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Kathryn M. Baldwin

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NOTES

ENDANGERED DEFERENCE: SEPARATION OF POWERS AND JUDICIAL REVIEW OF AGENCY INTERPRETATION

KATHRYN M. BALDWIN[†]

INTRODUCTION

Donald Zarda, a skydiving instructor, did what he was paid to do: put a client at ease when tensions were running high before a big jump. For Zarda, that meant disclosing he was gay to a female client whose boyfriend was teasing her about being closely strapped to a man.¹ The boyfriend called Zarda's employer to complain, and Zarda was subsequently fired.² Zarda filed a complaint alleging, among other things, that he was fired for discrimination on the basis of sex under Title VII of the 1964 Civil Rights Act.³ The United States Court of Appeals for the Second Circuit, bound by its precedent in *Simonton v. Runyon*,⁴ affirmed the District Court's grant of summary judgment for the employer on that claim.⁵ While the Supreme Court has established a Title VII claim for "discrimination based on a failure to conform to 'sex stereotypes,'"⁶ it has not recognized a "'sex stereotype' that men should date women."⁷ Based on the anomalous logic that a plaintiff alleging discrimination could prevail if she were a masculine woman but not if she were a

[†] Associate Managing Editor, *St. John's Law Review*; J.D., 2018, St. John's University School of Law; B.A., Xavier University. With thanks to Professor Anita Krishnakumar for her support and invaluable insight and to the editorial board for their diligent and thorough work.

¹ Joseph Goldstein, *Discrimination Based on Sex Is Debated in Case of Gay Sky Diver*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/nyregion/discrimination-based-on-sex-sky-diver-donald-zarda.html>.

² *Id.*

³ *Zarda v. Altitude Express*, 855 F.3d 76, 79 (2d Cir. 2017) (per curiam) (citing 42 U.S.C. § 2000e *et seq.* (2018)).

⁴ 232 F.3d 33, 36 (2d Cir. 2000) (holding that Title VII does not prohibit discrimination based on sexual orientation).

⁵ *Zarda*, 855 F.3d at 79–80 (noting that a three-judge panel cannot overturn Second Circuit precedent).

⁶ *Id.* at 80 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)).

⁷ *Id.* at 81.

masculine woman who is also a lesbian, the Second Circuit granted a rehearing en banc to revisit the question of whether the term “sex” encompasses sexual orientation.⁸

At the rehearing, the Equal Employment Opportunity Commission (“EEOC”), the agency charged with enforcing the Civil Rights Act, argued that Title VII’s prohibition against discrimination on the basis of sex includes discrimination on the basis of sexual orientation.⁹ The agency first established this position in *Baldwin v. Foxx*,¹⁰ which was decided during the pendency of Zarda’s case and formed the basis for his appeal.¹¹ Using its unique vantage point to adjudicate anti-discrimination hearings across the country, the EEOC construed a notoriously ambiguous statute to fulfill its congressionally delegated duty. The Second Circuit’s en banc decision in *Zarda* cited the evolved position the EEOC took in the *Baldwin* case, and adopted its framework and analysis to hold that Title VII discrimination on the basis of sex includes sexual orientation.¹²

This is a critical issue to resolve, as states vary widely in their protections for LGBTQ workers, resulting in confusion and insecurity for employees.¹³ As the United States Courts of Appeals for the Seventh and Eleventh Circuits have reached divergent definitions of “sex,”¹⁴ the Second Circuit’s en banc interpretation reinforces a circuit split that primes the issue for eventual certification to the United States Supreme Court. While the Second Circuit found statutory protection for the LGBTQ workforce, its refusal to explicitly state that it was

⁸ Braden Campbell, *2nd Circ. Grants En Banc Rehearing on Gay Bias Precedent*, LAW 360 (May 25, 2017, 7:50 PM), <https://www.law360.com/articles/928578/2nd-circ-grants-en-banc-rehearing-on-gay-bias-precedent>.

⁹ Goldstein, *supra* note 1 (noting that the Department of Justice argued *against* this reading).

¹⁰ EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015).

¹¹ *Zarda*, 855 F.3d at 81.

¹² *Zarda v. Altitude Express, Inc.*, No. 15–3775, slip op., at 8, 12–13, 21 (2d Cir. Feb. 26, 2018) (en banc).

¹³ See German Lopez, *The Equality Act, the Most Comprehensive LGBTQ Rights Act Ever, Explained*, VOX (Nov. 10, 2015, 6:00 PM), <https://www.vox.com/2015/7/23/9023611/equality-act-lgbt-rights>.

¹⁴ *Compare* *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 350–51 (7th Cir. 2017) (“It would require considerable calisthenics to remove the ‘sex’ from ‘sexual orientation.’”), *with* *Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248, 1255–57 (11th Cir. 2017) (denying a claim under Title VII for discrimination based on sexual orientation).

persuaded by, or deferring to, the EEOC's position was a missed opportunity to shed critical light on who is best positioned to interpret statutes: agencies or courts.¹⁵

Agencies set and enforce a wide variety of rules and regulations that bring the federal government inside the homes of Americans, affecting everything from our paychecks to our prescriptions to the foods in our pantries. Since the inception of administrative agencies, courts and legislators have wrestled with agencies' proper role in government, and how to appropriately cabin the scope of agency power.

For over thirty years, courts have deferred to an agency's reasonable interpretation of an ambiguous statute through the framework of the *Chevron* doctrine. Subsequent judicial decisions have complicated this doctrine¹⁶ and questioned whether it amounts to a constitutional violation of separation of powers.¹⁷ Adding fuel to the fire is the bipartisan acknowledgment that the executive branch under President Obama expanded its authority, either to circumvent a gridlocked Congress,¹⁸ to further the President's own agenda,¹⁹ or both. As

¹⁵ Of note, the EEOC did not argue for deference to the agency's position in its amici brief to the Second Circuit, sitting en banc. See En Banc Brief Amicus Curiae of Equal Employment Opportunity Commission in Support of Plaintiffs-Appellants and Reversal, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2017) (No. 15-3775).

¹⁶ See Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141, 171-72 (2012) (noting complications in the doctrine, categorical limitations in application, and a decline in its overall application).

¹⁷ See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2713-14 (2015) (Thomas, J., concurring) ("As in other areas of our jurisprudence concerning administrative agencies . . . we seem to be straying further and further from the Constitution without so much as pausing to ask why.").

¹⁸ See Sandra Zellmer, *Treading Water While Congress Ignores the Nation's Environment*, 88 NOTRE DAME L. REV. 2323, 2384 (2013) ("When Congress is dysfunctional, the other branches of government tend to fill the vacuum.").

¹⁹ See, e.g., Emma Brown, *Bipartisan Group of Senators Asks Obama to Rein in Education Department Proposals*, WASH. POST (Nov. 3, 2016), https://www.washingtonpost.com/news/education/wp/2016/11/03/senators-from-both-parties-ask-obama-to-rein-in-education-department-proposals/?utm_term=.af9ec36d6881 (Senators argued Obama-era regulations from the Education Department would undermine their goal of shifting power back to the states); Rebekah Mintzer, *Obama Administration Champions Pay Equity, But Some Allege Overreach*, NAT'L L.J. (Oct. 24, 2016, 5:50 AM), <http://www.law.com/sites/almstaff/2016/10/21/obama-administration-champions-pay-equity-but-some-allege-overreach/?slreturn=20161030135154>; Alan Gomez, *Obama Immigration Plan Will Challenge Agency, Applicants*, USA TODAY (Dec. 1, 2014, 3:45 AM), <http://www.usatoday.com/story/news/nation/2014/12/01/obama-immigra>

further evidence of *Chevron's* growing unpopularity, Congress is considering a bill that would overturn agency deference. In January 2017, the House passed a bill including the Separation of Powers Restoration Act ("SOPRA") to curtail agency authority by eliminating agency deference, shifting the primacy of statutory interpretation to courts through de novo review of agency construction.²⁰

This Note argues in defense of deference. From a separation of powers perspective, this Note argues first that Congress should rely on its other legislative checks over agency rulemaking and interpretation rather than legislating a blanket standard of judicial review. This Note next argues that while overruling *Chevron* is within the Supreme Court's ambit, it should decline to do so. A de novo review of agency interpretations would create its own separation of powers issues, and would destabilize the predictable backdrop against which lower courts, Congress, and agencies have operated for more than three decades. Instead, the Court should incorporate post-enactment legislative history as an indication of congressional intent, closely mirroring the agency's own understanding of Congress's will, and redistributing some interpretive power to Congress.

