the general public" and would be able to "seek judicial relief that would bar certain foreign intelligence gathering by the executive branch," the Special Advocate would be exercising "significant" and "sovereign" authority on behalf of the United States and would thus constitute an officer.[145] Others, however, contend that the Special Advocate would not be a senior officer because he or she "would not exercise significant government authority."[146]

If the Special Advocate were an officer of the United States, then whether his or her status is a principal or inferior officer must be determined. The Supreme Court has applied two different tests for determining whether an officer is principal or inferior. First, in *Morrison v. Olson*,[147] the Court laid out four factors to consider in making this determination: (1) whether the officer is "subject to removal by a higher Executive Branch official"; (2) whether the officer "is empowered by the Act to perform only certain, limited duties"; (3) whether the officer's office "is limited in jurisdiction"; and (4) whether the officer's office "is limited in tenure."[148] In *Edmond v. United States*,[149] on the other hand, Justice Scalia applied a test that he first iterated in his dissenting opinion in *Morrison*:[150] "the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior."[151] Additionally, "'inferior officers'

145. ANDREW NOLAN ET AL., CONG. RESEARCH SERV., 7-5700, INTRODUCING A PUBLIC ADVOCATE INTO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT'S COURTS: SELECT LEGAL ISSUES 10 (2013) [hereinafter CRS REPORT], *available at* http://www.fas.org/sgp/crs/intel/advocate.pdf. For a more recent analysis of the issues that arise in introducing a public advocate into the FISC proceedings, see generally ANDREW NOLAN ET AL., CONG. RESEARCH SERV., R43260, REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: INTRODUCING A PUBLIC ADVOCATE (2014), *available at* http://www.fas.org/sgp/crs/intel/R43260.pdf.

146. Marty Lederman & Stephen Vladeck, *The Constitutionality of a FISA "Special Advocate"*, JUST SECURITY (Nov. 4, 2013, 1:34 PM), http://justsecurity.org/2013/11/04/fisa-special-advocate-constitution/ (noting that the advocate would simply present non-binding legal arguments, would not be able to sue to enforce compliance, and would only be permitted to participate before the FISC after the government had filed a surveillance application).

147. 487 U.S. 654 (1988).

148. *Id.* at 671–72 (applying the factors and concluding that the independent counsel is an inferior officer and thus need not be appointed by the President with the advice and consent of the Senate).

149. 520 U.S. 651 (1997).

150. *Morrison*, 487 U.S. at 720 (Scalia, J., dissenting) ("Of course one is not a 'superior officer' without some supervisory responsibility, just as, I suggest, one is not an 'inferior officer' . . . unless one is subject to supervision by a 'superior officer.'").

151. *Edmond*, 520 U.S. at 662.

are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[152] An inferior officer is therefore one who is controlled by an officer appointed by the President and confirmed by the Senate.[153]

Applying the *Morrison* criteria to the FISA Court Reform Act, it is unclear whether the Special Advocate is a principal or inferior officer. The Special Advocate can only be fired for cause, but it is not apparent whether this is enough to constitute being "subject to removal by a higher Executive Branch official."[154] In *Morrison*, the Court concluded that because the independent counsel could be removed for cause by the Attorney General, the first prong was met.[155] In contrast, the FISA Court Reform Act does not establish who would have the authority to remove the Special Advocate. The Court in *Morrison* determined that the independent counsel, even though she was granted "'full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice,'" had only "certain, limited duties."[156] In this case, the Special Advocate is not given such sweeping responsibility. He or she is granted authority to review each FISC application, to review each FISC or FISA Court of Review decision and all relevant materials, to participate in proceedings before the FISC, and to appeal a decision and participate in such appeal.[157] The Special Advocate can also delegate duties to outside counsel and obtain access to any documents to carry out his or her duties.[158] The Special Advocate's duties are, in effect, limited, so the Supreme Court would likely find that the Special Advocate would be an inferior officer based on *Morrison*'s second prong.

The third *Morrison* factor—limited jurisdiction—demonstrates that the Special Advocate would be an inferior officer. In *Morrison*, the independent counsel's jurisdiction was limited.[159] Under the FISA Court Reform Act, the Special Advocate is appointed solely to advocate for privacy rights.[160] He or she is not given the authority to do any other sort of investigation,

152. *Id.* at 663.
153. *See* CRS REPORT, *supra* note 145, at 12.
154. *Morrison*, 487 U.S. at 671.
155. *Id.*
156. *Id.*
157. S. 1467 § 3(d)(1)(A)–(H).
158. *Id.* § 3(d)(3)–(4).
159. *Morrison*, 487 U.S. at 672 (noting that jurisdiction was limited to investigating serious crimes of certain federal officials).
160. S. 1467 § 3(d)(2).

which demonstrates limited jurisdiction. The last factor—limited tenure—points to the Special Advocate being a principal officer. In *Morrison*, the independent counsel was "appointed essentially to accomplish a single task, and when that task [was] over the office [was] terminated."[161] On the other hand, the office of the Special Advocate is "established in the executive branch as an independent establishment," is appointed for a term of five years, and is permitted to serve for an unlimited number of terms.[162] Such language implies that the office itself is permanent and is not being established solely to advocate for privacy rights in only a single proceeding before the FISC; the Special Advocate is performing more than "a single task."[163]

Applying the *Edmond* criteria to the FISA Court Reform Act, however, leads to the clearer conclusion that the Special Advocate is a principal officer. The Special Advocate is not an officer "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[164] Though the Special Advocate is chosen from a list compiled by the PCLOB,[165] the Act gives no indication whether the PCLOB or any other government official would supervise the Special Advocate. On the contrary, the Act establishes the Office of the Special Advocate as "an independent establishment" within the Executive Branch.[166]

Analyzing the Office of the Special Advocate this way demonstrates that Article II Appointments Clause issues may arise in the FISA Court Reform Act. It is unclear whether the Special Advocate would even be considered an "Officer of the United States" and thus subject to the Appointments Clause. Then, if the Special Advocate is considered an officer, whether he or she is a principal or inferior officer varies based on the *Edmond* and *Morrison* standards. Under *Edmond* the Special Advocate is clearly a principal officer, but the distinction is more ambiguous under *Morrison.*

This principal or inferior distinction determines whether the Special Advocate, due to his or her status as a principal or inferior officer, must be appointed by the President. If the Special Advocate is a principal officer, then, under the Appointments Clause, the President must appoint him or her with the advice and consent of the Senate. On the other hand, if the Special Advocate is an inferior officer, then Congress could confer the

161. *Morrison*, 487 U.S. at 672.
162. S. 1467 § 3(a), (b)(2)(D)–(E).
163. *Morrison*, 487 U.S. at 672.
164. Edmond v. United States, 520 U.S. 651, 663 (1997).
165. S. 1467 § 3(b)(2)(B).
166. *Id.* § 3(a).

appointment power to a court through legislation. If this were the case, then the fact that the presiding judge of the FISA Court of Review would be choosing the Special Advocate from a list provided by the PCLOB would likely not raise any constitutional issues.

Standing. Article III of the U.S. Constitution grants the courts the power to hear only "cases" and "controversies."[167] One of the "essential and unchanging part[s] of the case-or-controversy requirement of Article III" is the doctrine of standing.[168] The standing doctrine contains three elements: "injury in fact," "a causal connection between the injury and the conduct complained of," and likelihood "that the injury will be 'redressed by a favorable decision.'"[169]

The FISA Court Reform Act grants the Special Advocate standing when the FISC has appointed him or her to be a participant in a FISC proceeding.[170] One can debate whether the FISC proceedings "are an adjudicatory function of an Article III court and require adherence to Article III's case-or-controversy requirement" or are "merely incidental to the traditional Article III powers of a federal court."[171] Nonetheless, since the government is the party bringing the case and the Special Advocate would not be a party to the case,[172] it does not seem "that a public advocate who has a more limited role in the FISA proceedings . . . would . . . be constitutionally infirm under Article III."[173]

Issues arise, however, when the Special Advocate is granted standing when he or she makes an appeal of a FISC ruling to the FISA Court of Review or then to the Supreme Court,[174] given that the special advocate has not suffered any personal harm.[175] Because standing requires that the

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167. U.S. CONST. art. III, § 2, cl. 1.

168. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

169. *Id.* at 560–61 (citations and internal quotation marks omitted). The "injury in fact" must be "(a) concrete and particularized" and "(b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (citations and internal quotation marks omitted).

170. S. 1467 § 4(a)(1)–(2).

171. CRS REPORT, *supra* note 145, at 19–20. For a more extensive discussion of whether FISC proceedings are subject to Article III requirements, see *id.* at 14–19.

172. *See* Lederman & Vladeck, *supra* note 146.

173. CRS REPORT, *supra* note 145, at 21; *see also* Stephen I. Vladeck, *Standing and Secret Surveillance*, 9 I/S: J.L. & POL'Y FOR INFO. SOC'Y 1, 24 (forthcoming 2014), *available at* http://ssrn.com/abstract=2351588 ("At least with regard to proceedings before the FISA Court, the creation of a 'special advocate,' however conceived, should not raise any new Article III concerns (if anything, it should mitigate any existing constitutional objections).") (footnote omitted).

174. S. 1467 § 5(a)(2), (b)(2).

175. CRS REPORT, *supra* note 145, at 21–22.

injury is "concrete and particularized,"[176] not generalized,[177] and because a party must have standing "not just at the beginning of a suit . . . but also standing to *appeal*,"[178] the Special Advocate would have difficulty meeting the Article III appellate standing requirements. Additionally, the standing requirement is not overcome solely because Congress permits it: "Congress cannot obviate the standing requirements by statutorily authorizing the advocate to appeal a FISC ruling."[179]

The FISA Court Reform Act, therefore, appears to raise issues of appellate standing under Article III, even though it may not lead to any concerns for initial proceedings before the FISC. It is unlikely that the Special Advocate would be able to demonstrate any concrete and specific injury to meet the Article III standing requirements. Such a concern is not present in the proceedings before the FISC because the government is the party initially bringing the case, not the Special Advocate. This means that, under the FISA Court Reform Act, the Special Advocate would have standing initially when the applications are brought before the FISC, but the Special Advocate's standing on appeal becomes dubious. Because the Special Advocate is granted the authority to appeal, the fact that the Advocate's standing may no longer exist on appeal raises constitutional standing issues with the Act.

Disclosure. Under the proposed amendment, the Attorney General would be required to disclose many FISC and FISA Court of Review decisions made after July 10, 2003 in various potential formats—releasing opinions in their entirety or in redacted form, releasing summaries of decisions, or releasing the applications and briefs.[180] The disclosures would be part of efforts to promote transparency in the intelligence community's surveillance

176. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); *see also supra* note 169 (laying out the requirements for an injury).

177. *See* Flast v. Cohen, 392 U.S. 83, 106 (1968) (concluding that a taxpayer cannot "seek to employ a federal court as a forum in which to air his generalized grievances about the conduct of government").

178. Vladeck, *Standing and Secret Surveillance*, *supra* note 173, at 24 (emphasis in original) (citing Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997)); *see also* Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013) ("To have standing, a litigant must seek relief for an injury that affects him in a 'personal and individual way.' He must possess a 'direct stake' in the outcome of the case.") (finding that appellants lacked standing to appeal). For further discussion of how *Perry* affects the appellate standing of the Special Advocate before the FISA Court of Review and the Supreme Court, see generally Vladeck, *supra* note 173, at 24–26, and CRS REPORT, *supra* note 145, at 22–24.

179. CRS REPORT, *supra* note 145, at 22 (citing Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009); Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997); Gladstone, Realtors v. Bellwood, 441 U.S. 91, 100 (1979)).

180. *See* S. 1467 § 6(a)(1)–(3), (c)(1)–(3).

methods and also in the FISA and FISC processes. The issues of disclosure focus predominantly on disclosure to the American public, because procedures exist for Congress to be well-informed on the surveillance that the Executive Branch performs.[181] Disclosure to the public obviously raises national security concerns, as David Kris points out: "At one level, of course, keeping classified information from the American People is exactly what the Intelligence Community is supposed to do, because there is no way to inform the American People without also informing the People's

181. Transparency regarding the government's bulk collection methods and the authorizations given by the FISC appears to have been extensive throughout Congress generally and particularly within the Senate and House Select Intelligence Committees and the Judiciary Committees. For a far-reaching analysis of the extent of congressional knowledge and oversight of the scope of the surveillance programs, see generally David S. Kris, *On the Bulk Collection of Tangible Things*, LAWFARE RESEARCH PAPER SERIES, Sept. 2013, 1, 41–59 (2013), *available at* http://www.lawfareblog.com/wp-content/uploads/2013/09/Lawfare-Research-Paper-Series-No.-4-2.pdf (discussing the extent to which members of Congress had been given the opportunities to review the government's bulk collection methods and the opinions of the FISC) (quoting Senator Saxby Chambliss, the Vice Chair of the Senate Intelligence Committee, as stating in 2012: "In matters concerning the FISA Court, the congressional Intelligence and Judiciary Committees serve as the eyes and ears of the American people. Through this oversight, which includes being given all significant decisions, orders, and opinions of the court, we can ensure that the laws are being applied and implemented as Congress intended."). *Compare* Marcy Wheeler, *How Mike Rogers' Excessive Secrecy in 2011 Might Kill the Dragnet*, EMPTYWHEEL.NET (Sept. 17, 2013), http://www.emptywheel.net/2013/09/17/how-mike-rogers-excessive-secrecy-in-2011-may-kill-the-dragnet/?utm_source=rss&utm_medium=rss&utm_campaign=how-mike-rogers-excessive-secrecy-in-2011-may-kill-the-dragnet ("[A] very large block of Congresspersons . . . appear to have had no such opportunity to learn about the program."), *and* Orin Kerr, *My (Mostly Critical) Thoughts on the August 2013 FISC Opinion on Section 215*, VOLOKH CONSPIRACY (Sept. 17, 2013, 7:39 PM), http://www.volokh.com/2013/09/17/thoughts-august-2013-fisc-opinion-section-215/ ("[F]ew members of Congress knew of the opinions . . . ."), *and* Alan Grayson, *Congressional Oversight of the NSA Is a Joke. I Should Know, I'm in Congress*, THE GUARDIAN, Oct. 25, 2013, http://www.theguardian.com/commentisfree/2013/oct/25/nsa-no-congress-oversight ("Despite being a member of Congress possessing security clearance, I've learned far more about government spying on me and my fellow citizens from reading media reports than I have from 'intelligence' briefings . . . . I've requested information, and further meetings with NSA officials. The House Intelligence Committee has refused to provide either."), *with* Benjamin Wittes & Jane Chong, *Congress Is Still Naked*, LAWFARE (Sept. 19, 2013, 12:03 AM), http://www.lawfareblog.com/2013/09/congress-is-still-naked/#more-25155 ("Both committees were kept fully apprised, as they have both made clear. . . . So the question is really limited to whether non-committee members were kept informed in advance of their votes . . . . [T]he answer to this question is also unambiguous."), *and* Cordero, *supra* note 141 ("Today's FISA collection is probably the most oversight-laden foreign intelligence activity in the history of the planet.").

adversaries."[182] Kris goes on to explain, however, that reasonable, though time-consuming and difficult, methods do exist to promote better public disclosure.[183]

Judge Walton has also addressed the national security and practical obstacles to disclosure. One obstacle to releasing summaries of FISC opinions is that, unlike summaries of federal court opinions, which are accompanied by the full opinion, "nuanced or technical points of a court's analysis" may be lost in a summary of a FISC decision, creating a risk of confusion without the full opinion to fall back on.[184] Additionally, in most FISC opinions, "the facts and the legal analysis are so inextricably intertwined that excising the classified information from the FISC's analysis would result in a remnant void of much or any useful meaning."[185] Thus, the summaries would not "meaningfully inform[] the public."[186] Problems also exist with revisiting prior opinions and writing post hoc summaries, potentially written by judges who did not write the original opinions.[187] Resource concerns are also present: writing summaries would take time away from the FISC judges fulfilling their current obligations.[188] Judge Walton further points out that procedures already do exist for FISC orders and opinions to be made public.[189]

Though further transparency and public disclosure would help to bring more legitimacy to the FISA process and help alleviate the "rubber-stamping" concerns of the FISC, national security and practical problems exist in simply allowing for full publication of FISC orders and opinions.

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182. Kris, *supra* note 181, at 59.

183. Methods could include reestablishing the annual reports that existed during the first five years of FISA and releasing them to the public. *See id.* at 62–63 ("Such public reporting . . . would require considerable and sustained effort from the two political branches . . . but it could be done. Of course . . . significant limits would remain, meaning that much would need to remain secret, but it would be reasonable to expect at least incremental gains in transparency and public understanding.").