This Note proceeds in four parts: Part I consists of a brief history²¹ of the development of agency deference doctrine. Part II examines the decline of deference from the perspective of all three branches of government: the overuse by the executive agency that catalyzed deference's denouement, the underuse by the United States Supreme Court and renewed separation of

tion-executive-action-preparations/19544657/; JAMES E. MCCARTHY & CLAUDIA COPELAND, CONG. RESEARCH SERV., R41561, EPA REGULATIONS: TOO MUCH, TOO LITTLE, OR ON TRACK? (2016) (citing bipartisan criticism towards regulations promulgated by the EPA under the Obama Administration).

²⁰ See *infra* Part II.C.

²¹ As *Chevron* is one of the most discussed cases in academic writing, only a broad summary of its origin is necessary. See Peter M. Shane & Christopher J. Walker, Symposium, *30 Years of Chevron: Looking Back and Looking Forward, Foreword*, 83 FORDHAM L. REV. 475, 475 (2014) ("*Chevron* has been cited in over 68,000 total sources available on Westlaw—including in over 13,500 subsequent judicial decisions, in over 41,000 court filings, and in nearly 12,000 law review articles and secondary sources."); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 613 (1996) ("*Chevron* deference has preoccupied administrative law scholarship in a way few issues ever have.").

powers challenges, and the parallel assault from Congress under the pending SOPRA. Part III addresses the proposed de novo review standard and highlights the deficiencies in that solution, emphasizing instead the tools that Congress already employs to meaningfully check agency interpretations. Part IV concludes with a suggestion to courts to better balance separation of powers not through de novo review, but by embracing congressional intent as exhibited in post-enactment legislative history.

I. DEFERENCE DEVELOPS WITH THE EXPANSION OF THE ADMINISTRATIVE STATE

Agency rulemaking powers, including rules that interpret and construe statutory terms, are derivative powers, predicated on a grant of authority from Congress. The Administrative Procedure Act outlines the scope of judicial review of agency decisions, including interpretive rulemaking.²² Pursuant to this review, a court may “hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”²³ Thus, where an agency’s construction of a statutory term exceeds the limits or language of the statute, the court may invalidate the agency’s rule. If, however, Congress has expressly or impliedly left a gap for the agency to fill, it has not exceeded its delegated authority by filling in those gaps. While “[i]t is emphatically the province and duty of the judicial department to say what the law is,”²⁴ courts incorporate the agency’s reasoned construction and expertise into their judicial review.

The Supreme Court first heeded an agency’s statutory interpretation in *Skidmore v. Swift*.²⁵ Focusing on the administrator’s expertise, the Court gave “weight”²⁶ to administrative rulings, interpretations, and opinions based on the following factors: thoroughness, logic, consistency, and

²² See 5 U.S.C. § 706 (2018).

²³ *Id.* § 706(2)(C).

²⁴ *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

²⁵ 323 U.S. 134 (1944).

²⁶ Peter Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1145 (2012).

persuasiveness.²⁷ Ultimately, the *Skidmore* Court held that administrative rulings should “guide applications for enforcement,” but were not “conclusive” or binding on the Court.²⁸

Forty years later, the Court changed agency interpretation doctrine by announcing a new deference regime that built on *Skidmore*'s inclination for favoring agency expertise.²⁹ In *Chevron v. National Resource Defense Council*,³⁰ the Court reviewed the Environmental Protection Agency's (“EPA”) construction of the term “stationary source” for equipment that produces emissions pursuant to the EPA's mandate to regulate air pollution under the Clean Air Act.³¹ The Court developed a two-part test for judicial review of agency statutory construction.³² First, where “Congress has directly spoken to the precise question at issue,” its “unambiguously expressed intent” controls.³³ If, however, Congress is “silent or ambiguous,” then the Court must determine if the agency's interpretation “is based on a permissible construction of the statute.”³⁴ The agency in question need not be the only body interpreting the statute, nor does the Court need to independently reach the same reading; if the statute is silent or ambiguous, the agency's reasonable interpretation governs.³⁵

When *Chevron* solidified an agency's interpretative primacy over statutes, it directly addressed separation of powers concerns. The Court expressed its intent to avoid deciding

²⁷ *Skidmore*, 323 U.S. at 140.

²⁸ *Id.* at 139.

²⁹ Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980 (1992) (describing *Chevron* as “a significant shift in the deference doctrine,” but stopping short of a “complete revolution”). *But 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, 1098 (2008) (“[T]he *Chevron* regime . . . plays a surprisingly modest role in the Court's deference jurisprudence.”); Shane & Walker, *supra* note 21, at 494 (noting the “big deal” effect of *Chevron* is most notable outside of the courts).

³⁰ 467 U.S. 837 (1984).

³¹ *Id.* at 840. The EPA's rule provided for a “bubble” that included the entire plant within the stationary source, which environmental groups challenged as being too lenient on polluters. *See id.* The Court of Appeals set aside the regulation, and “adopt[ed] a static judicial definition of the term ‘stationary source’ when it had decided that Congress itself had not commanded that definition.” *Id.* at 842.

³² *Id.* at 842–43.

³³ *Id.*

³⁴ *Id.* at 843.

³⁵ *Id.* at 843 n.11

among permissible interpretations based on “competing political interests,” stating that the Executive Branch is the appropriate actor to make policy decisions because the President, unlike the judiciary, is “directly accountable to the people.”³⁶ Federal judges, having no constituency, should “respect legitimate policy choices” of the actors who do.³⁷ *Chevron* pivoted towards dynamic statutory interpretation as a necessary outgrowth of the modern administrative state and extended *Skidmore* to its logical conclusion: heed the wisdom of expert, political actors who create technical rules to interpret and properly administer increasingly complex laws.³⁸ *Chevron* cemented itself as the dominant doctrine to guide statutory interpretation in an increasingly agency-driven government,³⁹ as the growing complexity and technicality of the administrative state requires an executive-legislative blend to nimbly create and enforce the rules, guidelines, and regulations for a functioning modern government.

II. DEFERENCE IN DANGER AND THE PIVOT TOWARDS DE NOVO REVIEW

This Part examines deference’s destiny from three perspectives. First, it analyzes the Obama administration’s increased use of executive authority and robust agency action that perhaps catalyzed the other branches’ rebuke of agency deference. Next, it looks at the United States Supreme Court’s underutilization of deference doctrines and the growing chorus of criticism. Finally, this Part discusses Congress’s reaction to a perceived power shift among the branches by proposing SOPRA.

A. *Executive Expansion of Agency Action*

The growing presidential reliance on the administrative state contextualizes the Court’s and Congress’s changing

³⁶ *Id.* at 865–66.

³⁷ *Id.* at 866.

³⁸ Deference to expertise is neither novel nor exclusive to administrative law. For example, the Business Judgment Rule recognizes a lack of institutional confidence in the judiciary compared to the expertise of a director on a corporate board. The Business Judgment Rule is a judicial presumption deferring to a decision made by the board of directors of a corporation acting within their authority, so long as the directors have acted in accord with their fiduciary duties of care, loyalty, and good faith. *See Schlensky v. Wrigley*, 237 N.E. 2d 776, 778–80 (Ill. App. Ct. 1968).

³⁹ The cracks in the foundation will be addressed *infra* Part II.

response to agency deference. Bureaucratic control described as the “administrative presidency” dates back to the Reagan administration.⁴⁰ Each modern administration has developed different tactics for maximizing executive control over agencies.⁴¹

In particular, President Obama exercised a robust executive authority to make significant policy changes outside of the purview of the legislative branch.⁴² One explanation for President Obama’s amplified agency and executive rulemaking is the ineffectiveness of the gridlocked Congress in office during most of his tenure. An entrenched, partisan Congress is unable to form the necessary level of consensus on potentially controversial or broad policy and lacks the political will and votes to pass legislation drafted with specificity.⁴³ To accomplish policy reform, the Obama administration circumvented the legislative process to offer rules on climate change,⁴⁴ immigration,⁴⁵ and civil rights issues.⁴⁶

⁴⁰ Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 577 (2011).