184. *See* Letter from the Hon. Reggie B. Walton, Presiding Judge of the FISC, to Sen. Dianne Feinstein, Chairwoman, S. Select Comm. on Intel. (Mar. 27, 2013) [hereinafter Walton Mar. 27, 2013 Letter], *available at* http://www.fas.org/irp/agency/doj/fisa/fisc-032713.pdf (responding to Letter from Sen. Feinstein, Chairwoman, S. Select Comm. on Intel., to the Hon. John D. Bates, Presiding Judge of the FISC (Feb. 13, 2013), *available at* http://www.fas.org/irp/agency/doj/fisa/fisc-021313.pdf.).

185. *Id.* at 2.

186. *Id.*

187. *See id.*

188. *Id.*

189. *Id*; *see* FISC R. Procedure 62(a) (Nov. 1, 2010), *available at* http://www.fas.org/irp/agency/doj/fisa/fiscrules-2010.pdf (providing a mechanism for releasing opinions with necessary redactions).

The Executive Branch has already started to release a substantial number of previously classified documents,[190] but it is yet to be seen whether such disclosures will lead to greater transparency and to what extent the publications may have an effect on national security.[191]

B. FISA Judge Selection Reform Act of 2013

The purpose of the FISA Judge Selection Reform Act is "To create two additional judge positions on the court established by [FISA] and modify the procedures for the appointment of judges to that court."[192] The proposed amendment would increase the number of judges on the court from eleven to thirteen.[193] Under the current version of FISA, eleven district court judges are chosen from at least seven of the Federal Circuit Courts of Appeals, three of whom must reside within twenty miles of the District of Columbia, where the court sits.[194] Under the proposed bill, the thirteen judges would be designated from each of the thirteen Federal Circuit Courts of Appeals.[195] There is no requirement that a minimum number of judges reside within any established distance of the District of Columbia.

Currently, each of the eleven district court judges that sits on the FISC is chosen by the Chief Justice of the Supreme Court.[196] Under the reforms, the chief judge of the circuit where there is a vacancy will propose a district judge from that circuit.[197] The Chief Justice of the Supreme Court has the discretion to appoint the nominee, and if he chooses not to, the chief judge will propose two other district judges from that circuit and the Chief Justice must then designate one of them to fill the vacant position.[198] Eleven of the FISC judges, therefore, will be appointed as the vacancy from the circuit that he or she represents becomes available. The other two judges,

190. *See generally* IC ON THE RECORD, *supra* note 107.

191. *See* Kris, *supra* note 181, at 67 ("As a democracy that runs on informed public debate but also engages in classified intelligence activity, America has struggled with the proper balance between secrecy and transparency. Recent disclosures have brought that struggle into much sharper relief, and have called into question the balance struck and maintained since the 1970s. It remains to be seen whether those disclosures will yield substantial, enduring change.").

192. S. 1460, 113th Cong. Preamble (2013).

193. *Id.* § 3(a).

194. 50 U.S.C. § 1803(a) (2006).

195. S. 1460 § 3(a).

196. 50 U.S.C. § 1803(a).

197. S. 1460 § 3(a)(1)(C).

198. *Id.*

representing the District of Columbia and Federal Circuits, are to be designated by the Chief Justice within 180 days of the enactment of the Act after being proposed by the chief judges of those circuits.[199] The current members of the FISC will finish up their scheduled terms before a new judge is designated.[200] The judges of the FISA Court of Review under the proposed bill would be designated by the Chief Justice, just as in the current version of FISA,[201] but the proposal would require that at least five associate Supreme Court justices approve each designation.[202] All of the judges would serve for a maximum of seven years, except for the district judge representing the Federal Circuit, who would only serve an initial term of four years.[203]

Senator Blumenthal proposed the FISA Judge Selection Reform Act "to ensure that the court is geographically and ideologically diverse and better reflects the full diversity of perspectives on questions of national security, privacy, and liberty."[204] He argued the current system "has failed to produce a panel of FISA judges representing diverse perspectives," particularly "the diversity of viewpoints held by the American people—not just the preferences of the Chief Justice of the Supreme Court."[205]

At first glance, the FISA Judge Selection Reform Act would appear to alter the designation of judges to the FISC in order to promote more

199. *Id.* § 3(a)(1)(C)(i).

200. *Id.*

201. 50 U.S.C. § 1803(b).

202. S. 1460 § 3(b)(2).

203. *Id.* § 3(a)(3)(B).

204. Press Release, Sen. Richard Blumenthal, *supra* note 18.

205. *Id.* (pointing out the fact that ten of the eleven current FISC judges were appointed to the federal bench by Republican presidents, that 86% of Chief Justice Roberts's designees have been Republican appointees, and that half of them have been former Executive Branch officials). But he also noted that the current makeup of the FISC "may not lead to bias." Press Release, Sen. Richard Blumenthal, Blumenthal Delivers Major Policy Address at Harvard Law School on Legislation to Reform FISA Courts (Aug. 8, 2013), http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-delivers-major-policy-address-at-harvard-law-school-on-legislation-to-reform-fisa-courts. Senator Blumenthal then backtracked, stating that "the issue we are grappling with is one of perception and the very essence of impartial justice. A court that appears not to reflect a diversity of viewpoints inevitably gives rise to the appearance of bias." *Id.* Should solely the appearance of bias necessitate a complete overhaul of the composition of the FISC? *See also* Charlie Savage, *Roberts's Picks Reshaping Secret Surveillance Court*, N.Y. TIMES, July 25, 2013, http://www.nytimes.com/2013/07/26/us/politics/robertss-picks-reshaping-secret-surveillance-court.html?pagewanted=1&http://www.nytimes.com/2013/07/26/us/politics/robertss-picks-reshaping-secret-surveillance-court.html?&_r=0 (raising the same concerns over the composition of the FISC as Senator Blumenthal).

diversity—simply the fact that more than one person (the thirteen chief judges of the circuit courts vs. the one Chief Justice) would have a voice in who gets chosen to sit on the court suggests this is the case. It is hard to argue with the recommendations of thirteen individuals, instead of just the decision of one individual, as representing a greater diversity of viewpoints. The question remains as to whether this system will produce the desired diversity in practice. If one of the dominant critiques of the composition of the FISC is that it is dominated by Republican appointees, to answer that criticism the new proposed system should establish a greater balance between Republican and Democratic appointees. The only way to determine if such a balance would be achieved is to analyze how the new selection process would occur in practice. The proposal appears to promote greater diversity, at least in terms of political affiliations, but if the same patterns remain, then the proposal fails to accomplish its goal.

To start with, the current membership of the FISC must be examined. The eleven current judges represent nine different circuits.[206] This means that four circuits are not currently represented and judges from these circuits would have to be added to the court at some point to follow the proposed reform.[207] The current judges will end their terms on the court between 2014 and 2020.[208] Pursuant to the proposed amendment, when a current member of the court completes his or her term, the chief judge from whichever circuit that judge represented will make a recommendation from the pool of district judges within that circuit.[209] The district judges who will be recommended from each circuit, therefore, will depend upon who the chief judge of each circuit is at the time that circuit's seat on the FISC is made available. It is thus necessary to analyze who the chief judges will be and by whom they were appointed (Republican vs. Democratic president) in order to determine whether the FISC will actually be more diverse than it is currently.[210]

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206. Current judges represent the First, Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and District of Columbia Circuits. The Fourth, Sixth, Eleventh, and Federal Circuits are not currently represented. For a listing of and statistics on the current and past composition of the FISC, see FEDERATION OF AMERICAN SCIENTISTS, *Current and Past Members of the Foreign Intelligence Surveillance Court (May 2013)*, FAS.ORG https://www.fas.org/irp/agency/doj/fisa/fisc-members.pdf (last visited May 9, 2013).

207. S. 1460 § 3(a).

208. *See Current and Past Members of the Foreign Intelligence Surveillance Court (May 2013)*, *supra* note 206.

209. S. 1460 § 3(a)(1)(C).

210. The following analysis assumes that the current chief judges would appoint nominees to the FISC from the same party that they were appointed by. Because the current critique of the FISC, and one of the motivating factors behind the FISA Judge

To determine whether the chief judge of a particular circuit is likely to choose a district judge for the FISC who will be either a Republican or a Democratic appointee, it must be established who will be the chief judge of each circuit, based upon the selection process, at the time that each circuit's seat on the FISC is made available.[211] A couple of examples will illustrate how the new process will play out in practice.[212]

(1) The current Chief Judge of the First Circuit is the Honorable Sandra L. Lynch.[213] Judge Lynch was an appointee of President Bill Clinton and she became Chief Judge of the First Circuit in 2008. Unless she retires earlier, in 2015 a new chief judge will be appointed to the First Circuit.[214] Based upon the required criteria,[215] the next First Circuit judge in line to become chief is the Honorable Jeffrey R. Howard. Judge Howard was appointed by President George W. Bush. The current district judge on the FISC who represents the First Circuit is the Honorable F. Dennis Saylor, IV. Judge Saylor's term on the FISC is scheduled to end in 2018.[216] Judge Howard, therefore, would be the chief judge from the First Circuit who would be selecting the next district judge from the First Circuit to be represented on the FISC. Because Judge Howard was a Republican appointee, it is assumed that he would also appoint a Republican appointee to the FISC.[217]

Selection Reform Act as proposed by Senator Blumenthal, rests on Chief Justice Roberts having appointed ten of the current eleven judges, the assumption behind the bill is that greater diversity in appointment power will create greater diversity in judges. Thus, even if chief judges do not follow exact party-line appointments, the analysis should achieve greater diversity.

211. *See* 28 U.S.C. § 45 (2012) (detailing requirements, such as age and length of service, for appointments of chief judge to the federal circuit courts).

212. In the examples that follow, for the sake of simplicity, it is being assumed that the FISA Judge Selection Reform Act of 2013 will be passed sometime in 2014.

213. For information on the composition of the First Circuit, see generally JUDGES, UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, http://www.ca1.uscourts.gov/judges (last visited May 9, 2014).

214. For the sake of simplicity, these examples are based upon the presumption that the current chief judges of the circuit courts will end their chief judgeships according to the normal process, i.e. their seven-year terms end or they reach seventy years of age before their seven-year terms end. The examples are also based upon the presumption that the circuit judges next in line to become the chief judges will remain on the circuit court until that time and through their seven-year terms.

215. 28 U.S.C. § 45.

216. As is the case with the chief judges of the circuit courts, *see* discussion *supra* note 214, the examples are also based upon the presumption, for the sake of simplicity, that the terms of the current FISC judges will end according to the normal process, i.e., when their seven-year terms end.

217. *See* discussion *supra* note 210.

(2) The current chief judge of the Second Circuit is the Honorable Robert A. Katzmann.[218] Judge Katzmann was an appointee of President Bill Clinton and he became Chief Judge of the Second Circuit in 2013, where he is scheduled to remain until 2020. The current district judge on the FISC who represents the Second Circuit is the Honorable Raymond J. Dearie. Judge Dearie's term on the FISC is scheduled to end in 2019. Judge Katzmann, therefore, would be the Chief Judge from the Second Circuit who would be selecting the next district judge from the Second Circuit to be represented on the FISC. Because Judge Katzmann was a Democratic appointee, it is assumed that his selection to the FISC will also be a Democratic appointee.

These two examples illustrate how the process of selecting the next FISC judges will take place under the FISA Judge Selection Reform Act. At times it will be a Republican-appointed chief judge who will be selecting the next FISC judge from any one circuit and at other times it will be a Democrat-appointed chief judge who would be making the selection, based upon when each circuit's FISC seat becomes available. If the full analysis is followed for each circuit, the final number of presumably Democrat-appointed FISC judges for the next round of selection to the court would be five and the final number of presumably Republican-appointed FISC judges would be three. There are several reasons why there are only eight FISC judges in total, and not the required thirteen.

The current composition of the FISC does not have representative district judges from the Fourth, Sixth, or Eleventh Circuit Courts. It is unknown, therefore, exactly when the position for a new FISC judge from these circuits will be available. Currently on the FISC are three representative judges from the District of Columbia Circuit.[219] A new procedure has been established through the Act for the selection of a FISC judge from the District of Columbia Circuit;[220] thus, when the first District of Columbia Circuit FISC seat becomes available in 2014, a new district judge from the District of Columbia Circuit will not be chosen. At that time, presumably, one of the three numbered circuits without a current representative on the FISC (the Fourth, Sixth, or Eleventh Circuits) will take this position and then, as the other two seats currently occupied by District of Columbia Circuit district judges become available in 2016 and 2020, the other two numbered circuits that were not chosen in 2014 will

218. For information on the composition of the Second Circuit, see generally JUDGES, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, http://www.ca2.uscourts.gov/judges/judges.html (last visited May 9, 2014).

219. As required under 50 U.S.C. § 1803.

220. S. 1460 § 3(a).

take those positions. The Act, however, does not include any provision to address this scenario. Indeed, the Act does not state when and how any of these three circuit representatives will be added. Consequently, it cannot be determined whether the representatives from the Fourth, Sixth, and Eleventh Circuits will be selected by Republican- or Democrat-appointed chief judges.

Additionally, who the representatives to the FISC from the District of Columbia and Federal Circuits (who are selected through a slightly different procedure)[221] will be is largely dependent on when the FISA Judge Selection Reform Act would come into effect. If the Act takes effect some time in 2014, then, within 180 days after the date of enactment, the Chief Justice would have to designate the representatives from the District of Columbia and Federal Circuits from selections of the Circuits' chief judge. The current Chief Judge of the District of Columbia Circuit is the Honorable Merrick B. Garland, a President Clinton appointee, who was appointed Chief Judge in 2013 and whose seven-year term will expire in 2020.[222] The current Chief Judge of the Federal Circuit is the Honorable Randall R. Rader, a President George H. W. Bush appointee, who was appointed Chief Judge in 2010 and whose seven-year term will expire in 2017.[223] The representatives from these circuits, therefore, would include one Republican-appointed judge and one Democrat-appointed judge. This would bring the current total up to six Democrat-appointed FISC judges and four Republican-appointed judges, with the final three seats unknown.

This analysis demonstrates that, if the process goes perfectly, the next round of FISC judges will consist of an almost even split of Republican- and Democrat-appointed district judges, or, at the least, the selections to the FISC will be made by an almost even split of Republican- and Democrat-appointed circuit chief judges. Does this mean that the new system of selecting FISC judges is a resounding success that achieves the "geographical[] and ideological[] divers[ity]"[224] that Senator Blumenthal was seeking? Not necessarily; other considerations may be involved.

In 2007, Professor Theodore Ruger analyzed the appointments that

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221. *Id.*

222. For information on the composition of the U.S. Court of Appeals for the District of Columbia Circuit, see generally JUDGES, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, http://www.cadc.uscourts.gov/internet/home.nsf/Content/Judges (last visited May 9, 2014).

223. For information on the composition of the Federal Circuit, see generally JUDGES, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://www.cafc.uscourts.gov/judges/randall-r-rader-chief-judge.html (last visited May 9, 2014).

224. Press Release, Sen. Richard Blumenthal, *supra* note 18.

Chief Justice Rehnquist made to the FISC during his tenure as Chief Justice from 1986 until his death in 2005.[225] In an effort to discover whether Chief Justice Rehnquist typically appointed judges to the FISC who were politically conservative and more likely to side with the government, Professor Ruger reviewed hundreds of Fourth Amendment rulings made by the twenty-five judges that Chief Justice Rehnquist appointed to the court.[226] He also looked at the political parties of the presidents who appointed those district judges.[227] This analysis led to "a picture of twenty-five Rehnquist-selected judges who are primarily Republican appointees, who skew in a conservative direction . . . [and] who ruled in the government's favor in a large majority of the Fourth Amendment questions presented to them."[228]

Professor Ruger took the analysis further, and selected a random group of twenty-five district judges from the same pool from which the Chief Justice selected his FISC judges and analyzed them in the same manner. Professor Ruger found that "the Rehnquist [FISC] judges may be conservative both in general, and on Fourth Amendment issues in particular, but this conservatism appears to reflect the baseline of the federal judiciary rather than an unrepresentative cohort chosen by the Chief Justice."[229] Though the FISC judges appeared not to be an anomaly in terms of their political parties and Fourth Amendment decisions, Chief Justice Rehnquist may have taken a couple of factors into account in his selections, including FISC judges' divergence in Fourth Amendment cases and the number of Fourth Amendment cases they heard.[230] Chief Justice Rehnquist's FISC judges had a much lower standard deviation in terms of the government win rate in Fourth Amendment cases than the random group, meaning that the judges showed less variance in their Fourth Amendment decisions and more consistently held in the government's favor.[231] Chief Justice Rehnquist's appointments also heard more Fourth

225. *See* Theodore W. Ruger, *Chief Justice Rehnquist's Appointments to the FISA Court: An Empirical Perspective*, 101 NW. U. L. REV. 239 (2007).

226. *Id.* at 242, 257.

227. *Id.* at 243.

228. *Id.*

229. *Id.* For example, of Chief Justice Rehnquist's twenty-five FISC appointees, sixteen were Republican appointees (64%); of the twenty-five randomly selected district judges, fifteen were Republican appointees (60%). *Id.* at 253. Similarly, in Fourth Amendment rulings of Chief Justice Rehnquist's FISC appointees, the government won about 87% of the time; in Fourth Amendment rulings of the randomly selected district judges, the government won about 83% of the time. *Id.* at 255.