⁴¹ *Id.* at 605–07 (describing President Reagan’s strategy, later adopted by President George W. Bush, to fill agency appointments and restructured positions to “alter[] the career-appointee balance in many agencies,” while the Clinton Administration inserted White House staff into regulatory review and exerted pressure on agency heads to promulgate rules that conform with presidential policy choices (quoting DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 52 (2008))).

⁴² *Supra* notes 18–19 and accompanying text.

⁴³ *Cf.* Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 208 (2013) (“Polarization is already leading to an increase in the power of the Court against Congress, whether or not the Justices affirmatively seek that additional power.”).

⁴⁴ Coral Davenport, *Obama Plans New Rule to Limit Water Pollution*, N.Y. TIMES (May 22, 2015), http://www.nytimes.com/2015/05/23/us/politics/obama-set-to-strengthen-federal-role-in-clean-water-regulation.html?_r=0 (“The water rule is part of a broader push by President Obama to use his executive authority to build a major environmental legacy, without requiring new legislation from the Republican-controlled Congress.”).

⁴⁵ *See* Gomez, *supra* note 19.

⁴⁶ U.S. Dep’t of Justice, Civil Rights Div. & U.S. Dep’t of Educ., *Dear Colleague Letter on Transgender Students* (May 13, 2016), <https://www.justice.gov/opa/file/850986/download> (announcing that the term “sex” in Title IX legislation, schools receiving federal funding must allow students to use restrooms “consistent with their gender identity”). The Trump administration is similarly frustrated by congressional stalemates, and continues to use executive orders and agency decisions to circumvent stalled or failed legislative action, most notably in the synthetic repeal of the Affordable Care Act. Robert Pear, Maggie Haberman, & Reed Abelson, *Trump to Scrap Critical Healthcare Subsidies, Hitting Obamacare Again*,

Some critics argue that President Obama, assuming deference to agency action, took advantage of the doctrine to expand executive branch influence and policy-making control.⁴⁷ Importantly, the polarization of political parties affects agency oversight shared between Congress and the President.⁴⁸ Leaders on both sides of the aisle take umbrage with the increase in power of the executive branch during the Obama administration,⁴⁹ yet it is predominantly right-wing members of Congress⁵⁰ and Republican-appointed justices on the Supreme Court⁵¹ who criticize and rally against the aggrandizement of agency authority. Against this backdrop of increased executive branch action, deference meets its downfall in the other two branches.

B. The Court Cools on Deference Without Overturning Chevron or Auer

The Supreme Court fails to exercise deference when appropriate, applying *Chevron* to just one in four eligible cases, whittling down the interpretive domain of agencies.⁵² The series

N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/us/politics/trump-obamacare-executive-order-health-insurance.html>.

⁴⁷ Binyamin Appelbaum & Michael D. Shear, *How the President Came to Embrace Executive Power*, N.Y. TIMES, Aug. 13, 2016, at A1 (“[H]is exercise of administrative power expanded and cemented a domestic legacy that now rivals Lyndon B. Johnson’s Great Society in reach and scope.”). This is a large departure from early agency action, where President Obama issued executive orders to streamline agencies and reduce administrative redundancy, and called on federal agencies to use behavioral science to become more practical and effective. See Cass R. Sunstein, *Making Government Logical*, N.Y. TIMES, Sept. 20 2015, at 9(L).

⁴⁸ See Michael A. Livermore, *Political Parties and Presidential Oversight*, 67 ALA. L. REV. 45, 97 (2015). For example, President Obama’s controversial use of recess appointments likely influenced the erosion of Congress’s trust in agency decisions, as legislators were threatened by the loss of a key oversight opportunity. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2555–56 (2014).

⁴⁹ Appelbaum & Shear, *supra* note 47 (“The administration’s regulatory legacy has become an issue in the campaign to replace Mr. Obama. . . .”).

⁵⁰ See David Hawkins, *Article One: The Right’s Recipe for a Hill Revival*, CQ MAG., Apr. 4, 2016.

⁵¹ See *infra* notes 65–74 and accompanying text.

⁵² See Richard J. Pierce, Jr., *The Future of Deference*, 84 GEO. WASH. L. REV. 1293, 1300 (2016) (describing the inconsistencies of the Court in applying *Chevron*). The Court applies *Auer* even less frequently, affording deference “in a mere 7.1% of eligible cases.” Eskridge & Baer, *supra* note 29, at 1104 (covering Court decisions from 1984–2006). See also Kevin M. Stack, *The Interpretive Dimension of Seminole Rock*, 22 GEO. MASON L. REV. 669, 670 (2015). This dearth of deference might be explained by an overlap of available doctrines, including *Chevron*, but most *Auer*-

of exceptions limiting the application of *Chevron* deference has crippled the doctrine's legitimacy and use, and contrary to its original purpose, has created an unpredictable body of law.

Three considerations explain why the Court decides not to defer to agency construction of ambiguous statutes or regulations. First, exceptions are often based on the formal process of rule-making.⁵³ The scholar-termed "Chevron Step Zero" ignores an agency's construction when it lacks the "force of law" or was the product of informal procedures.⁵⁴ Second, the Court recognizes the spectrum of complexity or technicality among statutes and rewards agencies interpreting technical statutes based on expertise necessarily beyond the Court's institutional ken.⁵⁵ Further, some enabling statutes explicitly prescribe the standard of judicial review, leaving less room for courts to defer to agency decisionmakers.⁵⁶ Finally, politics could explain the inconsistencies in whether *Chevron* is applied and, when it is, which agency interpretations are upheld. Arguably, the selective application of deference is a proper check on politicized agency rule-making.⁵⁷ Realistically, ideological voting plagues Supreme Court administrative case law.⁵⁸ It is very

eligible cases are afforded no deference at all. Eskridge & Baer, *supra* note 29, at 1104. Compare Eskridge & Baer, *supra* note 28, at 1125, with Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 115 MICH. L. REV. 1, 32 (2017) ("[C]ircuit courts applied the *Chevron* framework in . . . 74.8% [of] interpretations, [and] the agency prevailed . . . 77.4% [of the time].").

⁵³ See Barnett & Walker, *supra* note 51, at 14 (citing Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1449–50 (2005)).

⁵⁴ See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 218 (2006); Thomas W. Merrill, *Step Zero After City of Arlington*, 83 FORDHAM L. REV. 753, 756–57 (2014).

⁵⁵ Eskridge & Baer, *supra* note 29, at 1144–45 (noting that at the Supreme Court level, energy and intellectual property interpretations prevail 93.3% and 88.2% of the time, respectively, closely followed by foreign affairs and national security, bankruptcy, business regulation, tax, and entitlement programs, whereas civil rights interpretations succeed only 61.0% of the time).

⁵⁶ See Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 26–27 (2015) (describing how Congress reacted to preemption decisions by the Office of Comptroller of the Currency by setting a specific, lower level of *Skidmore* deference in the Dodd-Frank Act to show it had lost confidence and respect for the agency).

⁵⁷ See Pierce, *supra* note 52, at 1309.

⁵⁸ See Eskridge & Baer, *supra* note 29, at 1156 (noting in an empirical study a pronounced agreement-rate differential based on liberal or conservative agency interpretations, where "the best indicator of whether the agency will win in any given case is the ideological characterization of the agency interpretation").

likely that the Court splits along ideological lines deciding a policy decision on the merits, then works backwards to determine whether application of deference supports the end result.⁵⁹

The re-emergence of the “Major Question Doctrine” in *King v. Burwell*⁶⁰ is a paradigmatic example of how a politicized Court approaches *Chevron*. The Major Question Doctrine declines to apply *Chevron* deference for significant policy questions.⁶¹ In *King*, the Court stated that the availability of tax credits for federally established exchanges under the Affordable Care Act was “a question of deep ‘economic and political significance’ that is central to this statutory scheme” not meant for the IRS to interpret without an express assignment from Congress.⁶² Even without applying *Chevron*, the Court ultimately agreed with the IRS’s construction,⁶³ leading critics to believe that the Court needlessly jettisoned the doctrine while achieving the ends-focused result it intended all along.⁶⁴

Background policy preferences may have led four members of the Court to entertain the idea of overturning some aspect of agency deference during President Obama’s tenure. Chief Justice Roberts first questioned agency deference as a violation of separation of powers in a dissenting opinion for *City of Arlington v. FCC*.⁶⁵ In his dissent, Chief Justice Roberts emphasized the

⁵⁹ See Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 839 (2010).

⁶⁰ 135 S. Ct. 2480 (2015).

⁶¹ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26 (2000); *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 220 (1994).

⁶² *King*, 135 S. Ct. at 2489.

⁶³ *Id.* at 2496.

⁶⁴ See Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 498–99 (2016); Vanessa L. Johnson, Marisa Finley & J. James Rohack, *King v. Burwell: The Supreme Court's Missed Opportunity to Cure What Ails Chevron*, 42 J. LEGIS. 101, 131–32 (2016); see also Erwin Chemerinsky, *SCOTUS Gets Another Look at the Affordable Care Act*, ABA JOURNAL (Feb. 25, 2015, 9:15 AM), http://www.abajournal.com/news/article/chemerinsky_scotus_gets_another_look_at_the_affordable_care_act (noting the correlation between partisan appointment and lower court judges’ determination of whether to uphold the Affordable Care Act).

⁶⁵ 569 U.S. 290, 312 (2013) (Roberts, C. J., dissenting); See Andrew M. Grossman, *City of Arlington v. FCC: Justice Scalia's Triumph*, CATO SUP. CT. REV. 331, 332 (2013). In *City of Arlington*, state and local governments challenged a declaratory ruling issued by the FCC that limited their authority for zoning wireless

need for judicial authority against an unruly and all-encompassing administrative state.⁶⁶ Nevertheless, the majority opinion of the Court upheld the agency's ruling, applied *Chevron*, and declined to grapple with questions raised in the case about the scope of the agency's jurisdiction.⁶⁷ The majority even went so far as to describe de novo review as "an invitation to make an ad hoc judgment regarding congressional intent."⁶⁸

Justice Thomas has also questioned agency deference, writing separately in *Michigan v. EPA*⁶⁹ to directly challenge the constitutionality of *Chevron* deference.⁷⁰ In *Perez v. Mortgage Bankers Ass'n*,⁷¹ he argued that deference to agency decisions "undermines [the Court's] obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent."⁷² In the same case, Justice Scalia indicated a willingness to overturn the *Seminole Rock* or *Auer* doctrine affording deference to an agency's interpretation of its own regulations,⁷³ and Justice Alito also indicated his interest in reviewing the constitutionality of the *Auer* doctrine, though not on the facts of that case.⁷⁴ In the last five years, conservative Justices have planted seeds of doubt about the prudence and constitutionality of deference, and their congressional counterparts are harvesting them, intent on dismantling the primacy of agency interpretation.

telecommunication antennae and tower sites, claiming the ruling was outside the bounds of the FCC's statutory authority. 569 U.S. at 294–95 (majority opinion).

⁶⁶ *City of Arlington*, 569 U.S. at 313–15 (Roberts, C.J., dissenting) (noting that presidential oversight is not enough to keep agencies in check and warning against "the danger posed by the growing power of the administrative state").

⁶⁷ *Id.* at 304 (majority opinion) (noting that forcing a jurisdictional question is an attack not on the agency's authority, but rather "the ultimate target . . . is *Chevron* itself").

⁶⁸ *Id.* at 307.

⁶⁹ 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

⁷⁰ *Id.* at 2713–14.

⁷¹ 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring).

⁷² *Id.* Although that decision focused on interpretations of agency regulations, *Chevron* is necessarily implicated in the broad sweep of Justice Thomas's constitutional concerns. *See id.* at 1217.

⁷³ *Id.* at 1213 (Scalia, J., concurring) ("The agency is free to interpret its own regulations with or without notice and comment; but courts will decide—with no deference to the agency—whether that interpretation is correct.")

⁷⁴ *Id.* at 1210–11 (Alito, J., concurring).

C. *Congress Seeks to Legislate the Standard of Review for the Court*

Like the Court, the efforts to override deference from Congress are driven by conservatives making a broad push to enhance the power of the legislature.⁷⁵ While this might be consistent with party ideology to deregulate and shrink the federal government, it is impossible to ignore that the political underpinnings of a hegemonic struggle are a driving force behind a congressional body with obstructionist tendencies.⁷⁶

Unwilling to wait for the Court to overturn *Chevron* and *Auer*, members of Congress seek to achieve the same end by mandating a judicial standard of de novo review for all matters of agency interpretation in SOPRA.⁷⁷ At the start of the new term, SOPRA was repackaged as Title II of The Regulatory Accountability Act of 2017, which passed in the House in January 2017.⁷⁸

The House Judiciary Committee Report on SOPRA⁷⁹ emphasizes the importance of democratic accountability and calls on members of Congress to sharpen their writing in arms against a runaway administrative state. In explaining the need for SOPRA, legislators argue that agency deference is a “slippery slope” that will lead to uncertainty in the law based on the whims of agency interpretations.⁸⁰ They further argue that the effect of deference is bad for Congress’s accountability in writing comprehensive and clear statutes, noting that “the modern administrative state is characterized by poor and gauzy legislation in which gaps and ambiguities are too often left intentionally by Congress, to be filled by unaccountable agency

⁷⁵ See Hawkins, *supra* note 49 (describing the fear that “Congress has become the dullest point on the federal triangle” as animating the group’s initiatives).

⁷⁶ See 163 CONG. REC. H324 (daily ed. Jan. 11, 2017) (statement of Rep. Goodlatte) (remarking that “[t]he Obama Administration abused regulation to force its will on the American people” and that regulatory reform, including SOPRA, would give the incoming Trump Administration the “tools” to end “abusive regulation”).

⁷⁷ H.R. 4768, 114th Cong. (2016).

⁷⁸ H.R. 5, 115th Cong. § 202 (2017) (proposing amendments to 5 U.S.C. § 706). The following July, Senator Orrin Hatch introduced the Separation of Powers Restoration Act of 2017 to the Senate. S. 1577, 115th Cong. (2017).

⁷⁹ STAFF OF H. JUDICIARY COMM., 114TH CONG., REP. ON SEPARATION OF POWERS RESTORATION ACT OF 2016 (Comm. Print 2016).

⁸⁰ *Id.* at 4.

officials, whose work in turn is facilitated by deference from unaccountable judges.”⁸¹ The report does not address how *de novo* review will encourage better drafting from Congress.⁸²

Also absent from the committee report, but likely not from drafters' minds, is the concern that *Chevron* could unfairly heighten the hurdle for statutory abrogation. When a court exercising interpretive primacy construes a statute contrary to Congress's intent, Congress can amend or legislate around the decision.⁸³ By contrast, when a court upholds an agency's unintended interpretation, any corrective legislation would be more likely to face presidential veto for the sake of consistent policies within the executive branch, effectively requiring a super-majority to override both the misinterpretation and veto,⁸⁴ further insulating the agency's interpretation from oversight. Even fully crediting Congress's concerns as accurately identifying the weaknesses of deference doctrines, their proposed solution, *de novo* review, will only exacerbate these problems.

III. DE NOVO REVIEW IS NOT AN EFFECTIVE SOLUTION

It is unlikely that either the Regulatory Reform Act of 2017 or SOPRA will be enacted.⁸⁵ Regardless of their viability, this Note will proceed to examine why *de novo* review, which the United States Supreme Court could impose by overturning *Chevron*, is ill-suited for agency interpretations. First, Congress has other legislative powers to check agency overreach. Second, *de novo* review would undermine the ideologies behind

⁸¹ *Id.* at 5. Ironically, the bill would cut out the middleman, leaving the statutory interpretation up to “unaccountable judges” alone. As discussed *supra* notes 36–38, democratic accountability was a primary concern of the *Chevron* Court.

⁸² Nor does the Committee Report acknowledge any of the necessities of vague drafting, including bounded rationality and the difficulties of compromise across a staggeringly deep partisan divide.

⁸³ See Vikram David Amar, *Chevron Deference and the Proposed “Separation of Powers Restoration Act of 2016”*: A Sign of the Times, JUSTIA: VERDICT (Jul. 26, 2016), <https://verdict.justia.com/2016/07/26/chevron-deference-proposed-separation-powers-restoration-act-2016-sign-times>.