230. *See generally id.* at 255–57.

231. *Id.* at 255–56. Professor Ruger suggests that the "less dramatic variation" in

Amendment cases altogether compared to Professor Ruger's randomly selected group.[232]

A complete analysis of all the district judges currently seated across the country and their decisions in Fourth Amendment cases, such as the one that Professor Ruger performed, is beyond the scope of this writing; however, Professor Ruger's conclusions speak to the general demographic of the federal district courts and there is no reason to believe that today, only seven years after Professor Ruger's analysis, the demographics have substantially changed. The current federal district judges may, therefore, on the whole be Republican appointees and may decide in favor of the government in the majority of Fourth Amendment cases. If that is the case, then the fact that Chief Justice Roberts's FISC judges are predominantly Republican appointees and that the FISC largely grants the government's surveillance requests is not altogether surprising.[233] Additionally, it must not be forgotten that this criticism of FISC judges is based on the assumption that, because the majority of judges were appointed as district judges by Republican presidents, the FISC judges themselves are Republicans, and that party affiliation will impact rulings. Presidents do not always appoint federal judges that necessarily follow their own political views, whether intentionally or not.[234]

IV. AN EXECUTIVE REVIEW

Senator Blumenthal's proposals in the form of the FISA Court Reform

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Rehnquist's appointments' Fourth Amendment decisions in favor of the government demonstrates "a strategic choice [by the Chief Justice] to avoid preference outliers, particularly in a pro-defendant direction." *Id.* at 256.

232. *Id.* at 256. Rehnquist may have taken this "notoriety" in Fourth Amendment decisions into account in making his appointments to the FISC. *Id.*

233. Chief Justice Roberts' most recent selection to the FISA Court of Review was Judge José A. Cabranes. Though Judge Cabranes was appointed to the Court of Appeals for the Second Circuit by President Bill Clinton, "he is considered among the more conservative-leaning Democratic appointees on crime and security issues." Charlie Savage, *Newest Spy Court Pick Is a Democrat but Not a Liberal*, N.Y. TIMES, Aug. 20, 2013, http://www.nytimes.com/2013/08/21/us/roberts-varies-pattern-in-choice-for-spy-court.html?pagewanted=all&_r=1&.

234. One interesting example of this is President Eisenhower's appointment of Earl Warren as Chief Justice of the Supreme Court in 1953. Although they were both Republicans, the Warren Court became "synonymous with liberal activism." DOUGLAS CLOUATRE, PRESIDENTS AND THEIR JUSTICES 102–03 (2010). When asked by his biographer Stephen E. Ambrose what his biggest mistake was, Eisenhower answered: "The appointment of that S.O.B. Earl Warren." Bernard Schwartz, *Chief Justice Earl Warren: Super Chief in Action*, 33 TULSA L.J. 477, 477 (1997) (footnote omitted) (internal quotation marks omitted).

Act and FISA Judge Selection Reform Act were just a couple of the many similarly themed bills introduced in Congress. As part of its efforts to assess the steps required to address the calls for reform in light of competing national security and privacy interests, the Executive Branch instituted a review mechanism through which an Executive body evaluated the need for and viability of changes to the government surveillance programs and the proceedings before the FISC. The review was performed by the newly-created President's Review Group on Intelligence and Communications Technologies (Review Group).[235] Additionally, after the release of the Review Group's findings, President Obama made a speech to the nation addressing the intelligence review and his plan for reforming the surveillance programs and FISC operations.

President's Review Group. Shortly after Senator Blumenthal announced the introduction of his reform proposals, on August 12, 2013, President Obama announced the establishment of the Review Group. The Review Group was tasked with assessing "how . . . the United States can employ its technical collection capabilities in a way that optimally protects our national security . . . while respecting our commitment to privacy and civil liberties, recognizing our need to maintain the public trust, and reducing the risk of unauthorized disclosure."[236] The Review Group released its findings on December 12, 2013.[237]

The Review Group's Report consisted of a series of forty-six recommendations relating to, among other topics, reforming governmental domestic surveillance, determining what type of intelligence to collect, how to collect it, and reforming the FISC.[238] The Review Group even briefly addressed the rubber-stamping critique of the court. The Review Group cited to Judge Walton's letter to Senator Leahy from July 29, 2013[239] and

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235. Press Release, The White House, Presidential Memorandum—Reviewing Our Global Signals Intelligence Collection and Communications Technologies (Aug. 12, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/08/12/presidential-memorandum-reviewing-our-global-signals-intelligence-collec.

236. Press Release, The White House, Statement by the Press Sec'y on the Review Group on Intelligence and Communications Technology (Aug. 27, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/08/27/statement-press-secretary-review-group-intelligence-and-communications-t.

237. PRESIDENT'S REVIEW GROUP, LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES (Dec. 12, 2013) [hereinafter REVIEW GROUP REPORT], *available at* http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

238. *See generally id.* at 14–42.

239. *See supra* text accompanying notes 88–106 (discussing Judge Walton's July 29, 2013

stated that Judge Walton's insight that many government surveillance applications to the FISC are changed before being approved "seem[] quite credible."[240] Additionally, the Review Group recognized "the FISC's strong record in dealing with non-compliance issues" and the FISC taking "seriously its responsibilities to hold the government accountable for its errors."[241] Nonetheless, the Review Group recommended changes to the FISC including: (1) the creation of a Public Interest Advocate, (2) making greater technological expertise available to FISC judges, (3) increasing transparency through declassification of FISC opinions, and (4) reforming the appointment process of FISC judges.[242]

The Review Group first recommended that Congress create a Public Interest Advocate who would "represent the interests of those whose rights of privacy or civil liberties might be at stake" and who could either be invited to participate in FISC proceedings by a FISC judge or could intervene on her own accord.[243] However, the Public Interest Advocate would not have the authority to participate in all matters before the FISC. It could only intervene in cases involving "novel and complex issues of law" that "would benefit from an adversary proceeding" and would be "likely to result in a better decision."[244] The idea behind allowing the Advocate to participate in such proceedings would be to give the FISC judge a more "researched and informed presentation of an opposing view."[245] The

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and Oct. 11, 2013 letters to Senator Leahy).

240. REVIEW GROUP REPORT, *supra* note 237, at 260.

241. *Id*; *see also supra* text accompanying notes 107–118 (positing that many of the recently declassified FISC opinions contain instances of the FISC rebuking the government for not complying with the court's orders).

242. REVIEW GROUP REPORT, *supra* note 237, at 200–201 (encompassing the suggested FISC reforms in Recommendation no. 28).

243. *Id.* at 204.

244. *Id.* at 203–04. An example of a case that would raise a "novel and complex issue[] of law" would be the § 215 authorizations for bulk telephony metadata, which "posed serious and difficult questions of statutory and constitutional interpretation about which reasonable lawyers and judges could certainly differ." *Id.* at 203. The Review Group's recommended role for the Advocate appears to be much narrower than the role that the Special Advocate would play in Senator Blumenthal's FISA Court Reform Act, under which the Special Advocate could review every FISC application and could participate in FISC proceedings without being limited by any specific issues of law. *See generally* S. 1467, 113th Cong. § 3(d)(1) (2013). This aspect of the Review Group's proposal appears quite similar to Representative Schiff's Ensuring Adversarial Process in the FISA Court Act, however. *See* H.R. 3159, 113th Cong. § 2(b) (2013), *supra* note 16 (proposing that the Public Interest Advocate should be appointed in any matter involving "any novel legal, factual, or technological issue").

245. REVIEW GROUP REPORT, *supra* note 237, at 204.

Review Group, while recognizing the difficulties of doing so, recommended that the Advocate could either be housed in the Civil Liberties and Privacy Protection Board (CLPP Board) or could be outsourced to a law firm or public interest group.[246]

Concerned about the ever-evolving complexity of many of the legal issues that the FISC must examine, the Review Group, as its second FISC reform recommendation, suggested that the FISC "should be able to call on independent technologists . . . who do not report to NSA or Department of Justice," who would be able to assist the judges in overseeing these complex legal issues.[247] Going along with many of the legislative reform proposals, the Review Group then recommended that, "unless secrecy of the opinion is essential to the effectiveness of a properly classified program," whole FISC opinions or redacted versions should be publicized.[248] The Review Group pointed out that the ODNI determined "that the gains from transparency outweighed the risk to national security" when it decided to begin releasing various FISC opinions in their entirety.[249]

Finally, the Review Group, reflecting concerns over the Republican-appointed FISC judges, recommended a plan to change the way that FISC judges are appointed, allowing each Supreme Court justice the ability to nominate judges from their own circuits.[250]

The Review Group's Report was met with mixed reviews. Some commentators appeared to agree with the overall thrust of the Report,[251]

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246. *Id.* at 204–05. The Civil Liberties and Privacy Protection Board (CLPP Board) is a new creation of the Review Group that would replace the existing PCLOB and which would "have broad authority to review government activity relating to foreign intelligence and counterterrorism whenever that activity has implications for civil liberties and privacy." *Id.* at 21.

247. *Id.* at 205. No such provision is included in Senator Blumenthal's proposal. *See generally* S. 1467.

248. REVIEW GROUP REPORT, *supra* note 237, at 207; *accord* S. 1467 § 6.

249. REVIEW GROUP REPORT, *supra* note 237, at 207.

250. *Id.* at 208. This suggestion for the appointment of FISC judges is substantially different from Senator Blumenthal's proposal in the FISA Judge Selection Reform Act, in which the chief judge of each federal circuit would appoint one FISC judge. *See* S. 1460, 113th Cong. § 3(a)(1)(C) (2013).

251. *E.g.*, Jack Goldsmith, *40,000 Foot Reactions to President's Review Group Report and Recommendations*, LAWFARE (Dec. 20, 2013, 10:25 AM), http://www.lawfareblog.com/2013/12/40000-foot-reactions-to-presidents-review-group-report-and-recommendations/#.UwlnKfldU6Y ("I find myself in wild agreement with the basic approach at the heart of the Report."); Benjamin Wittes, *Assessing the Review Group Recommendations: Final Thoughts*, LAWFARE (Jan. 13, 2014, 8:16 AM), http://www.lawfareblog.com/2014/01/assessing-the-review-group-recommendations-final-thoughts/#.UwgIk_ldU6Y ("On the good side, the Review Group report offers a lot of

but the same and other commentators also found the Report critically flawed.[252] Indeed, the Report is over 300 pages long with comparatively very few citations explaining on what bases the Review Group made its assertions.[253]

V. AN INDEPENDENT REVIEW

The Review Group Report, authorized by the President, was not the sole review taking place with increased calls for legislative reform. The PCLOB, on its own initiative and with congressional encouragement, conducted an investigation into the reform proposals and produced its own set of recommendations.

The PCLOB is an "independent, bipartisan agency within the executive branch" with the authority to "ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism."[254] The PCLOB oversees Executive Branch policies, procedures, regulations, and actions and advises the Executive Branch on policy creation and application.[255]

In the immediate aftermath of the original NSA disclosures, on June 7, 2013, the PCLOB sent a letter to DNI James Clapper requesting a classified background briefing on the government surveillance programs.[256] Shortly thereafter, on June 12, 2013, a group of senators requested that the PCLOB investigate the surveillance programs mentioned in the NSA leaks

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sound ideas. It thinks boldly. And it offers the President cover for dramatic change to the extent he wants to pursue it.").

252. *E.g.*, Goldsmith, *supra* note 251 (describing at least one of the Review Group Report recommendations as "pie-in-the-sky"); Michael Leiter, *Too Much and Too Little*, LAWFARE (Dec. 26, 2013, 10:39 AM), http://www.lawfareblog.com/2013/12/too-much-and-too-little/#.UwgB9vldU6Z (arguing that the breadth of reform topics and proposals in the Review Group Report "may sound good in isolation—but they can combine to form a deadly and inefficient bureaucratic mix" that "will almost certainly have an intelligence 'cost' even if they simultaneously produce a transparency and privacy 'benefit'"); Wittes, *supra* note 251 ("I think on balance the Review Group did the President, and the country, a disservice. . . . [It is a] document that is at once aggravatingly long-winded yet simultaneously badly underdeveloped.").

253. *See generally* REVIEW GROUP REPORT, *supra* note 237.

254. PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, http://www.pclob.gov/ (last visited May 9, 2014); *see also supra* note 126 (discussing the other authority of the PCLOB).

255. PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, http://www.pclob.gov/ (last visited May 9, 2014).

256. Letter from David Medine, Chairman, PCLOB, to the Honorable James R. Clapper, Dir. of Nat'l. Intel. (June 7, 2013), *available at* http://www.pclob.gov/SiteAssets/newsroom/ PCLOB_ODNI%20FISA%20PRISM%20Briefing%20Request.pdf.

and provide an unclassified report on its findings.[257] The Board responded, stating that, "to the greatest extent possible," it would provide the senators with the requested unclassified report.[258] Additionally, on July 11, 2013, House Minority Leader Nancy Pelosi requested that the Board examine the operations of the FISC.[259] One week after the President gave his speech on reforming the surveillance programs, the PCLOB released its final report on January 23, 2014.[260] Prior to his speech on surveillance reform programs, the President met with the Board to hear its conclusions and had access to near final drafts of the PCLOB report.[261]

PCLOB Report. The PCLOB Report focused on transparency issues at the FISC, and addressed some of the same concerns that the President's Review Group did in its report.[262] The PCLOB report briefly discussed how the FISC pushes back against the government when compliance issues come to its attention. The report also discussed how the media figures about the FISC application approval rate are misleading.[263]

Turning to the Board's recommendations, the PCLOB report gave great weight to two considerations: "that the FISC, its judges, their staff, and the government lawyers who appear before the court operate with integrity and give fastidious attention and review to surveillance applications; but also that it is critical to the integrity of the process that the public have confidence in its impartiality and rigor."[264] The PCLOB report furnished three recommendations for reforming the FISC process: (1) allowing the

257. Letter from Sen. Tom Udall et al., to Members of PCLOB (June 12, 2013), *available at* http://www.pclob.gov/SiteAssets/newsroom/6.12.13%20Senate%20letter%20to%20PCLOB.pdf.

258. Letter from David Medine, Chairman, PCLOB, to Sen. Tom Udall (June 20, 2013), *available at* http://www.pclob.gov/SiteAssets/newsroom/PCLOB_TUdall.pdf.

259. Letter from Rep. Nancy Pelosi, Minority Leader, U.S. House of Representatives, to David Medine, Chairman, PCLOB (July 11, 2013), *available at* http://www.pclob.gov/SiteAssets/newsroom/Pelosi%20Letter%20to%20PCLOB.pdf.

260. PCLOB, REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT (Jan. 23, 2014) [hereinafter PCLOB REPORT], *available at* http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf.

261. *Id.* at 6.

262. *See* REVIEW GROUP REPORT, *supra* note 237, at 202. *See generally* PCLOB REPORT, *supra* note 260, at 8–17 (summarizing the Board's analysis of the surveillance programs and recommending that the government end its § 215 bulk telephone records program and implement additional privacy safeguards in operating the program).

263. PCLOB REPORT, *supra* note 260, at 177–80 (citing to Judge Walton's letters of July 29, 2013 and Oct. 11, 2013).

264. *Id.* at 182.

FISC to hear an independent voice on "novel and significant applications," (2) expanding appellate review of FISC decisions, and (3) giving the FISC the opportunity to obtain technical assistance and legal input from outside parties.[265]

To add an independent voice to the FISC proceedings, PCLOB recommended that Congress authorize the FISC to create a panel of Special Advocates who would serve before the FISC in "important" cases.[266] "Important" cases would include cases in which "FISC judges are considering requests for programmatic surveillance affecting numerous individuals or applications presenting novel issues."[267] This provision is largely in line with the recommendations of the Review Group.[268] The panel of Special Advocates would be national security, privacy, and civil liberties experts from the private sector who would be selected by the presiding judge of the FISC.[269] Participation of the Special Advocate would be determined at the discretion of the FISC. The PCLOB report does "not mandate the participation of the Special Advocate in any particular case"; rather, the FISC "should have the option of seeking input when such applications present novel legal or technical questions."[270] The role of the Special Advocate under this system would be much narrower compared to the Review Group's recommendation of the role of the Public Interest Advocate, who would be permitted to participate when invited by a FISC judge but who would also have the authority "to intervene on her own initiative."[271] The role of the PCLOB report's Special Advocate would be substantially similar to the role of Senator Blumenthal's Special Advocate under the FISA Court Reform Act, who could review every FISC application but participate in proceedings only if the FISC appoints the Special Advocate to do so or grants the Special Advocate's request.[272] The Special Advocate under Senator Blumenthal's proposal, however, is not limited by any specific issues of law.[273]

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265. *Id.* at 183–89.

266. *Id.* at 184.

267. *Id.*

268. *See* REVIEW GROUP REPORT, *supra* note 237, at 203–204 (permitting the Public Interest Advocate to participate in cases involving "novel and complex issues of law").