⁸⁴ *See id.*

⁸⁵ Even in a single-party controlled government, PredictGov estimates the bill has a 45% chance of being enacted. GOVTRACK, *H.R. 5: Regulatory Accountability Act of 2017*, <https://www.govtrack.us/congress/bills/115/hr5> (last visited March 18, 2018). Additionally, similar attempts to set blanket standards of review have failed. See Barnett, *supra* note 56, at 52. (“Congress’s failure to pass a judicial-review statute of general application since the APA in 1946 suggests that an omnibus statutory response is unlikely to succeed.”).

separation of powers. Finally, deference doctrines are functional and relied upon by lower courts, Congress, and agencies, and should be maintained for consistency and predictability of law.

A. *Congress Can Achieve Agency Oversight Through Legislative Action*

SOPRA is unnecessary to achieve congressional oversight over administrative agencies, as Congress has both *ex ante* and *ex post* means to limit agency overreach. *Ex ante*, Congress could draft legislation with greater specificity, delineating agency authority and designating the level of judicial review on a rule-by-rule or agency-by-agency basis.⁸⁶ Yet given the realities of current drafting practices, including an increased use of omnibus legislation,⁸⁷ the need to reconcile committees and drafters with divergent interests,⁸⁸ and the effect of the budget score in allowing ambiguity to prevail in a given statute,⁸⁹ relying on Congress to draft statutes with enhanced precision seems an unlikely, if not impossible, solution. Instead, Congress develops a robust and descriptive legislative history for agencies to use as an interpretive tool as they construe their delegated authority.⁹⁰ However, these solutions fail to influence agency interpretation of prior enacted statutes or an agency's own rules and guidelines. For those issues, Congress turns to its *ex post* administrative oversight powers.

⁸⁶ See *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (“Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.”); see also Barnett, *supra* note 56, at 53 (arguing for a systematic codification of judicial review for already-existing statutes in reauthorization and appropriations bills).

⁸⁷ Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 761 (2013) (“[T]he use of [this] ‘unorthodox’ vehicle[] is on the rise and . . . the rise is attributable to increased polarization.”).

⁸⁸ *Id.* at 756.

⁸⁹ *Id.* at 764.

⁹⁰ See Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 716 (2014) (showing agency awareness and use of legislative histories in statutory interpretation); Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 884 (2015) (arguing that because agencies participate in drafting legislative histories, they are more acutely aware of the drafting process and thus better equipped to utilize legislative histories than courts).

Congress cabins agency overreach and encourages agency interpretations to conform to Congressional intent through three powers.⁹¹ First, and most potent, Congress exercises the power of the purse through appropriations.⁹² Congress signals its interpretive preferences to agencies using appropriations in three ways: passing riders and earmarks,⁹³ enacting authorizing legislation,⁹⁴ and reducing the overall budget of the agency.⁹⁵ Some agencies are statutorily established to be self-funded and, therefore, are outside of Congress's budgetary control.⁹⁶ As such, the legislature—specifically the Senate—would have to rely on its second tool, the appointment process, to vet agency leaders on specific policy positions and send a strong prescriptive signal to the President on those policies.⁹⁷ Appointments are a less effective means of control than the budget, as they theoretically occur less frequently than annual appropriations bills, and are a speculative and unpredictable way to determine future agency action.⁹⁸ Third, Congress can use both formal processes, such as

⁹¹ For a comprehensive analysis of Congress's active participation in administering laws, see generally Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006).

⁹² See U.S. CONST. art I, § 8, cl. 1; *id.* art. I § 9, cl. 7; Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV L. REV 1822, 1825 (2012) ("Agencies are entirely dependent upon Congress . . . for funding.").

⁹³ Note, *supra* note 92, at 1826 (explaining that riders, which the Court treats like legislation, prohibit the use of funding for specific purposes, and are "temporary, narrowly focused amendments to the underlying statute," while earmarks specifically designate funding).

⁹⁴ Charles Tiefer, *Congressional Oversight of the Clinton Administration and Congressional Procedure*, 50 ADMIN. L. REV. 199, 200 (1998) ("[M]ost federal agencies pay constant attention to their authorizing and appropriating committees, and they do very little of significance without clearing—or at least informing—the relevant committees." (quoting T. Alexander Aleinikoff, *Non-Judicial Checks on Agency Actions* 49 ADMIN. L. REV. 193, 195 (1997))).

⁹⁵ See Note, *supra* note 92, at 1827–28 (noting that while it is possible for the President to exercise control over the budget, using a veto to get more money for an agency is a weak power).

⁹⁶ See *id.* at 1823–24.

⁹⁷ See U.S. CONST. art II, § 2, cl. 2; *Developments in the Law—Presidential Authority*, 125 HARV. L. REV. 2057, 2135 (2012); Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1625–26 (2015).

⁹⁸ Cf. Ian Ostrander, *Senate Democrats are Battling Every Trump Nomination. Here's How That Can Hurt Trump's Policies*, WASH. POST (Feb. 15, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/senate-democrats-are-battling-every-trump-nomination-heres-how-that-hurt-trumps-policies/?utm_term=.46b9043e8117 (arguing that delaying appointments has a large effect on an agency's ability to execute its policy aims).

oversight hearings⁹⁹ and committee reports, and informal contacts and statements to indicate its preference towards specific policies.¹⁰⁰

Congress, of course, already employs these tactics. For example, legislators have used budget cuts, riders to appropriation bills, and Senate refusal to confirm a permanent director to prevent the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) from carrying out specific policy goals, such as creating a federal registry for firearm transactions.¹⁰¹ Congress has effectively hamstrung the ATF with a combination of exclusively legislative actions, underscoring the power of the legislative branch to oversee agency decision making.¹⁰² However, where Congress remains unsatisfied with the discretion exercised by the agency after it has exhausted all of its opportunities to influence the executive branch, judicial review is its last hope.

B. Deference Serves Separation of Powers Interests

De novo review strays further away from the goals of separation of powers by shifting policy-making power to the judiciary, effectively subverting democratic accountability and undermining the economic exercise of judicial authority. In *Chevron*, the Court emphasized the necessity of allowing agencies and administrators who are beholden to the President, an officer elected by the entire country, to make policies.¹⁰³ Some critics argue that presidential oversight delegitimizes agency choices.¹⁰⁴ If the electorate is dissatisfied with the way the

⁹⁹ See Brian D. Feinstein, *Avoiding Oversight: Legislator Preferences and Congressional Monitoring of the Administrative State*, 8 J.L. ECON. & POL'Y 23, 28, 42 (2011) (arguing that oversight hearings are an important, legitimate, and effective way to elicit a change in bureaucratic response post-hearing).

¹⁰⁰ Beermann, *supra* note 91, at 70 (“All of the informal congressional action directed at agencies takes place in the context of (often unspoken) threats that Congress (or a particularly powerful member or committee) will not cooperate with the executive branch in the future.”).

¹⁰¹ Erica Goode & Sheryl Gay Stolberg, *Legal Curbs Said to Hamper A.T.F. in Gun Inquiries*, N.Y. TIMES (Dec. 25, 2012), <http://www.nytimes.com/2012/12/26/us/legislative-handcuffs-limit-atfs-ability-to-fight-gun-crime.html>.

¹⁰² See *id.* (noting that the NRA encouraged Congress to take these actions).

¹⁰³ *Chevron v. Nat'l Res. Def. Council*, 467 U.S. 837, 865–66 (1984).

¹⁰⁴ See Nina A. Mendelson, *Another Word on the President's Statutory Authority over Agency Action*, 79 FORDHAM L. REV. 2455, 2479–80 (2011) (noting the opacity of the White House's policy decision-making process).

President and agency develop policies, the Court conscientiously chose deference to prioritize political accountability, something that federal judges with lifetime appointments lack by design. Interpretation is an inherently political task, as it affects substantive policy outcomes.

Where critics of deference argue that agency deference aggrandizes executive branch power at the expense of Congress, a shift to de novo review similarly expands judicial power by ensuring a branch purportedly unable to make policy decisions in effect controls policy outcomes. This judicial power-grab is most obvious in the Major Question Doctrine. Rather than defer to agency decisions, judges make policy choices in de novo review.¹⁰⁵ Such interpretations infringe on the power of the legislative and executive branches to make and determine policy, and encourage an independent and unaccountable branch to take on that role.