269. PCLOB REPORT, *supra* note 260, at 184.

270. *Id.* at 185; *see also id.* at 186 ("The Board does not intend this proposal to confer on the Special Advocate any absolute right to participate in any matter. Instead, the Board intends that Special Advocate participation would be at the discretion of the court.").

271. REVIEW GROUP REPORT, *supra* note 237, at 204.

272. *See generally* S. 1467, 113th Cong. §§ 3(d)(1) & 4(a) (2013).

273. *See generally id.* The proposed bill does not limit Special Advocate participation only to "novel and complex issues of law" or "important" cases. Of course, if the Special

The PCLOB report's second recommendation was to expand the occasions for appellate review of FISC decisions by both the FISA Court of Review and the Supreme Court to "strengthen the integrity of judicial review under FISA" and "further increase public confidence in the integrity of the process."[274] The Board suggested two potential ways that judicial review could be sought. The Special Advocate could either (1) directly file a petition for review with the FISA Court of Review or (2) request that the FISC certify an appeal.[275] This proposal appears to raise the same standing concerns that Senator Blumenthal's FISA Court Reform Act did.[276]

The Board, however, did not seem concerned about standing issues. Though the PCLOB report states that the Special Advocate "would not be considered an adversary in the traditional sense," which would imply that he has not suffered any injury in fact, the Board was confident that both of its mechanisms for appellate review "avoid concerns by some commentators that a Special Advocate lacks Article III standing to directly appeal a FISC decision."[277] The Board, although convinced that no standing issues would arise, nonetheless covered its bases, stating in a footnote that "The Board does not take a position on whether these concerns about lack of standing would ultimately prevail in litigation."[278] It is hard to understand how, since the PCLOB report is not "requiring the Special Advocate to serve as the government's adversary, as opposing lawyers would do in traditional litigation,"[279] the Special Advocate meets the injury in fact standing requirement and thus has a basis to appeal any FISC decision.

As its last recommendation for reforming the FISC process, the PCLOB report suggests, similar to the Review Group Report,[280] that FISC judges

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Advocate can only participate if the FISC grants permission, then the FISC is unlikely to grant permission to participate when the court is handling only routine individual search warrant requests that do not implicate complex legal issues.

274. PCLOB REPORT, *supra* note 260, at 187. The Review Group Report does not advance any recommendation for appellate review of FISC decisions. *See generally* REVIEW GROUP REPORT, *supra* note 237, at 200–208.

275. PCLOB REPORT, *supra* note 260, at 187.

276. *See supra* text accompanying notes 167–79 (laying out the Article III appellate standing concerns for the Special Advocate).

277. PCLOB REPORT, *supra* note 260, at 188 n.64 (citing the CRS REPORT, *see supra* note 145, and Lederman & Vladeck, *The Constitutionality of a FISA "Special Advocate"*, *see supra* note 146).

278. *Id.* at 189 n.641.

279. *Id.* at 185.

280. *See* REVIEW GROUP REPORT, *supra* note 237, at 205.

should be able to appoint technical experts to help with the applications.[281] Participation of amici curiae should also be made available and encouraged.[282]

Concerning transparency, the PCLOB report gave three recommendations for FISC decisions and process: (1) the government should release future FISC documents with minimal redactions, (2) the government should review previously written FISC documents with an eye toward declassification, and (3) the government should publicly report on the operation of the Special Advocate program.[283] Looking forward, the PCLOB report suggests that FISC judges should draft their opinions expecting they will be released publically so that FISC opinions and orders can be released with minimal redactions.[284] Statistics should be released chronicling the involvement of the Special Advocate in FISC proceedings, including when the Special Advocate was and was not invited to participate.[285] The PCLOB report's transparency proposals are generally consistent with the other reform proposals.[286]

The PCLOB report did not mention or give any recommendations relating to whether or how the FISC judges should be appointed, thus differing from the Review Group Report and Senator Blumenthal's FISA Judge Selection Reform Act. The recommendations encompassed in the PCLOB report as a whole constituted only a majority viewpoint of the Board; two of the five members of the Board filed dissenting statements to the PCLOB report.[287] The two Board members who filed the separate statements, however, did not disagree with the majority's recommendations in relation to reforming the operations of the FISC or increasing transparency; rather, they largely disagreed with the majority's opinion that the § 215 bulk collection program should be shut down.[288]

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281. PCLOB REPORT, *supra* note 260, at 189.

282. *Id.* For a thorough treatment of the issues surrounding the participation of amici curiae before the FISC, see generally ANDREW NOLAN & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R43362, REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: PROCEDURAL AND OPERATIONAL CHANGES (2014), *available at* http://www.fas.org/sgp/crs/intel/R43362.pdf.

283. *See* PCLOB REPORT, *supra* note 260, at 203–04.

284. *Id.* at 203.

285. *Id.* at 203–204.

286. *See, e.g.*, REVIEW GROUP REPORT, *supra* note 237, at 205–07; S. 1467, 113th Cong. § 6 (2013).

287. *See generally* PCLOB REPORT, *supra* note 260, at 208–18.

288. *See id.* Board member Rachel Brand stated: "Although I believe the FISC already operates with the same integrity and independence as other federal courts, I agree with the Board that some involvement by an independent third party will bolster public confidence in

VI. A JUDICIAL RESPONSE

After the President's Review Group released its findings, and shortly before President Obama addressed the nation on reforming the surveillance programs and the FISC, Judge John Bates, the Director of the Administrative Office of the United States Courts and former presiding judge of the FISC, sent a letter and accompanying documentation to Senator Dianne Feinstein setting forth some of the judiciary's comments on the FISC reform proposals.[289] In preparing this commentary, Judge Bates consulted with current and former judges of both the FISC and FISA Court of Review.[290] The purpose of the commentary was "to explain how certain proposals for substantive or procedural changes to FISA would significantly affect the operations of the FISC and the [FISA] Court of Review . . . in an effort to enhance the political branches' ability to assess whether, on balance, it would be wise to adopt those proposals."[291] Stressing the need for a "commensurate augmentation of resources" if the proposed reforms were to take effect, Judge Bates[292] reviewed the effects of four general FISC operations reform plans: (1) an independent advocate, (2) substantive proposals, (3) selection of FISC judges, and (4) declassification of FISC decisions and orders.[293]

Judge Bates began by pointing out that the vast majority of proceedings before the FISC are simple ex parte government search warrant requests, electronic surveillance orders, and requests for production of records, not requests for bulk collection of data by the NSA.[294] Thus, the majority of

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the FISC's integrity and strengthen its important role." *Id.* at 208. Similarly, Board member Elisebeth Cook stated: "I also agree with the Board that modifications to the operations of the [FISC] and an increased emphasis on transparency are warranted—to the extent such changes are implemented in a way that would not harm our national security efforts." *Id.* at 214.

289. Letter from the Hon. John D. Bates, Dir., Admin. Office of the United States Courts, to Sen. Dianne Feinstein, Chairwoman, S. Select Comm. on Intel. (Jan. 13, 2014), *available at* http://www.fas.org/irp/news/2014/01/bates.pdf; Judge John D. Bates, *Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act* (Jan. 10, 2014) [hereinafter *Comments of the Judiciary*], *available at* http://www.fas.org/irp/news/2014/01/bates.pdf.

290. *Comments of the Judiciary*, *supra* note 289, at 1.

291. *Id.*

292. Although the comments in the document are the comments of the Judiciary and not solely the comments of Judge Bates, because Judge Bates compiled the comments and penned the letter to Senator Feinstein, Judge Bates will be referred to throughout this discussion.

293. *See generally Comments of the Judiciary*, *supra* note 289.

294. *Id.* at 3.

government applications "do not implicate the privacy interests of many U.S. persons because the collections at issue are narrowly targeted at particular individuals . . . that have been found to satisfy the applicable legal standards."[295] Judge Bates concluded, therefore, that having the participation of an independent advocate "in the large majority of cases" would be unnecessary and would give suspected terrorists greater due process protections than U.S. citizens would receive in criminal investigations.[296]

Judge Bates also raised practical concerns to the functioning of the FISC, including, complicating the gathering of information in fact- and time-intensive cases by necessitating all information to be supplied to the advocate, requiring the duty judge to extend his or her normal duty week (thus disrupting the judge's regular district court duties), and preventing the FISC from receiving all relevant facts from the government due to intelligence agency concerns over providing sensitive information "to a permanent bureaucratic adversary."[297] In terms of appellate review, Judge Bates was concerned with "standing and other constitutional issues," as well as practical "scheduling and logistical challenges" to the FISC and the potential need to increase the number of judges on staff on the FISA Court of Review to handle the extra caseload.[298]

Turning to the selection of FISC judges, Judge Bates emphasized the need for a "smoothly functioning selection process" that would "become even more imperative if other legislative changes result in a heavier workload for the [FISC and FISA Court of Review]."[299] One potential implication of any changes to the selection process concerns the requirement that at least three FISC judges reside within twenty miles of Washington, D.C., as is necessitated under FISA.[300] In particular, under Senator Blumenthal's approach in the FISA Judge Selection Reform Act, this would be a concern because only two of the FISC judges would be selected from the Washington, D.C. area—the District of Columbia and

295. *Id.*

296. *Id.* at 4. *But see* Stephen Vladeck, *Judge Bates and a FISA "Special Advocate"*, LAWFARE (Feb. 4, 2014, 9:24 AM), http://www.lawfareblog.com/2014/02/judge-bates-and-a-fisa-special-advocate/#.UweBePldU6Y (contending that most of the reform proposals do not anticipate participation by the independent advocate in routine individualized warrant applications).

297. *Comments of the Judiciary*, *supra* note 289, at 5–7. *But see* Vladeck, *supra* note 295 (offering three responses to Judge Bates' concern that the government will not be as willing to share classified information with the FISC).

298. *Comments of the Judiciary*, *supra* note 289, at 8–9.

299. *Id.* at 12.

300. 50 U.S.C. § 1803(a)(1) (2006).

Federal Circuits, both located in D.C.[301] Judge Bates also pointed out the "unique role" that the Chief Justice maintains within the Judicial Branch.[302] As President of the Judicial Conference of the United States, the Chief Justice is tasked with "the responsibility to assign federal judges across the country to the various Conference committees . . . including service on special courts," thus making the Chief Justice "uniquely positioned . . . [to] select qualified judges for additional work on the FISC or [FISA] Court of Review."[303]

Judge Bates, much like Judge Walton before him,[304] also dealt with some of the practical limitations in requiring extensive declassification of FISC opinions and orders, including that declassification is predominantly reserved to the Executive Branch and that redacted opinions will largely give legal analysis devoid of any factual information.[305]

As can be seen from its comments, the Judiciary, at least those judges for whom Judge Bates spoke, sees many functional, practical, and constitutional difficulties in many proposals calling for change to operations of the FISC.

VII. AN EXECUTIVE PROPOSAL

On December 18, 2013, President Obama met with the Review Group to discuss its Report. The White House reported that "the President will work with his national security team to study the Review Group's report, and to determine which recommendations we should implement. The President will also continue consulting with Congress as reform proposals are considered in each chamber."[306] The Review Group Report was intended to become the basis for the Obama Administration's recommendations concerning the government surveillance programs. At least one commentator, however, points out that the Review Group Report

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301. *See* S. 1460, 113th Cong. § 3(a)(1)(B) (2013).

302. *Comments of the Judiciary*, *supra* note 289, at 13.

303. *Id.* For a detailed analysis of the many positions for which the Chief Justice appoints judges, see generally Russell Wheeler, *John Roberts Appoints Judges to More Than the FISA Court*, BROOKINGS (Aug. 8, 2013), http://www.brookings.edu/research/articles/2013/08/08-john-roberts-judges-appointees-wheeler.

304. *See generally* Walton Mar. 27, 2013 Letter, *supra* note 184.

305. *Comments of the Judiciary*, *supra* note 289, at 14. Releasing redacted opinions would create "the risk of distorting, rather than illuminating, the reasoning and result of [FISC] opinions." *Id.*

306. Press Release, The White House, President Obama's Meeting with the Review Group on Intelligence and Communications Technologies (Dec. 18, 2013), http://www.whitehouse.gov/the-press-office/2013/12/18/president-obama-s-meeting-review-group-intelligence-and-communications-t.

put President Obama in a difficult position because it sought to rein in some of the aspects of the program that the President did not believe needed curtailing, including the § 215 program and the structure of the FISC.[307] Additionally, the media was not thrilled with the President's immediate response to the Review Group Report, contending that he should have instituted the Review Group's recommendations before the end of the year.[308]

In addition to meeting with his Review Group, on January 8, 2014, the President also met with the PCLOB to discuss its findings and recommendations before it released its final report on January 23, 2014.[309]

President's Speech. Against this backdrop, President Obama addressed the nation on January 17, 2014 to discuss the results of the Signals Intelligence Review.[310] In the midst of calling for reforms to the substance of the surveillance programs under §§ 215 and 702, the President also addressed some of the concerns over the FISC. In this regard, the President called for (1) reforms to increase transparency through an annual review "for the purposes of declassification [of] any future opinions of the [FISC] with broad privacy implications" and (2) the creation of "a panel of advocates from outside government" to add "a broader range of privacy perspectives" to the FISC proceedings.[311] The President also envisioned an increased role of the FISC by requiring a judicial finding before any information can be queried from the § 215 bulk metadata program database.[312] The President did not offer any reforms to the structure of the FISC for an alternative judge selection process, but he did state that he would be open to working with Congress to address these issues.[313]

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307. *See* Benjamin Wittes, *The Very Awkward President Review Group Report*, LAWFARE (Dec. 18, 2013, 4:36 PM), http://www.lawfareblog.com/2013/12/the-very-awkward-president-review-group-report/#.UwgRgvldU6Y ("This presumably was not the report Obama was imagining when he asked this group to take this on. . . . To put the matter bluntly, there is no way the administration will embrace a bunch of these recommendations.").

308. *E.g.*, Editorial Board, *Mr. Obama's Disappointing Response*, N.Y. TIMES, Dec. 20, 2013, http://www.nytimes.com/2013/12/21/opinion/mr-obamas-disappointing-response.html?_r=0 ("There was really only one course to take on surveillance policy from an ethical, moral, constitutional and even political point of view. And that was to embrace the recommendations of his handpicked panel on government spying—and bills pending in Congress—to end the obvious excesses. . . . He did not do any of that.").

309. *See* PCLOB REPORT, *supra* note 260, at 6.

310. Press Release, The White House, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014), http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence.

311. *Id.*

312. *Id.*

313. *Id.*

Reactions to the President's speech were largely peppered with uncertainty and more questions.[314] Particularly with regard to his proposal to include an adversarial process to the FISC proceedings, the President's remarks left the public with little guidance on what this measure would entail. With all of the different possible reform proposals, including his own Reform Group's submission, the President left the specifics for Congress to hash out and the experts to speculate and debate.[315]

CONCLUSION

The NSA leaks in the summer of 2013 implanted fear and anxiety into the American public over the extent and power of the government's surveillance programs. Commentators, scholars, and reporters were outspoken over the seemingly unrestrained Foreign Intelligence Surveillance Court. Senators and Representatives, "like greyhounds in the slips, straining upon the start," hurriedly drafted legislative reforms to overhaul FISA and the FISC "[a]t the first sound of a new argument over

314. *E.g.*, Wells Bennett, *The President's Speech: A Quick Reaction*, LAWFARE (Jan. 17, 2014, 3:53 PM), http://www.lawfareblog.com/2014/01/the-presidents-speech-a-quick-reaction/#.UwmFR_ldU6Y ("The devil is in the details . . . but details did not figure prominently in today's remarks, and some important ones will not come into focus for a while."); Editorial Board, *The President on Mass Surveillance*, N.Y. TIMES, Jan. 17, 2014, http://www.nytimes.com/2014/01/18/opinion/the-president-on-mass-surveillance.html?hp&rref=opinion ("Most of [the President's] reforms were frustratingly short on specifics and vague on implementation."); David Cole, *Just the Data, Ma'am*, FOREIGN POL'Y (Jan. 17, 2014), http://www.foreignpolicy.com/articles/2014/01/17/just_the_data_ma_am_nsa_surveillance_speech (asserting that the President's proposals do not go far enough); Stephen Vladeck, *Which Congressional NSA Reform Proposals Will the Obama Administration Now Support?* JUST SECURITY (Jan. 18, 2014, 3:51 PM), http://justsecurity.org/2014/01/18/congressional-nsa-reform-proposals-obama-administration-support/ (stating, while contending that the President's speech could be just one step in the Administration's larger plan, that the speech contained "frustratingly equivocal language").