Similarly, deference promotes institutional confidence by allowing experts to regulate.¹⁰⁶ Once a court determines that a statute is ambiguous, it “ha[s] naught else to do *beyond* either nakedly choosing [its] own policy preferences or assessing whether the agency’s choice seems reasonable.”¹⁰⁷ The more deference is afforded to agencies, the more expertise will be utilized, resulting in more reasoned and precise policy decisions.¹⁰⁸ Technical decisions without the appropriate expertise are judgments built on sand that erode the potency of the Court’s rulings.¹⁰⁹

Moreover, empowering agencies’ decisions also allows the Court to give effect to Congress’s delegation of power. In this way, the Court is acting as the “faithful agent[]” of the

¹⁰⁵ See *supra* notes 59–63 and accompanying text.

¹⁰⁶ *Chevron*, 467 U.S. at 865 (reasoning that the agency or administrator’s interpretation is entitled to deference where the “regulatory scheme is technical and complex,” the interpretation evidences a “detailed and reasoned” consideration by the agency, “and the decision involves reconciling conflicting policies.”).

¹⁰⁷ Kristin E. Hickman, *The Proposed Separation of Powers Restoration Act: Why?* 41 A.B.A. SEC. OF ADMIN. L. & REG. PRAC. 7 (2016).

¹⁰⁸ See Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1141 (2015).

¹⁰⁹ Even if the Court relied on scientists, economists, or other analysts to inform its opinions, recreating the work of capable administrators would waste time and taxpayer dollars.

legislature¹¹⁰ by carrying out its will to empower agencies to fill in the gaps in legislation. Thus, de novo review would aggrandize judiciary discretion without any payoff for Congress in either enhanced expertise or fidelity.

C. *Reliance Interests Favor Maintaining the Deference Status Quo*

While many commentators have called for *Chevron's* death at the hands of the United States Supreme Court,¹¹¹ agencies, lower courts, and Congress assume that deference applies to agency decisions and act accordingly. The reliance on *Chevron* extending across all branches of the federal government should give the Court pause when it considers overruling the doctrine.

First, agencies depend on the stability of the *Chevron* regime to guide their interpretations. Agency rulemakers are aware of *Chevron* and consider its use more than any other tool in drafting.¹¹² De novo review would result in “delay, complexity, and uncertainty in the administrative process.”¹¹³

Second, lower courts consistently and successfully rely on the doctrine. While the Supreme Court applies *Chevron* to roughly 25% of the relevant cases, circuit courts apply *Chevron* to 74.8% of interpretations.¹¹⁴ At the Supreme Court level, “the Court’s choice to apply *Chevron* deference, as opposed to a less-deferential doctrine or no deference at all, does not seem to affect

¹¹⁰ For more on faithful agency, see John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5 (2001). *But see* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 169 (2010) (noting instead, judges are “faithful agents of the Constitution.”).

¹¹¹ *See generally* Beermann, *supra* note 91; Cory R. Liu, *Chevron’s Domain and the Rule of Law*, 20 TEX. REV. L. & POL. 391 (2016); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239 (2002); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010).

¹¹² Walker, *supra* note 90 at 716, 724 (noting 94% of rule drafters knew *Chevron* by name, and offering “some support for the empirical assumption that federal agencies draft differently when they know *Chevron* deference applies”).

¹¹³ STAFF OF H. JUDICIARY COMM., 114TH CONG., REP. ON SEPARATION OF POWERS RESTORATION ACT OF 2016 23–24 (Comm. Print 2016) (dissenting views) (describing effect of de novo review as a “regulatory paralysis”).

¹¹⁴ Barnett & Walker, *supra* note 52, at 4, 29.

the outcome of the case.”¹¹⁵ By contrast, at the circuit court level, “[t]he agency was twice as likely . . . to prevail . . . as opposed to reviewing the interpretation de novo”¹¹⁶ Perhaps de novo review would not increase the arbitrariness of Supreme Court decisions, where the application of a deference standard does not seem to affect the outcome of the case. However, deference matters in lower courts, and contributes to the predictability and consistency of decisions. Some scholars have questioned whether it is necessary for the Supreme Court to be uniform in its own application of *Chevron* and the instructions it provides to lower courts.¹¹⁷ The Supreme Court’s exceptions and inconsistent applications trickle down to circuit courts,¹¹⁸ and a doctrinal schism would give the Supreme Court a license to arbitrarily decide if and how *Chevron* applies to the few cases where it does grant certiorari. Imposing de novo review at all levels of the judiciary would gut lower courts of a predictable and reliable tool, and “fix” a problem that does not exist outside of the Supreme Court.

Third, congressional drafting depends, in part, upon legislators relying on deference doctrines as a backdrop. Unique among interpretive canons, Congress “consider[s] *Chevron* . . . when drafting precisely because [it] understand[s] that courts use [it].”¹¹⁹ Unifying the approximately 12,000 congressional staffers to conform with the Supreme Court’s notion of grammar canons would prove difficult.¹²⁰ Congress exemplified its understanding of *Chevron* when it codified deference standards in the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).¹²¹ Congress set a *Skidmore*-level standard for courts reviewing preemption decisions from the Office of Comptroller of the Currency, and

¹¹⁵ *Id.* at 4. When the Court applies *Chevron*, the “agency win rate” is 76.2%. Eskridge & Baer, *supra* note 29, at 1142. Agencies prevail 66% of the time when no deference regime is invoked. *Id.*

¹¹⁶ Barnett & Walker, *supra* note 52, at 31.

¹¹⁷ Pierce, *supra* note 52, at 1314 (“Can, and should, the Supreme Court establish for the first time a legal regime in which it tells lower courts to do as we say and not as we do?”).

¹¹⁸ See Barnett & Walker, *supra* note 52 at 68 (“*Mead*’s focus on delegation and formality, unsurprisingly, has a firm grasp on the circuit courts.”).

¹¹⁹ Bressman & Gluck, *supra* note 87, at 732.

¹²⁰ *Id.* at 739.

¹²¹ See 12 U.S.C. § 25b (2018).

maintained a *Chevron* “savings clause,” indicating Congress acted in reliance on its assumption that courts will apply *Chevron* by structuring legislation around it.¹²²

De novo review would reorder the logic of actors across the entire federal government, removing a cornerstone of administrative law that, with the exception of its use by the Supreme Court, functions as intended. The solution to the perceived separation of powers problem, then, is not to reject deference, but to embrace it. If the Court shifts interpretations towards a more nuanced understanding of the dynamic Congress-agency relationship, drafters would be better able to predict how legislation and interpretation might fare in judicial review.¹²³

IV. THE COURT SHOULD CONSIDER POST-ENACTMENT LEGISLATIVE HISTORY

The *Chevron* framework already gives courts the means to construe statutes according to the will of Congress and address illegitimate exercises of agency authority. *Chevron* incorporates some form of de novo judicial review by first discerning whether the statute is ambiguous.¹²⁴ The United States Supreme Court, encouraged by Justice Scalia, has increasingly taken a textualist approach at *Chevron* Step One.¹²⁵ This method directly correlates to the decline in the application of *Chevron*.¹²⁶ Limiting the available interpretive tools not only deprives courts of vital context for the statute, but also impractically freezes the statute at the time of enactment. Instead, courts should stand in the shoes of the agency breathing life into a statute through enforcement and undertake a more flexible statutory interpretation.

¹²² Barnett, *supra* note 56.

¹²³ Bressman & Gluck, *supra* note 87, at 766–67.

¹²⁴ Emily Hammond, *Four Flaws of the Proposed Separation of Powers Restoration Act*, 41 A.B.A. SEC. OF ADMIN. L. & REG. PRAC. 9 (2016).

¹²⁵ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 363–65 (1994). *But see* Eskridge & Baer, *supra* note 29, at 1136 (“[T]here can no longer be serious debate whether Supreme Court precedent instructs judges to consider relevant legislative history in applying *Chevron* deference. It does.”).

¹²⁶ Merrill, *supra* note 125, at 366. This might also account for the disparity of application of *Chevron* doctrine between the Supreme Court and circuit courts.