315. *See, e.g.*, Bennett, *supra* note 314 ("Its [sic] anyone's guess what the legislature might come up with here: a stable of trusted attorneys who can file amicus briefs, when called upon to do so in especially important FISC cases? A slate of lawyers who will play a wider role in FISC proceedings? Something else?"); Vladeck, *supra* note 314 ("Does the Administration have no view on how those questions should be answered? Or will we hear more specifics in the days and weeks to come, either affirmatively or in response to questions at congressional hearings?"). *But see* Joel Brenner, *President Obama's Speech and PPD-28*, LAWFARE (Jan. 17, 2014, 7:30 PM), http://www.lawfareblog.com/2014/01/president-obamas-speech-and-ppd-28/#.UwmFefldU6Y ("There [was no] point in being more detailed than he was on the nature of the privacy advocates panel for the FISC. Anything he did in that regard would be hashed over on the Hill anyway.").

the United States Constitution and its interpretation."[316] The proposals, however, come up short of creating a perfect system that is able to protect both the national security of the United States and every privacy interest of the American people effectively. Establishing an independent advocate to participate in FISC proceedings brings with it appointment and standing difficulties, as well as practical implications for the FISC itself. Overhauling the FISC is based upon misplaced assumptions and concerns about the ideologies of Republican- and Democrat-appointed federal judges and the amount of pushback the government receives from the court. The court is not merely a rubber stamp for the government surveillance programs; it takes a hard look at the information that it receives and makes complicated decisions based upon the law.

The court or its process, however, may need to be reformed to provide greater trust to the American people. After the quick reactions to the NSA disclosures in the form of the Legislative Branch proposals died down, the Executive and Judicial Branches, as well as an independent agency, were given the opportunity to produce more thoughtful responses after thorough analyses of all the issues and options. Now, almost one year after the first NSA leaks propelled the surveillance programs into the public debate, many choices are available, but few decisions have been made. Greater transparency has occurred through the increase in declassified FISC opinions and orders, but many are still left wondering what the future of the surveillance programs and the role of the FISC will be and in what direction the Executive,[317] Legislative,[318] and Judicial[319] Branches will

316. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring) (quoting THE ECONOMIST, at 370, May 10, 1952).

317. A request was made by President Obama following his January 17 speech for a report from the intelligence agencies and the Attorney General on alternative options to remove the phone surveillance program from the hands of the NSA. The DOJ and Office of the Director of National Intelligence provided the President with four options: (1) having the phone companies retain the metadata themselves; (2) having another agency besides the NSA, such as the Federal Bureau of Investigation, retain the metadata; (3) having a third party besides a government agency or the phone companies hold the data; or (4) abolish the program altogether. *See* Siobhan Gorman & Devlin Barrett, *White House Weighs Options for Revamping NSA Surveillance*, WALL ST. J., Feb. 25, 2014, http://online.wsj.com/news/articles /SB10001424052702303880604579405640624409 74. In March 2014 the Executive Branch announced that the bulk collection of telephony metadata under § 215 would be overhauled. *See* Charlie Savage, *Obama to Call for End to N.S.A.'s Bulk Data Collection*, N.Y. TIMES, Mar. 24, 2014, http://www.nytimes.com/2014/03/25/us/obama-to-seek-nsa-curb-on-call-data.html?hp&_r=2. Under the President's proposal, the NSA would no longer collect the telephone records; instead, the telephone companies would retain the metadata themselves and the government could only obtain the records after receiving individual FISC orders approving the querying of specific telephone numbers. Press Release, The

proceed. It is yet to be seen if any of the proposed legislative reforms will be passed or whether the Executive Branch will give more concrete answers as to how, or if, the changes to the structure of the programs and the FISC will be implemented.

White House, FACT SHEET: The Administration's Proposal for Ending the Section 215 Bulk Telephony Metadata Program (Mar. 27, 2014), http://www.whitehouse.gov/the-press-office/2014/03/27/fact-sheet-administration-s-proposal-ending-section-215-bulk-telephony-m. The proposal did not mention any changes to the structure or proceedings of the FISC. Jameel Jaffer, Deputy Legal Director at the ACLU, while still having questions, heralded the Administration's proposal as a "milestone." Jameel Jaffer, *Some Questions About the President's Phone-Records Proposal*, JUST SECURITY (Mar. 25, 2014, 1:42 PM), http://justsecurity.org/2014/03/25/questions-presidents-phone-records-proposal.

318. One day after the *New York Times* reported the Executive Branch's proposal to end the NSA's collection of metadata, *see supra* note 317, the House Intelligence Committee unveiled its own bill similar to the Administration's plan. *See* Frank Thorp V, *House Intel Panel Unveils NSA Metadata Overhaul Bill*, NBC NEWS, Mar. 25, 2014, 1:33 PM, http://www.nbcnews.com/storyline/nsa-snooping/house-intel-panel-unveils-nsa-metadata-overhaul-bill-n61751. In addition to the ending of the metadata collection by the government, the bill would allow the FISC to appoint an amicus curiae who would "assist the court in the consideration of a covered application." FISA Transparency and Modernization Act, H.R. 4291, 113th Cong. § 5(i) (2014). In early May 2014, just before this Comment went to print, the House Judiciary Committee (through a unanimous 32–0 vote) and the House Intelligence Committee (through a voice vote) approved the USA FREEDOM Act, H.R. 3361, *see supra* note 19, which was proposed by Representative James Sensenbrenner, Jr., R-Wis., and Senator Patrick Leahy, D-Vt., in October 2013. *See* Julian Hattem, *House Clears Path for NSA Reform*, THE HILL, May 11, 2014, 7:30 AM, http://thehill.com/policy/technology/205762-house-poised-to-pass-nsa-reforms. The USA FREEDOM Act would require the phone companies to store the metadata instead of the NSA, would require NSA officials to obtain a FISC order before searching the metadata, and would create a panel of legal and technical experts that would analyze matters before the FISC. *Id.* The Act was the result of a compromise geared toward speeding its move through the House. Supporters of the bill expect a vote on the Act on the House floor by the end of May 2014 before it moves to the Senate. *Id.* Senator Leahy, Chairman of the Senate Judiciary Committee, promised that the Judiciary Committee would consider the bill in the summer of 2014. *Id.*

319. *See supra* notes 21–22 (discussing the recent district court decisions in *Klayman v. Obama* and *ACLU v. Clapper* on the legality of the government's bulk telephony metadata collection programs).

UNCHARTED TERRITORY: THE FAA AND THE REGULATION OF PRIVACY VIA RULEMAKING FOR DOMESTIC DRONES

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INTRODUCTION

The Federal Aviation Administration (FAA or Agency) has traditionally been tasked with regulating safety in the United States' national airspace.[1] However, the role of this vitally important federal agency may be shifting in order to keep up with the rapidly emerging use of private and public drone technology. Drones are unmanned aircraft that are piloted remotely and are equipped with surveillance equipment such as powerful cameras.[2] While their use is typically associated with military operations overseas,[3] drones are increasingly being used in the skies over the United States.[4] Unbeknownst to much of the public, local and federal law enforcement agencies, border patrol agents, firefighters, and public universities conducting research all use drones domestically.[5] Thus far, the FAA has tightly controlled the public use of domestic drones.[6] However, their use is expected to increase dramatically as drone technology continues to advance, the technology becomes more accessible and affordable, and the U.S. regulatory schemes are adapted to keep up with and support emerging technology.[7] As a result, the FAA has estimated that by 2030, more than 30,000 unmanned aircraft systems (UASs) will fly in the skies over the

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1. *See* Fed. Aviation Admin., *Mission*, FAA.GOV, http://www.faa.gov/about/mission (last visited May 9, 2014) [hereinafter FAA, *Mission*] (stating that the mission of the Federal Aviation Administration (FAA) "is to provide the safest, most efficient aerospace system in the world").

2. *See* FAA, *Unmanned Aircraft (UAS) Questions and Answers*, FAA.GOV, http://www.faa.gov/about/initiatives/uas/uas_faq/#Qn1 (last updated July 26, 2013) [hereinafter FAA, *UAS Q & A*].

3. *See* RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R42701, DRONES IN DOMESTIC SURVEILLANCE OPERATIONS: FOURTH AMENDMENT IMPLICATIONS AND LEGISLATIVE RESPONSES 2 (2013) (observing that the public most commonly associates drones with their military utility, typically in tracking and targeting suspected terrorists overseas).

4. *See* Chris Francescani, *From Hollywood to Kansas, Drones are Flying Under the Radar*, REUTERS, Mar. 3, 2013, http://www.reuters.com/article/2013/03/03/us-usa-drones-domestic-idUSBRE92206M20130303 (detailing the various current applications for drones, including filming movies and sporting events, tracking wildfires, surveying crops, monitoring weather and wildlife patterns, and detecting illegal drugs and people crossing the nation's borders).

5. *See* FAA, *Fact Sheet—Unmanned Aircraft Systems (UAS)*, FAA.GOV, http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153 (last updated Jan. 6, 2014) [hereinafter FAA, *Fact Sheet*].

6. *See id.*

7. *See* FED. AVIATION ADMIN., FAA AEROSPACE FORECAST: FISCAL YEARS 2010–2030 48 (2010), *available at* http://www.faa.gov/data_research/aviation/aerospace_forecasts/2010-2030/media/2010%20Forecast%20Doc.pdf [hereinafter FAA, *Forecast*].

United States.[8] With nearly limitless possibilities for the uses of UASs, domestic drones are expected to become a part of the everyday lives of Americans in the near future. However, the addition of such an enormous number of unmanned aircraft flying alongside and sharing airspace with manned aircraft will require complex modifications to the regulatory structure of the national airspace system (NAS).[9]

Because UASs will be operating in national airspace, the FAA is responsible for formulating regulations and policies on their safe integration and use.[10] To keep ahead of this emerging phenomenon and in anticipation of the regulatory challenges it will present, Congress has directed the FAA to develop a comprehensive plan for the safe and efficient integration of both public and private UASs into the national airspace through the FAA Modernization and Reform Act of 2012 (FMRA).[11] The all-inclusive regulation of UASs will present many unique challenges for the FAA. One of the foremost concerns is how the FAA can ensure that citizens' fundamental privacy rights will not be infringed upon once the nation's skies are teeming with UASs capable of sophisticated and intrusive surveillance.[12] Another concern is whether the FAA, which has rarely, if ever, implemented rules concerning the protection of fundamental privacy rights before, is adequately equipped to take on the role of privacy policy enforcer.[13] Taking on a new role concerned with adjudicating privacy rights has the potential to interfere with the most important responsibility of the FAA—ensuring that American airspace remains the safest airspace system in the world.[14]

This Comment argues that the FAA, which traditionally has the structure in place to focus solely on safety and security in the national airspace, is not the appropriate agency to regulate privacy policy and ensure that individual privacy rights are protected. Part I of this Comment provides an overview of UASs. Part II discusses the FAA's traditional and transforming regulatory role in the wake of increasing UAS use in the national airspace. This discussion includes an examination of the relevant provisions of the FMRA and the progress the FAA has made in developing

8. *See id.*

9. *See* FAA, *Fact Sheet*, *supra* note 5.

10. *See* FAA, *Safety: The Foundation of Everything We Do*, FAA.GOV, http://www.faa.gov/about/safety_efficiency/ (last updated Feb. 1, 2013) [hereinafter FAA, *Safety*].

11. FAA Modernization and Reform Act of 2012 (FMRA), Pub. L. No. 112-95, § 332, 126 Stat. 11, 73–75 (2012) (codified at 49 U.S.C. § 40101).

12. *See* THOMPSON, *supra* note 3, at 1.

13. *Id.* at Summary.

14. *See* FAA, *Mission*, *supra* note 1.

a comprehensive plan for regulating UASs. Part III examines the FAA's stance on its responsibility to protect privacy rights, as well as the current resistance UAS integration is facing at local, state, and federal levels because of the lingering privacy questions that have gone unanswered. Part IV considers the practicality of the FAA regulating privacy policy and argues that Congress is the more appropriate body for formulating and enforcing privacy policy. The Comment concludes with recommendations for the FAA as it moves forward with the integration of UASs, as well as recommendations for Congress if and when it decides to take on the issue of UAS privacy safeguards.

I. OVERVIEW OF UNMANNED AIRCRAFT SYSTEMS

UASs are aerial aircraft that are controlled remotely by a pilot on the ground or independently by an on-board computer with pre-programmed routes.[15] UASs serve a variety of surveillance and wartime functions, and come in diverse shapes and sizes,[16] ranging from the size of a passenger jet to a hummingbird.[17] UASs, more commonly known as drones, have traditionally been technology exclusively reserved for military use in overseas operations.[18] UASs were originally developed by the U.S. military, contained very expensive technology, and were composed of generally classified materials.[19] However, in the past decade, with the

15. *See* FAA, *UAS Q & A*, *supra* note 2 (defining a unmanned aerial system (UAS) as "the unmanned aircraft (UA) and all of the associated support equipment, control station, data links, telemetry, communications and navigation equipment, etc., necessary to operate the unmanned aircraft. The UA is the flying portion of the system, flown by a pilot via a ground control system, or autonomously through use of an on-board computer, communication links and any additional equipment that is necessary for the UA to operate safely.").

16. *See* FAA, *Fact Sheet*, *supra* note 5.

17. *See* Editorial, *The Dawning of Domestic Drones*, N.Y. TIMES, Dec. 25, 2012, http://www.nytimes.com/2012/12/26/opinion/the-dawning-of-domestic-drones.html?_r=0 (describing the "Nano Hummingbird" drone that has the capability to hover and take pictures, while weighing only 19 grams).

18. *See* THOMPSON, *supra* note 3, at 2 (stating that drones are most commonly associated with their military function, specifically in the Middle East where they are used to target and kill suspected Al Qaeda members and other members of terrorist organizations); *see also* Jefferson Morley, *Drones for "Urban Warfare"*, SALON (Apr. 24, 2012, 7:37 AM), http://www.salon.com/2012/04/24/drones_for_urban_warfare/ (observing that aerial surveillance technology was first developed in the "battle space" of America's war operations in the Middle East).

19. *See* Ben Popper, *Drones Over U.S. Soil: the Calm Before the Swarm*, THE VERGE (Mar. 13, 2013, 1:00 PM), http://www.theverge.com/2013/3/19/4120548/calm-before-the-swarm-domestic-drones-are-here.

explosion of the commercial availability of many military-developed technologies such as Global Positioning Systems (GPS), drone technology has become more affordable, user friendly, and accessible to even the most amateur hobbyist.[20] One can now go on the Internet and purchase a highly-sophisticated UAS, equipped with GPS, the capability to affix a high-resolution camera, and capable of reaching speeds up to twenty-two miles per hour at an altitude of one thousand feet, for less than five hundred dollars.[21] The technology has advanced so much that some drones have even been developed to have the capability to crack Wi-Fi networks and intercept e-mails, cell phone conversations, and text messages.[22] Although this sophisticated technology has the potential to be used for good in the furtherance of the public interest, it could just as easily be misused.

UASs represent the fastest growing sector in the aviation industry.[23] According to FAA estimates, worldwide annual spending on research and development for all UASs will increase from $6.6 billion in 2013 to $11.4 billion in 2022.[24] To profit from this boom in the drone industry, at least fifty companies are in the process of developing over 150 different types of UASs.[25] With sales projections slated to reach $6 billion by the year 2016 in the United States alone, drone manufacturing companies have recognized the pattern of increased UAS use in the United States and have targeted American law enforcement and public safety agencies as potential customers.[26]

Because of the growing accessibility and ease of use of UASs, the FAA has estimated that there will be 30,000 UASs flying in the skies above

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20. *Id.* (quoting Chris Anderson as describing how once-rare components used in military UAS technology, such as accelerometers, magnetometers, gyroscopes, and Global Positioning Systems (GPS) trackers, are now affordable and commercially available with the surge of mobile devices).

21. *See, e.g.*, DJI PHANTOM AERIAL UAV DRONE QUADCOPTER FOR GOPRO, AMAZON.COM, http://www.amazon.com/DJI-Phantom-Aerial-Drone-Quadcopter/dp/B00AGOSQI8 (last visited May 9, 2014); *see also* Popper, *supra* note 19 (describing DJI Innovations' Quadcopter Phantom and its sophisticated capabilities).

22. *See* Andy Greenberg, *Flying Drone Can Crack Wi-Fi Networks, Snoop on Cell Phones*, FORBES, (July 28, 2011), http://www.forbes.com/sites/andygreenberg/2011/07/28/flying-drone-can-crack-wifi-networks-snoop-on-cell-phones/.

23. *See* FED. AVIATION ADMIN., FAA AEROSPACE FORECAST: FISCAL YEARS 2013–2033 65 (2013), *available at* http://www.faa.gov/about/office_org/headquarters_offices/apl/aviation_forecasts/aerospace_forecasts/2013-2033/media/2013_Forecast.pdf.

24. *See id.*

25. Morley, *supra* note 18; *see also* FAA, *Forecast*, *supra* note 7, at 48 (explaining that there are currently 100 private manufacturers, universities, and government organizations in the process of designing over 300 different types of UASs).

26. Morley, *supra* note 18.

America by the year 2030.[27] This use will be both public and private, as UASs have the potential to perform a number of useful, as well as questionable, applications domestically.[28] UASs are already used on a limited basis by government agencies, federal and local law enforcement agencies, research institutions, and other public entities for furthering the public interest. For example, UASs are used for firefighting, locating missing persons, monitoring weather, providing disaster relief, patrolling the border, and military training.[29] The Department of Homeland Security (DHS) regularly uses predator drones to patrol the U.S. border and survey for people, arms, and drugs crossing the border illegally.[30] In 2012, DHS assisted local law enforcement in North Dakota by using one of its predator drones for the first time to locate and aid in the capture of a wanted suspect.[31] DHS has also lent its drones to assist the Federal Bureau of Investigation (FBI), the Secret Service, the United States Forest Service, the Texas Rangers, and other local law enforcement agencies to conduct various operations.[32] It was recently revealed through a Freedom of Information Act request that DHS has considered the possibility of arming their UASs with non-lethal weapons to immobilize targets.[33]

Due to rapidly advancing technology, increased accessibility, and lower costs for cutting-edge surveillance equipment, commercially available UASs can now be equipped with super high-resolution cameras[34] and thermal infrared cameras capable of detecting individuals through walls and at great

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27. FAA, *Forecast*, *supra* note 7, at 48.

28. *Id.*

29. *Id.*

30. THOMPSON, *supra* note 3, at 3.

31. Jason Koebler, *First Man Arrested With Drone Evidence Vows to Fight Case*, U.S. NEWS & WORLD REP., Apr. 9, 2012, http://www.usnews.com/news/articles/2012/04/09/first-man-arrested-with-drone-evidence-vows-to-fight-case.

32. DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., OIG-12-85, CBP'S USE OF UNMANNED AIRCRAFT SYSTEMS IN THE NATION'S BORDER SECURITY 6 (2012), *available at* http://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-85_May12.pdf.

33. DEP'T OF HOMELAND SEC., CONCEPT OF OPERATIONS FOR CBP'S PREDATOR B UNMANNED AIRCRAFT SYSTEM: FISCAL YEAR 2010 REPORT TO CONGRESS 63 (2010), *available at* https://www.eff.org/files/filenode/cbp_uas_concept_of_operations.pdf.

34. Ryan Gallagher, *Could the Pentagon's 1.8 Gigapixel Drone Camera Be Used for Domestic Surveillance?*, SLATE (Feb. 6, 2013), http://www.slate.com/blogs/future_tense/2013/02/06/argus_is_could_the_pentagon_s_1_8_gigapixel_drone_camera_be_used_for_domestic.html (describing the world's highest resolution camera, a 1.8 gigapixel camera developed by the U.S. military for use on drones. The camera is capable of seeing a six-inch small object at 17,000 feet in the air; it is the "equivalent of having 100 Predator drones look at an area the size of a medium city at once.").

distances.[35] Furthermore, some UASs are capable of flying and surveying for up to fifty-four hours nonstop.[36] Due to the increasingly sophisticated and complex nature of commercially available surveillance equipment, many civil liberties groups are growing concerned over the potential for misuse of UASs by both public and private entities, and the prospect that such misuse will infringe upon individuals' privacy rights.[37]

Despite the authorized use of UASs by some public entities, the profit-making, commercial use of drones is currently illegal[38] and other civilian use is severely restricted.[39] However, one can imagine the day when a company such as Google will use a UAS for its aerial maps feature or a media outlet will use drones to capture breaking news in real time.[40] For example, the online retailer Amazon recently announced that it is in the process of developing a package delivery system using unmanned drones.[41]

Many other countries are already allowing domestic drones to be used for commercial purposes, with businesses finding innovative ways to integrate drones into their delivery methods. Organizers of a music festival

35. Barry Neild, *Not Just for Military Use, Drones Turn Civilian*, CNN, June 12, 2013, http://www.cnn.com/2012/07/12/world/europe/civilian-drones-farnborough; *see also* Brian Bennett, *Police Employ Predator Drone Spy Planes on Home Front*, L.A. TIMES, Dec. 10, 2011, http://articles.latimes.com/2011/dec/10/nation/la-na-drone-arrest-20111211.

36. Neild, *supra* note 35 (explaining that the "Penguin B" drone, which is privately manufactured by UAV Factory at a cost of over $50,000, is capable of fifty-four-and-one-half hours of continuous flying).

37. *See, e.g.*, AM. CIVIL LIBERTIES UNION, PROTECTING PRIVACY FROM AERIAL SURVEILLANCE: RECOMMENDATIONS FOR GOVERNMENT USE OF DRONE AIRCRAFT 1 (2011), *available at* http://www.aclu.org/files/assets/protectingprivacyfromaerial surveillance.pdf [hereinafter ACLU, RECOMMENDATIONS] (recommending mechanisms to protect civil liberties with the increased prevalence of surveillance).

38. 14 C.F.R. § 91.319(a)(2) (2013); *see also* Matthew L. Wald, *Current Laws May Offer Little Shield Against Drones, Senators Are Told*, N.Y. TIMES, Mar. 20, 2013, http://www.nytimes.com/2013/03/21/us/politics/senate-panel-weighs-privacy-concerns-over-use-of-drones.html.

39. 14 C.F.R. § 91.319; *see also* FAA, *Fact Sheet*, *supra* note 5 (describing how commercial use of drones is prohibited, while civilian use is currently only available to universities and drone manufacturers for research and development purposes, and flight and sales demonstrations).

40. Greg McNeal, *A Primer on Domestic Drones: Legal, Policy, and Privacy Implications*, FORBES (Apr. 10, 2012), http://www.forbes.com/sites/gregorymcneal/2012/04/10/a-primer-on-domestic-drones-and-privacy-implications/.

41. The delivery service, called Amazon Prime Air, will be able to deliver packages to customers within thirty minutes of placing the order online. Joanna Stern, *Amazon Prime Air: Delivery by Drones Could Arrive as Early as 2015*, ABC NEWS, Dec. 1, 2013, http://abcnews.go.com/Technology/amazon-prime-air-delivery-drones-arrive-early-2015/story?id=21064960.

in South Africa recently used a small drone to deliver beer via parachute to patrons who had placed their orders using a smartphone app.[42] Domino's Pizza recently tested its own drone, called the "DomiCopter," which successfully delivered two pepperoni pizzas to a suburb of London.[43] The FMRA mandates a regulatory structure to enable the private and commercial use of UASs in the United States.[44] The FAA has estimated that as many as 7,500 civil and commercial UASs may be in use in the national airspace by 2018.[45]

II. THE FAA'S STATUTORY AUTHORITY AND CURRENT REGULATORY FRAMEWORK

The FAA's foremost mission is to ensure safety in the nation's airspace.[46] To this end, the Agency is responsible for regulating the domestic use of UASs.[47] Safeguarding the nation's airspace has been the FAA's mission since its inception in 1958 with the passage of the Federal Aviation Act.[48] Congress believed it was important to have an independent agency tasked solely with providing and overseeing a safe and efficient NAS.[49] Although the FAA became an organization within the Department of Transportation in the 1960s, it retained its exclusive authority over regulating all civil aviation operations in the NAS.[50]

Congress grants the FAA authority to make and enforce rules to aid in the implementation of laws it passes.[51] The enabling legislation governing the FAA grants the administrator the authority to regulate the NAS by

42. Rianne Houghton, *Drone Drops Beer at South African Music Festival*, DIGITAL SPY (Aug. 9, 2013), http://www.digitalspy.com/odd/news/a505460/drone-drops-beer-at-south-african-music-festival.html.

43. Nidhi Subbaraman, *Domino's 'DomiCopter' Drone Can Deliver Two Large Pepperonis*, NBCNEWS.COM (June 3, 2013), http://www.nbcnews.com/technology/dominos-domicopter-drone-can-deliver-two-large-pepperonis-6C10182466.

44. FMRA, Pub. L. No. 112-95, § 332, 126 Stat. 11, 73–75 (2012) (codified at 49 U.S.C. § 40101).

45. FAA AEROSPACE FORECAST, *supra* note 23, at 66.

46. *See* FAA, *Mission*, *supra* note 1.

47. *See* FMRA § 332.

48. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958).

49. At that time, it was called the "Federal Aviation Agency." *See id.*; *see also* FAA, *A Brief History of the FAA*, FAA.GOV, https://www.faa.gov/about/history/brief_history/#origins (last modified Feb. 1, 2010) [hereinafter FAA, *Brief History*].

50. At which time the Agency became the Federal Aviation Administration. *See* FAA, *Brief History*, *supra* note 49; *see also* Federal Aviation Act of 1958, *supra* note 48, at § 301(a).

51. *See* OFFICE OF INFORMATION AND REGULATORY AFFAIRS, FAQS/RESOURCES, REGINFO.GOV, http://www.reginfo.gov/public/jsp/Utilities/faq.jsp (last visited May 9, 2014).

adopting regulations through rulemaking to ensure the safety of aircraft and the efficient use of airspace.[52] With the passage of the FMRA, Congress granted the FAA the authority to pass the appropriate regulations to facilitate the implementation and enforcement of UASs into the NAS.[53]

A. FAA Regulation of UASs in the NAS

The FAA's current policy toward the regulation of UASs in the NAS depends on the classification of the UAS as either public or civil.[54] A public UAS is an aircraft owned and operated by a local, state, or federal government entity, including the armed forces and law enforcement agencies, and put to public use.[55] A civil UAS is an aircraft owned and operated by any entity other than a public entity,[56] such as private individuals and private companies for commercial purposes. Regardless of its classification, any entity wanting to access the NAS must first be granted authorization from the FAA.[57]

The first authorization for an unmanned aircraft was granted in 1990.[58] Since then, the FAA has only authorized UASs for very limited purposes on a case-by-case basis, mainly for carrying out operations in the public interest.[59] Obtaining FAA authorization to fly a UAS in national airspace is quite difficult. Public entities such as government and law enforcement agencies that want to fly UASs in the national airspace must first apply for a Certificate of Waiver or Authorization (COA).[60] Once issued, public

52. 49 U.S.C. § 40103(b)(1) (2006); *see also* Administrative Procedure Act, 5 U.S.C. § 553 (2012) (describing the process of rulemaking in which an agency drafts and publishes a proposed rule in the Federal Register, receives and responds to public comments, and publishes a final, binding rule in the Federal Register).

53. FMRA, Pub. L. No. 112-95, § 332, 126 Stat. 11, 73–75 (2012) (codified at 49 U.S.C. § 40101).

54. *See* Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689 (Feb. 13, 2007) (codified at 14 C.F.R. pt. 91).

55. 14 C.F.R. § 1.1 (2013); *see also* Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. at 6689 (describing some public uses for UASs: military and law enforcement surveillance, customs and border control, and first responder reports on weather, natural disasters, or other catastrophes).

56. 14 C.F.R. § 1.1.

57. Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689.

58. FAA, *Fact Sheet*, *supra* note 5.

59. *Id.* (giving examples of public interest missions, which include: firefighting, disaster relief, search and rescue, law enforcement, border and port surveillance, military training, scientific research, and environmental and weather monitoring).

60. Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689.

entities are heavily restricted in their permitted scope of activity.[61] The COA defines the parameters under which the operator is allowed to fly the UAS, including the permitted block of airspace, the time of day, and the length of time the entity is allowed to fly the UAS.[62] As a testament to the increasing role drones are playing in domestic surveillance, the FAA has been increasing the number of COAs it authorizes annually to public entities.[63] In 2009, only 146 COAs were issued; yet as of October 2013, the FAA had already issued 373 COAs to public entities.[64] Authorized UASs are heavily restricted on where they are allowed to fly in the national airspace; for instance, they are not allowed to fly in Class B airspace, which includes densely-populated urban areas and in high-traffic areas of manned aircraft, such as near airports.[65]

Currently, the only way for civil or private UAS operators to obtain authorization to fly their drones is to apply for a special airworthiness certificate, in the experimental category.[66] These experimental certificates are only issued to operators such as private drone manufacturers and universities to carry out research and development, training, and flight and sales demonstrations.[67] Obtaining one of these experimental certificates is quite rare and difficult,[68] making it virtually impossible for private companies or individual drone hobbyists to obtain FAA authorization for their UASs. Furthermore, commercial use of UASs is still strictly

61. *Id.*

62. *See id.*; *see also* FAA, *Fact Sheet*, *supra* note 5 (explaining that public UAS operators are also required to coordinate with the appropriate air traffic control facility, and must be able to ensure that it can maintain visual contact with the UAS at all times when it is in airspace shared by other aircraft).

63. *See* FAA, *Fact Sheet*, *supra* note 5.

64. *See id.* (demonstrating that the number of Certificates of Wavier or Authorization (COAs) issued by the FAA has steadily increased every year, with the exception of 2012: 146 in 2009, 298 in 2010, 313 in 2011, 257 in 2012, and 373 as of October 31, 2013).

65. *Id.*

66. 14 C.F.R. §§ 21.191, 193, 195 (2013); *see also* 14 C.F.R. § 91.319 (2013).

67. Fed. Aviation Admin. Order No. 8130.34B Establishing Procedures for Issuing Special Airworthiness Certificates for Unmanned Aircraft Systems § 2 (Nov. 28, 2011), http://www.faa.gov/documentLibrary/media/Order/8130.34B.pdf; FAA, *Fact Sheet*, *supra* note 5.

68. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-981, UNMANNED AIRCRAFT SYSTEMS: MEASURING PROGRESS AND ADDRESSING POTENTIAL PRIVACY CONCERNS WOULD FACILITATE INTEGRATION INTO THE NATIONAL AIRSPACE SYSTEM 7 (2012) (demonstrating the rarity of experimental airworthiness certificates; between January 1, 2012 and July 13, 2012, the FAA only issued eight special airworthiness certificates for experimental use to four UAS manufacturers).

prohibited.[69]

B. The FAA Modernization and Reform Act of 2012

Despite the strong interest by government and law enforcement agencies in utilizing UAS technology to assist in domestic surveillance, so far the FAA has tightly controlled UAS use in the national airspace.[70] Consequently, laws meant to regulate the use of UASs have been far outpaced by the rapid development of drone technology.[71] However, Congress, the powerful UAS industry lobby, and law enforcement agencies began to pressure the FAA to loosen its restrictions on UASs in anticipation of the rapid influx of UASs in the skies over the United States in coming years.[72] To stay abreast of the unique challenges this will present, Congress directed the FAA to begin the integration of both public and private UASs into the NAS in the FMRA.[73] In only seven pages of the three-hundred page FMRA, Congress stipulates that the FAA meet a number of deadlines for developing a comprehensive plan of rules, standards, and regulations to safely and efficiently integrate both public and private UASs into the national airspace.[74] The final deadline for fully implementing the comprehensive plan for UAS integration is ambitiously set for September 30, 2015.[75] To assist in streamlining the integration process and developing a uniform and efficient procedure for issuing both civil and public COAs, the FAA has since created the Unmanned Aircraft Systems Integration Office.[76]

The Act first mandates the FAA to develop a simpler, more streamlined process for public and private entities to apply for and receive COAs.[77] The provision directs the FAA to now allow both public and government agencies carrying out public safety operations to operate UASs without going through the COA process as long as the aircraft meets the following criteria: less than 4.4 pounds, operated within the line of sight of the operator, less than four hundred feet above the ground, flown during daylight hours, and at least five miles away from airports and other

69. 14 C.F.R. § 91.319(a)(2); *see also* FAA, *Fact Sheet*, *supra* note 5.
70. ACLU, RECOMMENDATIONS, *supra* note 37, at 8.
71. Popper, *supra* note 19.
72. M. Ryan Calo, *The Drone as Privacy Catalyst*, 64 STAN. L. REV. ONLINE 29, 31 (2011).
73. FMRA, Pub. L. No. 112-95, § 332(4), 126 Stat. 11, 73 (codified at 49 U.S.C. § 40101).
74. *Id.* §§ 331–36.
75. *Id.* § 332(a)(3).
76. FAA, *Fact Sheet*, *supra* note 5.
77. *See* FMRA § 334(a)–(c).

locations with aviation activities.[78]

The Act also mandates that the FAA establish a program to integrate UASs into the NAS at six test ranges in coordination with the National Aeronautics and Space Administration (NASA) and the Department of Defense.[79] The FAA will use the designated test sites to test all aspects of the safe and effective full integration of UASs into the national airspace, such as determining how UASs can be safely designated to share airspace with manned aircraft, how UASs will operate with air traffic control systems, ensuring that UASs will integrate properly with the Next Generation Air Transportation System,[80] and testing the safety and navigation systems of various UAS models.[81] The FMRA set a deadline of August 10, 2012 for the FAA to establish these six test sites,[82] but the FAA missed the deadline,[83] citing emerging privacy concerns.[84] The FAA did not even initiate a public comment period to collect questions and concerns

78. *See id.* § 334(c)(2). *See generally* ASS'N FOR UNMANNED VEHICLE SYS. INT'L, 2011 ANNUAL REPORT, *available at* http://higherlogicdownload.s3.amazonaws.com/AUVSI/958c920a-7f9b-4ad2-9807 f9a4e95d1ef1/UploadedImages/2011_AnnualReport .pdf (detailing how the Association for Unmanned Vehicle Systems International, a UAS lobbying group, was largely responsible for the language in the 2012 FMRA, specifically the immediate access of public safety agencies with drones less than 4.4 pounds, and the creation of test sites).