Chevron tells the Court to “give effect to the unambiguously expressed intent of Congress.”¹²⁷ Legislative history explains the specifically expressed will of Congress. Legislative history “can aid the judge in understanding how the legislation’s congressional proponents wanted the statute to work, what problems they sought to address, [and] what purposes they sought to achieve. . . .”¹²⁸ To prevent agency overreach and uphold the meaning of the statute, the Court should consider legislative history as a means to affect the will of Congress in a way “that respects the general integrity of [congressional] processes (while mindful of the possibilities of manipulation).”¹²⁹

Critics of using legislative history in *Chevron* interpretations argue that if statutory ambiguity “signals a congressional delegation to the agency charged with implementing the statute, then a court’s use of legislative history to specify the terms of that delegation—to narrow the scope of *statutory* discretion—contradicts the very point of the statute.”¹³⁰ First, it is important to acknowledge that legislative histories must be read with some skepticism and afforded weight according to their context and content; not all materials are of the same caliber in offering insight into legislative intent or purpose.¹³¹ Second, this criticism presumes that external sources would force a judge to read a statute more narrowly than the limits of each word as explored through textualism. That idea is undermined by the Court’s current use of textualism to “reduc[e] the range of possible statutory meanings, and thus reduc[e] the occasions on

¹²⁷ *Chevron v. Nat’l Res. Def. Council*, 467 U.S. 837, 843 (1984).

¹²⁸ ROBERT A. KATZMANN, *JUDGING STATUTES* 35 (Oxford University Press, 2014) (“Legislative history can be especially valuable when construing a specialized term or phrase in statutes dealing with complex matters beyond the ordinary ken of the judge.”).

¹²⁹ Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 266 (1998) (arguing that legislative histories are critical to the interpretive process).

¹³⁰ John F. Manning, *Chevron and Legislative History*, 82 GEO. WASH. L. REV. 1517, 1542 (2014). For a general overview of criticisms of the use of legislative histories, see KATZMANN, *supra* note 128, at 39–42.

¹³¹ See James J. Brudney, Lecture, *Faithful Agency Versus Ordinary Meaning Advocacy*, 57 ST. LOUIS U. L.J. 975, 993 (2013) (“[S]tanding committee and conference committee reports traditionally are accorded the most weight Explanatory floor statements by bill or amendment sponsors receive almost as much attention Conversely, the Court considers statements by bill opponents and also subsequent legislative history to be unreliable.”).

which reference to agency views is appropriate.”¹³² Third, agencies themselves rely on legislative history in developing their interpretations.¹³³ While some might argue that the Court and agencies operate in “divergent normative contexts” and thus necessarily rely on different sources of authority in their interpretations,¹³⁴ it does not benefit the reviewing court to foreclose interpretive resources available to and utilized by the agency when determining whether the agency is acting within its scope of authority. Finally, this criticism ignores the possibility that the Court could use legislative history to corroborate, not foreclose, the ambiguity of a statute.

Post-enactment legislative history in particular is critical to agency-related statutory interpretation where agencies receive signals from and construe statutes in accordance with the preferences of the current, not the enacting, Congress.¹³⁵ While post-enactment legislative history could be an important interpretive tool, the Court, in most instances, currently rejects it.¹³⁶

Subsequent legislative history has two main forms: congressional resolutions and legislative acquiescence. The Court largely ignores resolutions,¹³⁷ which are meant to influence political actors with a majority vote of one or both houses of Congress.¹³⁸ Without bicameralism and presentment—significantly, the signature of the head of all executive agencies—resolutions are particularly susceptible to partisan politics, and

¹³² Merrill, *supra* note 125, at 366.

¹³³ *Supra* note 112 and accompanying text.

¹³⁴ Jerry Mashaw, *Exploring Agency Statutory Interpretation*, 31 A.B.A. SEC. OF ADMIN. L. & REG. PRAC. 7 (2006) (“Courts have long been viewed as rights-protecting, institutional brakes, while executive agencies are institutional accelerators.”).

¹³⁵ *See supra* Part III.A.

¹³⁶ *See* Heintz v. Jenkins, 514 U.S. 291, 298 (1995); Haynes v. United States, 390 U.S. 85, 87 n.4 (1968) (“The view of a subsequent Congress of course provide [sic] no controlling basis from which to infer the purposes of an earlier Congress.”); Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 609 (2008) (“[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.” (quoting United States v. Price, 361 U.S. 304, 313 (1960))).

¹³⁷ *See*, Gersen & Posner, *supra* note 136, at 609–10. Because courts do discern post-enactment legislative intent from congressional resolutions, Congress does not often utilize them. *Id.* at 612.

¹³⁸ *Id.* at 578–79.

are therefore not regarded as trustworthy indicators of legislative intent.¹³⁹

By contrast, the Court sometimes pays credence to legislative acquiescence, “a presumption about legislative views on the basis of congressional inaction or congressional action that has multiple interpretations.”¹⁴⁰ This presumption is strongest when Congress’s inaction follows vigorous debate by Congress and the public, and where “there is reason to regard the failure of the legislature to act as evidence of the correctness of the interpretation.”¹⁴¹ Saliiently, Congress pays close attention to statutory interpretation in civil rights cases, and is more likely to exercise “*restorative* overrides,” where it “‘restores’ what it considers the correct understanding of the statutory scheme”¹⁴² In essence, acquiescence allows an agency’s prior interpretation to gain deferential status in the event Congress does not take affirmative legislative action to abrogate the agency’s reading as affirmed by the Court.

Critics of acquiescence argue that “inaction does not contain the same guaranties as action.”¹⁴³ Congress could fail to enact a statute for any number of reasons that do not indicate its approval of a given interpretation.¹⁴⁴ Additionally, some standards for applying acquiescence are ambiguous. For example, it is unclear when an interpretation becomes “longstanding,” and how rigorously a topic should be debated before the Court is comfortable allowing the absence of action to

¹³⁹ See Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1523 n.304 (2000) (noting that because the bill passage process encourages some degree of partisan restraint, by comparison, “[p]ost-enactment legislative history seems especially likely to be strategic rather than truly descriptive of congressional intent”).

¹⁴⁰ Gersen & Posner, *supra* note 136, at 610.

¹⁴¹ Jill Schlick, *Administrative Law—The Fourth Circuit Strikes Down the FDA’s Tobacco Regulations*, 25 WM. MITCHELL L. REV. 741, 754–55 (1999).

¹⁴² Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1319–20 (2014) (listing as examples of restorative overrides the Pregnancy Discrimination Act of 1978 and the Lily Ledbetter Fair Pay Act of 2009).

¹⁴³ Schlick, *supra* note 141, at 756–57 (claiming a lack of political accountability where Congress can change the law by doing nothing).

¹⁴⁴ See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (“Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.”) (internal quotations omitted).

stand in for Congress's will.¹⁴⁵ These blurry boundaries could have the unintended effect of allowing courts to manipulate the tool in conformity with their own intent, rather than Congress's.

Nevertheless, the benefits of utilizing acquiescence to determine intent outweigh the drawbacks. Acquiescence would increase, not decrease, political accountability by burdening legislators with the duty to respond to interpretations. Moreover, a widespread use of this presumption, like a widespread use of deference, creates a predictable backdrop for legislators and agencies alike.¹⁴⁶ Legislators understand the consequences of failing to abrogate interpretations with which they disagree, and can measure their responses accordingly. Agencies, knowing that they are more likely to prevail in their interpretation the longer it is utilized without contest, might cater policies toward a longer aim, potentially with a more restrained effect that Congress would find less incendiary.

To illustrate this point, the following analysis applies post-enactment legislative history to *Zarda* to reimagine the strength of the agency deference argument the Second Circuit avoided. At the outset, given the evolution of Civil Rights Act jurisprudence, it strains credulity to assert that the term "sex" in Title VII is unambiguous on its face.¹⁴⁷ Here, *Chevron* Step One requires a searching inquiry to define the outer boundaries of that ambiguity. The scant legislative history that accompanies this act is not illuminating.¹⁴⁸ Using post-enactment legislative history, the court would focus its Step One analysis on Congress's dynamic interpretation of Title VII, looking for any indication

¹⁴⁵ See Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1864–65 (2015) (advocating to define longstanding as at least ten years because it requires the interpretation to be on the books for more than one presidential administration).

¹⁴⁶ See *supra* Part III.C.