79. FMRA § 332(c)(3).

80. The Next Generation Air Transportation System (NexGen) is the new satellite-based system of air traffic management being implemented by the FAA, which will replace the traditional ground-based system of air traffic control of manned aircraft. *See* FAA, *What is NexGen?*, FAA.GOV, http://www.faa.gov/nextgen/why_nextgen_matters/what/ (last modified May 13, 2013).

81. FAA, *Fact Sheet*, *supra* note 5.

82. *See* FMRA § 332(c)(1).

83. *See* Saurabh Anand, *Hovering on the Horizon: Civilian Unmanned Aircraft*, 26 THE AIR & SPACE LAW. 18 (2013), *available at* http://www.americanbar.org/content/dam/aba/publications/air_space_lawyer/ASL_V26N1_anand.authcheckdam.pdf.

84. Michael P. Huerta, in a letter to Representative McKeon, explained the FAA's delay:

> Our target was to have the six test sites named by the end of 2012. However, increasing the use of UAS in our airspace also raises privacy issues, and these issues will need to be addressed as unmanned aircraft are safely integrated. We are working to move forward with the proposals for the six test sites as we evaluate options with our interagency partners to appropriately address privacy concerns regarding the expanded use of UAS.

Letter from Michael P. Huerta, Acting Adm'r, FAA, to Rep. McKeon (Nov. 1, 2012), available at http://higherlogicdownload.s3.amazonaws.com/AUVSI/958c920a-7f9b-4ad2-9807-f9a4e95d1ef1/UploadedFiles/FAA%20Response%20to%20Congressional%20Unmanned%20Systems%20Caucus%20on%20Test%20Site%20Delay%20-%20112812.pdf.

about the proposed test ranges until February 2013, after which it began taking applications from state and local governments, universities, and other public entities to develop the six testing sites around the country.[85] The FAA finally selected the applicants to operate the six testing sites in December 2013.[86]

III. UASs AND PRIVACY RIGHTS

The current use of drones by domestic law enforcement agencies, coupled with the anticipated influx of private and public UASs in the national airspace, has drawn the attention of privacy and civil liberties advocates.[87] Many members of Congress, who themselves are responsible for prompting the speedy integration of UASs through the passage of the FMRA, and the public are concerned that the current regulatory system lacks sufficient safeguards that would ensure drones are not used to improperly spy on Americans.[88]

There is no express right to privacy in the United States Constitution; however, both the Supreme Court and Congress have recognized privacy as a fundamental right. For purposes relevant to the drone-privacy debate, the Fourth Amendment, which guards against unreasonable and warrantless searches and seizures,[89] is the most pertinent to a discussion of an individual's expectation of privacy. The rise of the use of drone technology in the United States is certain to raise a number of questions concerning an individual's expectation of privacy. With the proliferation of

85. *See* JOINT PLANNING & DEVELOPMENT OFFICE (JPDO), UNMANNED AIRCRAFT SYSTEMS (UAS) COMPREHENSIVE PLAN: A REPORT ON THE NATION'S UAS PATH FORWARD, DEP'T OF TRANSP. 15 (Sept. 2013), *available at* http://www.faa.gov/about/office_org/headquarters_offices/agi/reports/media/UAS_Comprehensive_Plan.pdf.

86. There are six applicants to operate testing sites: the University of Alaska, the State of Nevada, New York's Griffiss International Airport, North Dakota Department of Commerce, Texas A&M University Corpus Cristi, and Virginia Polytechnic Institute and State University. FAA, FACT SHEET—FAA UAS TEST SITE PROGRAM, FAA.GOV, http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=15575 (last visited May 9, 2014).

87. *See* ACLU, RECOMMENDATIONS, *supra* note 37; *see also* ELECTRONIC FRONTIER FOUNDATION (EFF), PUBLIC COMMENTS OF THE EFF REGARDING PROPOSED PRIVACY REQUIREMENTS FOR THE UNMANNED AIRCRAFT SYSTEM TEST SITE PROGRAM (Apr. 23, 2013), *available at* https://www.eff.org/document/effs-comments-faa.

88. *See* THOMPSON, *supra* note 3, at Summary.

89. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

UASs, a number of invasive surveillance scenarios could potentially occur. Government entities and law enforcement agencies could spy on unsuspecting citizens and perform warrantless searches of their property; corporations could collect data on the private lives and movements of individuals to amass information for market research purposes or to sell customer lists to other corporations; private citizens could simply spy on one another; or criminals could use invasive imagery acquired from UASs to carry out illegal activities.

Privacy advocates fear that the constant presence of UASs in our everyday lives may become commonplace and will be allowed to further infringe on our rights as UASs are embraced by law enforcement for more controversial uses.[90] Furthermore, as UASs infiltrate every part of our public lives, new uses for surveillance UASs will slowly expand.[91] Drones could potentially be equipped with non–lethal weapons (e.g. rubber bullets, tear gas, tasers) for crowd control and dispersal purposes, or even eventually be armed with lethal weapons for law enforcement purposes.[92] Although a seemingly far-fetched scenario, civil liberties advocates believe that it is a slippery slope once we allow UASs to carry out surveillance and law enforcement purposes.[93]

A. The FAA's Stance on Privacy

The FAA has indicated that it intends to take privacy concerns into account.[94] The privacy policy currently espoused in the FAA's proposed regulations includes the provision that the test site operator must "operate in accordance with Federal, state, and other laws regarding the protection of an individual's right to privacy."[95] Although vague, these proposed rules suggest that the FAA has taken some privacy concerns seriously in its mandate to fully integrate UASs into the national airspace. However, the FAA has only mentioned the issue of privacy as it pertains to its UAS test site program, largely ignoring privacy as it relates to the bigger picture of full UAS integration.[96] The FAA acknowledged that its test site privacy

90. This occurrence is referred to as "mission creep." ACLU, RECOMMENDATIONS, *supra* note 37, at 11.

91. *Id.*

92. *Id.*

93. *Id.* at 10–11 (explaining that "current trends" surrounding UAS usage suggest a "looming threat").

94. *See* Unmanned Aircraft System Test Site Program, 78 Fed. Reg. 12,259, 12,260 (Feb. 22, 2013) (to be codified at 14 C.F.R. pt. 91).

95. *Id.*

96. *See* JPDO, *supra* note 85, at 7.

requirements do not suggest it will adopt a long-term privacy regulatory framework for UAS use—only that it may help inform future policymakers and privacy advocates in the privacy debate.[97]

B. Current State and Federal Legislation Concerning Domestic Drones and Privacy

With lingering concerns as to whether the FAA is the appropriate body to be taking on privacy policymaking and enforcement,[98] and unwilling to wait for the courts to decide the issue, several state and federal lawmakers have crafted legislation in anticipation of having to curb "big brother" style surveillance by the government and other entities.[99] Altogether, forty-three states have proposed legislation to place restrictions on the use of domestic drones for surveillance, with nine states having enacted legislation in 2013.[100] Moreover, the mayor of Seattle recently ordered the police department to abandon its plans to utilize two drones, which were obtained through a federal grant, its surveillance operations after residents and privacy advocates protested the drone program.[101] The support for restricting the use of UASs by privacy advocates and state and local lawmakers is indicative of the widespread concern for protecting civil liberties; however, these pieces of legislation, once enacted, are largely symbolic since the FAA has ultimate control over the NAS and federal law supersedes state law and local ordinances.[102]

The small town of Deer Trail, Colorado wants to have open-season on UASs flying over the town.[103] Town officials and residents are considering

97. *See* Unmanned Aircraft System Test Site Program, 78 Fed. Reg. at 12,260.

98. *See* Matthew L. Wald, *Current Laws May Offer Little Shield Against Drones, Senators are Told*, N.Y. TIMES, Mar. 20, 2013, http://www.nytimes.com/2013/03/21/us/politics/senate-panel-weighs-privacy-concerns-over-use-of-drones.html (remarking that Rep. Barton and Rep. Markey have said that the FAA "had no jurisdiction in privacy, nor much expertise in the area").

99. *See* Brian Montopoli, *Lawmakers Move to Limit Domestic Drones*, CBSNEWS.COM (May 16, 2013, 4:28 PM), http://www.cbsnews.com/8301-201_162-57584695/lawmakers-move-to-limit-domestic-drones/; *see also* Allie Bohm, *Status of Domestic Drone Legislation in the States*, AMERICAN CIVIL LIBERTIES UNION (Feb. 15, 2014), http://www.aclu.org/blog/technology-and-liberty/status-domestic-drone-legislation-states.

100. *See* Bohm, *supra* note 99.

101. *See* Laura L. Myers, *Seattle Mayor Grounds Police Drone Program*, REUTERS, Feb. 8, 2013, http://www.reuters.com/article/2013/02/08/us-usa-drones-seattle-idUSBRE91704H20130208.

102. *See* U.S. CONST. art. VI (The Supremacy Clause establishes that the Constitution and federal law takes precedence over state law, and if there is a conflict between the two, federal law prevails).

103. *See* Ben Wolfgang, *Drone-hunting Permits on Hold—Colorado Town to let Voters Decide in November*, WASH. TIMES, Aug. 7, 2013, http://www.washingtontimes.com/news/ drone-

an ordinance that would allow hunters to apply for a license to shoot down drones in exchange for a cash reward.[104] Originally scheduled to take place in November 2013, the vote on the ordinance has been postponed while a district court rules on the ordinance's legality.[105] The FAA issued a warning in response to the proposed ordinance, reminding the public that the FAA is the sole authority in charge of regulating airspace.[106] The FAA also warned that it is illegal to shoot at an unmanned aircraft and such an act would result in civil or criminal liability, just as would firing at a manned aircraft.[107] Although the town of Deer Trail concedes that the drone hunting license would be more of a symbolic gesture than anything else—since nobody has actually witnessed a drone hovering above the town—Deer Trail represents the cross section of Americans who fear that widespread UAS use will result in the legitimization of government spying and surveillance on its citizens.[108]

In a further show of concern for protecting fundamental privacy rights, members of Congress have proposed three bills that would restrict the use of UASs for domestic surveillance.[109] The House and Senate Judiciary Committees have each held hearings on the issue of the domestic use of UASs.[110] The Preserving American Privacy Act of 2013, proposed by Representatives Zoe Lofgren and Ted Poe would require a public entity, either government or law enforcement, operating a UAS to minimize its

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hunting-permits-hold-colorado-town-let-voter/.

104. *See id.*

105. *See* Ana Cabrera, *Colorado Town's Vote on Drone Ordinance Postponed*, CNN.COM (Dec. 10, 2013, 9:44 AM), http://www.cnn.com/2013/12/10/us/colorado-town-drone-ordinance/.

106. *See* Joan Lowy, *FAA Warns Against Shooting Guns at Drones*, HUFFINGTON POST, July 19, 2013, http://www.huffingtonpost.com/2013/07/19/faa-guns-drones_n_3624940.html.

107. *See id.*

108. *See* Wolfgang, *supra* note 103 (calling the ordinance a "pre-emptive strike" against drones).

109. *See* Preserving American Privacy Act of 2013, H.R. 637, 113th Cong. (2013); Preserving Freedom from Unwarranted Surveillance Act of 2013, S. 1016, 113th Cong. (2013); Drone Aircraft Privacy and Transparency Act of 2013, H.R. 2868, 113th Cong. (2013).

110. *See Eyes in the Sky: The Domestic Use of Unmanned Aerial Systems: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Sec., and Investigations of the H. Comm. on the Judiciary*, 113th Cong. (2013); *see also Operating Unmanned Aircraft Systems in the National Airspace System: Assessing Research and Development Efforts to Ensure Safety: Hearing Before the Subcomm. on Oversight of the H. Comm. on Sci., Space, & Tech.*, 113th Cong. 1 (2013) [hereinafter *Hearing: Operating Unmanned Aircraft Systems*]; *The Future of Drones in America: Law Enforcement and Privacy Concerns: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013) [hereinafter *Hearing: Future of Drones*].

collection of personally identifying information.[111] The bill also would ban the use of data obtained by a UAS without a warrant against a suspect in a criminal investigation,[112] and further calls for an outright ban on weaponized drones in national airspace.[113] A second bill, the Preserving Freedom from Unwarranted Surveillance Act of 2013, proposed by Senator Rand Paul, would prevent public officials from using UASs to collect evidence in criminal cases.[114] Representative Ed Markey introduced the Drone Aircraft Privacy and Transparency Act of 2013. This bill would amend the FMRA to mandate the Department of Transportation to conduct a study on the privacy risks posed by the integration of UASs into the national airspace.[115] However, despite these efforts by a handful of members of Congress to take action on protecting privacy rights, none of the three bills have moved past committee.[116]

C. The Divisive Debate Over the Appropriate Entity

It could be years before the Supreme Court clarifies case law on the issue of whether data collected during an unmanned aerial surveillance operation constitutes a Fourth Amendment search. Furthermore, a persistently divisive Congress makes substantive federal privacy policy legislation regarding UAS use unlikely any time soon. Local policymakers and state legislatures have attempted to fill the privacy vacuum left by gaps in the legal framework, but those efforts are largely symbolic as these institutions may actually have little authority to regulate drone policy in national airspace. Because of the uncertainty over which entity has the authority to regulate privacy issues for UASs, there is no correct answer for who exactly has the responsibility to formulate domestic drone privacy policy.

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111. *See* Preserving American Privacy Act of 2013, H.R. 637, 113th Cong. § 3119b (2013).

112. *See* H.R. 637 § 3119(c).

113. *See id.* § 3119(h).

114. *See* Preserving Freedom from Unwarranted Surveillance Act of 2013, S. 1016, 113th Cong. § 10 (2013).

115. *See* Drone Aircraft Privacy and Transparency Act of 2013, H.R. 2868, 113th Cong. § 2 (2013).

116. *See* Preserving American Privacy Act of 2013, H.R. 637, GOVTRACK.US, http://www.govtrack.us/congress/bills/113/hr637 (last visited May 9, 2014); Preserving Freedom from Unwarranted Surveillance Act of 2013, S. 1016, GOVTRACK.US, http://www.govtrack.us/congress/bills/113/s1016 (last visited May 9, 2014); Drone Aircraft Privacy and Transparency Act of 2013, H.R. 2868, GOVTRACK.US, http://www.govtrack.us/congress/bills/113/hr2868 (last visited May 9, 2014).

The seemingly simple answer is the FAA. With the Congressional mandate encompassed in the FMRA, the FAA is the agency tasked with integrating UASs into the national airspace.[117] Some stakeholders claim that by extension, this mandate includes the FAA assuming the responsibility for formulating and implementing privacy regulations because it is a fundamental part of the integration process.[118] However, there is nothing expressly written into the FMRA mandate that requires the FAA to create privacy law protections as part of that integration.[119] The FAA may not even have the legal authority to create broad privacy protections without being delegated that authority by Congress.[120] While the FAA has promised to consider the issue of privacy in its regulations, it has also acknowledged that it may not actually have the legal authority to enforce rules and regulations with regard to privacy.[121] Furthermore, FAA officials have suggested that the agency is ill-equipped to take on regulating privacy issues that do not affect safety since doing so would be outside of the FAA's mission.[122] Because of this uncertainty, there are stakeholders who believe that Congress should take the additional step of instructing the FAA to take privacy policy formulation into account as part of the FMRA mandate.[123]

Congress having left the FMRA mandate quite open-ended,[124] when

117. *See* FMRA Pub. L. No. 112-95, § 332, 126 Stat. 11, 73–75 (codified at 49 U.S.C. § 40101).

118. *See* ACLU, RECOMMENDATIONS, *supra* note 37, at 2 (arguing that the FAA's mandate extends to "protecting individuals . . . on the ground" and therefore has the obligation to protect individuals' fundamental right to privacy); *see also,* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 68, at 35–36.

119. *See* Harley Geiger, *How Congress Should Tackle the Drone Privacy Problem*, CTR. FOR DEMOCRACY & TECH. (Mar. 27, 2012), *available at* https://www.cdt.org/blogs/harley-geiger/2703how-congress-should-tackle-drone-privacy-problem (suggesting the FAA need not develop privacy rules).

120. *See* ALISSA M. DOLAN & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R42940, INTEGRATION OF DRONES INTO DOMESTIC AIRSPACE: SELECTED LEGAL ISSUES 22 (2013) (arguing that federal agencies do not have "inherent power"—Congress must assign specific powers).

121. *The Future of Unmanned Aviation in the U.S. Economy: Safety and Privacy Concerns: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 113th Cong. 2 (2014) [hereinafter *Hearing: Future of Unmanned Aviation*] (statement of Michael P. Huerta, Adm'r, Fed. Aviation Admin.) (testifying that the FAA's role is limited to the "safety and operational efficiency" of the national airspace system (NAS), and therefore, issues outside of that scope are beyond the FAA's authority).

122. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 68, at 36.

123. *Hearing: Future of Drones*, *supra* note 110 (statement of Ryan Calo, Assistant Professor, Univ. of Washington School of Law).

124. Under the law, the FAA has been broadly tasked with developing "a

privacy policy is undoubtedly one of the foremost concerns associated with UAS use, is perhaps indicative of its intention to let the FAA fill the void left in drone privacy law.[125] On the other hand, the language of the FMRA seems to specifically focus on safety in the integration of UASs, while the absence of any mention of privacy issues is glaring.[126] One could argue this is evidence that Congress's actual intention was for the FAA to focus on what it does best—safety—rather than privacy.[127]

Although it serves as the final authority on all aircraft operations in the NAS and can preempt local and state law, the FAA itself has suggested that, in the absence of widespread federal privacy law, existing state laws that protect individual privacy rights could potentially be applied in situations of UAS use infringing on fundamental rights.[128] Although the FAA's enabling statute proclaims the federal government "has exclusive sovereignty of airspace of the United States,"[129] and courts have long-held that the federal government preempts all attempts by the states to regulate aircraft safety,[130] numerous state legislatures have still attempted to pass their own regulations over UAS operations.[131] Arguments can be made for using state privacy regulatory structures already in place to protect infringements of privacy; however, if state laws attempt to regulate the use of UASs in any way and are challenged under the principle of federal preemption, it is likely most courts would find the laws to be unenforceable.[132]

There seems to be no definitive answer as to which entity is best positioned to take the lead in implementing safeguards to ensure that fundamental privacy rights are not infringed upon by UAS surveillance and usage. Currently, no federal agency has been granted the specific statutory

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comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system." *See* FMRA, Pub. L. No. 112-95, § 332, 126 Stat. 11, 73–75 (codified at 49 U.S.C. § 40101).

125. *See* DOLAN & THOMPSON, *supra* note 120, at 27.

126. FMRA § 332(a).

127. DOLAN & THOMPSON, *supra* note 120, at 27.

128. JPDO, *supra* note 85, at 7.

129. 49 U.S.C. § 40103(a)(1) (2006).

130. *See, e.g.*, Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 371 (3d Cir. 1999) ("Because the legislative history of the FAA and its judicial interpretation indicate that Congress's intent was to federally regulate aviation safety, we find that *any* state or territorial standards of care relating to aviation safety are federally preempted.").

131. *See* Bohm, *supra* note 99.

132. *See* Jol. A. Silversmith, *You Can't Regulate This: State Regulation of the Private Use of Unmanned Aircraft*, 26 AIR & SPACE LAW. 23 (2013), *available at* http://www.zsrlaw.com/images/stories/ASL_V26N3_WINTER13_Silversmith.pdf.

authority by Congress to regulate privacy policy related to the integration and use of UASs in the NAS.[133] A top Government Accountability Office official testified at a congressional hearing that it is currently unknown which entity is responsible for regulating privacy concern issues in the UAS implementation process.[134] Some have suggested that the DHS or the Department of Justice (DOJ) would be better suited to address privacy policy since privacy concerns would most likely stem from those departments' surveillance and law enforcement operations.[135] No matter which legislative body, administrative agency, or group of agencies ends up formulating privacy-protective rules, such federal regulations are necessary to protect the fundamental right to privacy that Americans have come to expect.

IV. THE PRACTICALITY OF THE FAA REGULATING PRIVACY POLICY

There is considerable debate whether the FAA even has the legal authority to regulate privacy rights.[136] Congress' mandate in the FMRA only directs the FAA to implement two sets of rules.[137] The first requires the FAA to "develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system"[138] and to publish a final rule by August 14, 2015.[139] The second mandated rulemaking requires the FAA to issue a final rule on integrating "small unmanned aircraft systems that will allow for civil operation of such systems in the national airspace" by June 14, 2014.[140] The FMRA does not explicitly mandate the FAA to regulate privacy, nor does it explicitly provide the FAA with the authority to address privacy concerns in its regulatory rulemaking.[141]

The FAA has traditionally been a largely technical agency tasked with

133. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 68, at 35.

134. *Hearing: Operating Unmanned Aircraft Systems*, *supra* note 110, at 63 (2013) (statement of Gerald L. Dillingham, Dir., Civil Aviation Issues, Gov't Accountability Office).

135. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 68, at 36.

136. *Compare* Dolan & Thompson, *supra* note 120, at 22 (stating that Congress must delegate certain powers to federal agencies), *and Hearing: Future of Unmanned Aviation*, *supra* note 121 (implying that privacy lies outside the scope of the FAA's statutory authority to regulate safety), *with Hearing: Future of Drones*, *supra* note 110, at 28 (testimony of Amie Stepanovich, Dir., Domestic Surveillance Project, Elec. Privacy Information Ctr.) (stating that the FAA should be the "primary regulating source").

137. FMRA § 332(b).

138. *Id.* § 332(a)(1).

139. *Id.* § 332(b)(2).

140. *Id.* § 332(b)(1).

141. *Id.* § 332; *see* DOLAN & THOMPSON, *supra* note 120, at 23.

research, engineering, and development of new aviation technologies; operation of air traffic control and navigation systems; and regulating minimum standards for aircraft manufacturing, operation, and maintenance.[142] FAA employees are mostly technical and industrial professionals—air traffic controllers, safety inspectors, engineers, transportation systems specialists—all working toward the common goal of ensuring that the United States maintains the safest and most efficient NAS in the world.[143] A drastic change in mission, from one focused exclusively on safety to one split between safety and privacy, would likely require a substantial reorganization of the agency, starting with personnel. For instance, more bureaucrats and lawyers would be needed at the FAA to ensure that privacy laws are being properly implemented and enforced and that no unconstitutional invasions of privacy are being committed. The FAA, which currently has no constitutional lawyers on staff, would need to reorganize its legal department in anticipation of these changes, as well as to prepare itself for needing to defend itself in privacy lawsuits.

Although it has carried out important regulatory rulemaking, the FAA has never been tasked with the responsibility to protect fundamental privacy rights, and specifically, the Fourth Amendment's protection against unreasonable and warrantless searches and seizures.[144] The FAA's foremost mission is to keep the national airspace system safe and efficient.[145] It is impractical for the FAA to be the entity in charge of regulating fundamental privacy rights because the FAA has very little, if any, expertise in that area.[146] Likewise, it is unwise to distract the agency from its critically important mission by forcing it to take on the unfamiliar responsibility of privacy rulemaking and enforcement. Instead, the FAA should continue to focus solely on how to safely integrate unmanned aerial systems into national airspace shared with manned aerial systems.[147]

The agency has already faced considerable challenges concerning how to safely integrate UASs into the national airspace, resulting in delays and

142. FAA, FAA — WHAT WE DO, FAA.GOV, http://www.faa.gov/ about/mission/ activities/ (last visited May 9, 2014).

143. FAA, FAA—WHO WE ARE, FAA.GOV, http://www.faa.gov/jobs/who_we_are/ (last visited May 9, 2014).

144. DOLAN & THOMPSON, *supra* note 120, at 24*; see also* Wald, *supra* note 98.

145. FAA, *Mission*, *supra* note 1.

146. DOLAN & THOMPSON, *supra* note 120, at 23–24; *see Hearing: Future of Drones*, *supra* note 110, at 28 (testimony of Michael Toscano, President, Ass'n for Unmanned Vehicle Sys. Int'l.) (remarking that the FAA has "very limited, if any, expertise" in regulating privacy and that the Agency should stay focused on its mission of safety).

147. *See Hearing: Duture of Drones*, *supra* note 110, at 28 (testimony of Michael Toscano, President, Ass'n for Unmanned Vehicle Sys. Int'l).

missed deadlines.[148] Certainly, requiring the FAA to formulate privacy policy will create unique challenges and further add to the delays in implementation of the comprehensive plan.[149] With far more pressing responsibilities, it would be infeasible and a poor use of resources to have the FAA formulate and enforce privacy safeguards concerning UAS use.

V. MOVING FORWARD

Although the FMRA mandate for the FAA to make rules regarding UASs integration may be read to include the responsibility to regulate privacy policy, because the FAA does not have the expertise or focus to take on comprehensive privacy policy, Congress may be the more appropriate body to legislate and enforce protections for fundamental privacy rights. In his concurrence in *United States v. Jones*,[150] Justice Alito wrote, "In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative."[151] Recognizing that Congress can play a far more effective role than the Judicial or the Executive Branch, Justice Alito called for legislative solutions for privacy law concerns. Overzealous government surveillance is most likely to be executed by the Executive Branch and the federal agencies that operate under the Executive, such as DHS, DOJ, the FBI, and the Drug Enforcement Agency. Moreover, it may be years before the Supreme Court hears a case regarding this issue. With the number of UASs performing a variety of public and law enforcement functions ever-increasing,[152] and with privacy laws lagging behind the advances in technology,[153] it is important for Congress to take the reins and act fast to pass UAS privacy law.

However, just because Congress is the body that should take the

148. *See* Letter from Michael P. Huerta, *supra* note 84 (identifying privacy issues as a chief operational challenge to establishing the six testing sites, which was delayed by nearly a year-and-a-half); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 68, at 27 (citing privacy concerns regarding the collection and use of information gathered by UASs as the cause for delay in the FAA seeking Requests for Proposals from applicants for its six testing sites); *see also* Anand, *supra* note 83, at 2–3.

149. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 68, at 38 (remarking that no federal agency has stepped forward to proactively address UAS privacy issues and this lack of movement may trigger further delays in implementing UASs into the NAS).

150. 132 S. Ct. 945, 957 (2012) (Alito, J., concurring).

151. *Id.* at 964 (Alito, J., concurring).

152. *See* FAA, *Forecast*, *supra* note 7, at 48.

153. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-961T, PRIVACY: FEDERAL LAW SHOULD BE UPDATED TO ADDRESS CHANGING TECHNOLOGY LANDSCAPE 8–10 (2012) (Statement of Gregory C. Wilshusen, Dir., Info. Sec. Issues, Gov't Accountability Office).

primary role in addressing domestic drone privacy law and enact legislation to protect civil liberties from being encroached upon by drones, this does not mean that the FAA cannot use its resources to assist in this endeavor. There are steps that the FAA can take, as part of its implementing of the mandates of the FMRA, to ensure that individuals' privacy rights are protected.

A. Recommendations for the FAA

Although the FAA should not be tasked with formulating, implementing, and enforcing privacy right protections, it should still do its part to keep the UAS authorization process as democratic, open, and streamlined as possible to encourage the entities that will be utilizing UASs to respect fundamental privacy rights. Making the process transparent will encourage upholding privacy rights as well as expose those entities, both public and private, that infringe upon these rights. First, the FAA should make the information in the COA granting process publicly available so that the public can view which entities are flying UASs, over what airspace they will be flying, and for what purpose, with the exception of classified missions by government and law enforcement entities. All data concerning drone flights should be publicly available because the public remains skeptical of domestic UAS use due to their origins shrouded in secrecy and warfare. The word "drone" immediately calls to mind armed drones killing terrorist targets in distant lands.[154] The more publicly-available information there is, the more open-minded the public will become regarding the societal benefits that can be derived from domestic UAS use.[155]

Furthermore, the FAA should require anyone applying for a COA to operate a UAS to submit a statement of purpose, detailing what it intends to do with the data it collects and a plan for minimizing unnecessary intrusions into the privacy of individuals.[156] This information should be shared with the body or agency that is ultimately in charge of enforcing the UAS surveillance privacy law to ensure that the system is transparent and that information-sharing is efficient to minimize occurrences of

154. *See* Popper, *supra* note 19 (describing the public perception problem with UASs: "drones have entered the popular consciousness as robotic killing machines controlled by our government, [and therefore] introducing them to domestic airways as tools for law enforcement would only reinforce the image of them as operatives of Big Brother").

155. *See id.* (stating that the key to changing public perceptions is removing the function of drones as war machines or mediums for intrusive government surveillance in the minds of the public; instead, the public needs to see their utility in agriculture, or in finding missing children).

156. *Hearing: Future of Drones*, *supra* note 110, at 28 (testimony of Annie Stepanovich).

infringement on individuals' civil liberties. The FAA should be involved in these steps to preserve civil liberties because, as the agency authorizing and denying COAs to UAS operators, it is the first point of interaction for operators and the ultimate authority on approving UASs in the national airspace. The FAA is in the unique position to require UAS operators to provide a plan for what they intend to do with UASs and the data collected, or the operator will not be issued a COA.

B. Recommendations for Congress

Congress is the most appropriate body for updating existing and out-of-date federal privacy laws in order to meet the unique challenges of future UAS surveillance technology. Rapid technological advances that have taken place in the twenty-first century have made many of the country's privacy laws, some of which have not been updated since the 1970s, obsolete.[157] Since the widespread public and private use of UASs is inevitable, it is important for Congress to act quickly so that it is prepared for the rapid influx of UASs in the sky once the FAA implements its comprehensive plan for full integration.[158] To meet its obligations to the American public, Congress needs to implement its own comprehensive plan of privacy standards to meet the privacy challenges ahead.[159]

First, Congress should enact baseline privacy laws for all UAS operators, both public and private, that must be followed as part of its comprehensive privacy policy. This would include full compliance with all safety and privacy regulations and parameters that have been established by the FAA, including any mandatory disclosures and reports required for COA authorization. These reports should describe the region and airspace where the drone will be flown, for what purpose the mission is to be conducted, and what surveillance equipment is onboard the UAS.[160] Congress should also include a provision in the law that mandates full disclosure of all data collected on UAS operations, regardless of whether the operation is for private or public use, or commercial or recreational in nature, as well as establish a procedure for ensuring that all the collected

157. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 153, at 5 (describing how technological advances "have rendered some of the provisions of the Privacy Act and the E-Government Act of 2002 inadequate to fully protect all personally identifiable information collected, used, and maintained by the federal government.").

158. *See Hearing: Future of Drones*, *supra* note 110, at 58–59, 67 (written statement of Laura W. Murphy, Dir. of Am. Civil Liberties Union) (describing how it is critical that Congress act quickly since the courts cannot keep pace with rapidly developing drone technology).

159. *See id.* at 89–91.

160. *Id.* at 90.

data is used and disposed of in an appropriate manner. Furthermore, all of the reports should be made viewable to the public online to guarantee transparency in the process and gain the public's trust.[161]

Next, Congress should adopt uniform guidelines to be followed by government agencies, law enforcement, and other public safety agencies, including a mandate that personally identifiable images or data gathered either intentionally or inadvertently during an operation should not be retained, unless they are pertinent to an ongoing investigation.[162] Furthermore, it should be unlawful under any circumstance for any public entity to weaponize its UASs.[163] Also, to prevent abuses of power and maintain public accountability, it is imperative for Congress to establish a strict warrant requirement for all drone surveillance used by law enforcement.[164]

Congress should also insist upon industry-wide standards for the UAS manufacturing industry. Congress should outlaw three types of drone activity: 1) arming with either nonlethal or lethal weapons, 2) intercepting mobile or internet communications, or 3) saving personally identifiable information, such as data, video, and images, indefinitely.[165] These recommendations, in conjunction with existing statutory law and case law concerning privacy, should ensure that individuals' Fourth Amendment rights are protected against unlawful infringement.

CONCLUSION

The widespread use of UASs for both public and private entities is inevitable as the uses are nearly limitless. The potential to put drones to use for the public benefit is just too great to reverse the anticipated surge. However, with the eventual omnipresence of UASs in our everyday lives, the potential for misuse is also great. The courts have not yet carved out space in the legal framework for how individual privacy rights will be protected from the leering eyes of super cameras mounted on hovering drones, especially through government and law enforcement surveillance. Likewise, Congress has not taken any action to address the privacy concerns that will surely arise with the imminent integration of UASs into the nation's airspace. Therefore, it seems the responsibility may fall on the FAA as regulator of the nation's airspace.

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161. *Id.*
162. ACLU, RECOMMENDATIONS, *supra* note 37, at 15–16.
163. Geiger, *supra* note 119.
164. *Hearing: Future of Drones*, *supra* note 110, at 90 (testimony of Amie Stepanovich).
165. ACLU, RECOMMENDATIONS, *supra* note 37, at 16.

Even though the FAA was tasked with the job of integrating UASs into the NAS,[166] it is not the appropriate agency for ensuring that fundamental privacy rights are protected with the influx of UASs. Already tasked with the supremely important role of ensuring safety in the national airspace, it would be irresponsible and impractical to distract the agency from this vitally important mission and force it to focus its efforts on an area where it lacks the expertise and infrastructure to enforce such rules. Congress is the entity that is much better equipped to formulate and implement privacy policies that will protect the public's Fourth Amendment rights from being infringed upon by the onslaught of drones in the skies above America. Congress has the expertise, the personnel, and the infrastructure in place to implement substantive privacy policies that will surely impact all Americans.

166. *See* FMRA, Pub. L. No. 112-95, § 332, 126 Stat. 11, 72–75 (codified at 49 U.S.C. § 40101).