¹⁴⁷ See *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 386 (2015) (acknowledging the EEOC changed its construction of "sex" to include gender identity since plaintiff filed the case, and remanding to the District Court to assess the plaintiff's failure to exhaust administrative remedies); *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80 (1998) (allowing a claim for same-sex harassment under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (recognizing a Title VII claim on the basis of sex for discrimination for failure to conform to sex stereotypes).

¹⁴⁸ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63–64 (1986) (describing the last-minute amendment that added "sex" to Title VII, leaving interpreters with "little legislative history to guide us").

that once Congress was apprised of the EEOC's definition inclusive of sexual orientation, it reacted with legislative action to narrow the definition of sex.

Congress may have been aware of the interpretation of sex as sexual orientation as early as 2002, when a federal district court in Oregon held that "[t]he protections of Title VII are not limited to heterosexual employees only" where a lesbian woman stated a claim for sexual harassment based on nonconformity to gender stereotypes.¹⁴⁹ At the very least, Congress should have recognized the EEOC's interpretation of "sex" in 2015, when it decided *Baldwin v. Foxx*.¹⁵⁰ In 2003, the Supreme Court began weaving a tapestry of protection in sexual orientation discrimination cases.¹⁵¹ Congress must have noticed the evolution of the status quo on the Court and in society towards a more inclusive definition, which would necessarily alert Congress to the opportunity to abrogate a broader interpretation.

In light of the legal and cultural focus on LGBTQ rights, it is without question that the public has engaged in vigorous debate on the issue of sexual orientation discrimination. Congress has definitively joined the fray, as evidenced by a recent proposal for sweeping legislation to address LGBTQ rights and protections.¹⁵² While the Second Circuit dismisses arguments advocating for subsequent legislative developments put forward by amici,¹⁵³ it only cites to the Department of Justice's argument that the consistent introduction and failure of legislation that "expressly prohibit[s] sexual orientation discrimination in the workplace [means that] Congress has implicitly ratified decisions holding that sexual orientation was not covered by Title VII."¹⁵⁴ Far from seeking to reassert a contrary definition, Congress sought to explicitly codify the EEOC's interpretation of "sex" in the

¹⁴⁹ *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002).

¹⁵⁰ *Supra* note 10 and accompanying text.

¹⁵¹ *See* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 349–50 (7th Cir. 2017) (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)). *See also* *Zarda v. Altitude Express, Inc.*, No. 15–3775 slip op., at 66 n.33 (2d Cir, Feb. 26, 2018) (en banc) ("[T]here has been a sea change in constitutional framework governing same-sex marriage.").

¹⁵² *See* Equality Act, H.R. 2282, 115th Cong. (2017).

¹⁵³ *Zarda*, slip op., at 59.

¹⁵⁴ *Id.* at 62.

proposed Equality Act using a “belt and suspenders” method.¹⁵⁵ The bill’s 240 co-sponsors reiterate the new status quo of broad inclusion of LGBTQ rights in existing legislation,¹⁵⁶ showing that Congress is an active partner in continuously reshaping background norms. Instead of “ratif[ying] by silence”¹⁵⁷ and interpretation that precludes Title VII protection for gay workers, Congress evinces a robust rights-protective purpose in their consistent attempts to offer coverage to gay employees. In its most recent iteration, Congress’s underwriting of an agency decision shows harmony and alignment of interpretation in both policy-making branches, a persuasive statement that bolsters deference to the EEOC decision.¹⁵⁸ Should the Equality Act fail, it is unlikely that the EEOC’s new definition of sex, adjudicated in 2015, will be “longstanding” enough to merit accepting Congress’s silence as action for the decision before the Second Circuit.¹⁵⁹ However, given the intensity of public attention and debate, a court might accept a shorter timeframe, combined with the fact that the only proposed legislation reacting to the EEOC’s interpretation sought to codify *Baldwin* as sufficient to evince ambiguity.

Once the reviewing court finds an ambiguity left to the agency to construe, it then looks to the reasonableness of the agency’s interpretation. In *Baldwin*, the EEOC held that “[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or

¹⁵⁵ Equality Act, H.R. 2282, 115th Cong. § 2(a)(9) (2017); Brief Amici Curiae of Four Members of Congress in Support of Plaintiffs-Appellants and Reversal at 11–12, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2017) (No. 15-3775).

¹⁵⁶ See Lopez, *supra* note 13. Certainly, this bill cannot represent the unanimous will of Congress, nor is it enacted law.

¹⁵⁷ *Zarda*, slip op., at 63.

¹⁵⁸ See Ethan J. Lieb & James J. Brudney, *Legislative Underwrites*, 103 VA. L. REV 1487, 1491, 1498–99 (2017) (describing “an express legislative endorsement of a judicial reading of a statute” as potentially a form of “supercharged precedent,” but acknowledging that while “[o]ne can certainly make a case for considering underwrites of agency decisions,” including adjudications, the additional complexities of that endeavor are beyond the scope of that Article).

¹⁵⁹ The EEOC may, however, be able to assert acquiescence for an eventual Supreme Court case, assuming its definition remains consistent. The *Chevron* Court accounted for an agency’s changing policy priorities, and accepted that interpretations would not remain fixed over time. See *Chevron v. Nat’l Res. Def. Council*, 467 U.S. 837, 843 (1984).

norms,”¹⁶⁰ placing it squarely within prior precedent disallowing discrimination for nonconformity with gender stereotypes. The EEOC also analogized sexual orientation discrimination to the long-standing protection against discrimination of individuals in interracial relationships.¹⁶¹ Moreover, while the 1964 Congress might not have intended for Title VII to protect sexual orientation, the EEOC noted that “statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”¹⁶² Based on this expert analysis that benefitted from decades of the EEOC’s administering Title VII and broad national perspective on discrimination in the workplace, the EEOC should not only be permitted to reasonably evolve the definition of the statutes it enforces, but also be afforded deference for its decisions. As such, the Second Circuit should overturn its prior caselaw and adopt the EEOC’s interpretation of “sex” as inclusive of sexual orientation.

Where, as here, post-enactment legislative history evinces agreement among Congress and an agency on a permissible interpretation of a pre-existing statute, that definition should stand. Legislative history, including subsequent legislative acquiescence to agency interpretation, promotes a stable and consistent administrative state by placing policy decisions in the hands of politically accountable actors.¹⁶³

CONCLUSION

A stronger deference doctrine will increase predictability in the promulgation of laws and uniformity in their enforcement. Furthermore, *Chevron* is the single most recognizable doctrine in administrative law, and legislators and interpreters, including

¹⁶⁰ Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015).

¹⁶¹ *Id.* at *6 (“[A]n employment action based on an employee’s relationship with a person of another race necessarily involves considerations of the employee’s race. . .”).

¹⁶² *Id.* at *9 (quoting *Oncale v Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 79 (1998)).

¹⁶³ See William N. Eskridge, Jr., *Expanding Chevron’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 417 (arguing that society needs “predictability, expertise, and democratic legitimacy” for a successful legal system).

circuit courts, rely on deference to inform their work. A consistent application of *Chevron* doctrine emboldened by an expanded use of legislative histories will unify methodologies of statutory interpretation to help to eliminate the politicization of judicial opinions in administrative law.

Without agency deference, LGBTQ employees like Donald Zarda will not know if they have protection from being fired for their sexual identity. Their protection in the workplace may vary from state to state, as judges displace the well-reasoned interpretation offered by the agency charged with administering Title VII legislation. Even where the Second Circuit found a rights-protective doctrine within Supreme Court precedent of analogous cases, its repeated reliance on the framework and argument of the EEOC decision without explicitly crediting its persuasive or deferential value undermines the credibility and transparency of the judiciary and risks the perception that politics drove its decision.

Supporters of SOPRA are willing to exchange limited agency power for enhanced judicial activism, an opposite but not equal strain on separation of powers. It is not sufficient to claim that the President does not exercise sufficient oversight over administrative agencies to count them as democratically accountable. By comparison, judges have practically no oversight and a lifetime tenure. Additionally, a President's use of agencies to promote a specific agenda is not a per se violation of separation of powers. Finally, though SOPRA claims that de novo review would force tighter legislative drafting, there is no indication that *Chevron* doctrine was promoting sloppy legislating. Indeed, even with the most careful drafting, losing the ability to know how a statute would be interpreted and to what extent it would withstand scrutiny would be akin to losing the ability to know if coming out puts one out of a job. Neither are for the judge alone to decide.