"H.R. 4768, THE 'SEPARATION OF POWERS RESTORATION ACT OF 2016'"

Testimony of
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Chairman Marino, Ranking Member Johnson, and other members of the Subcommittee, thank you for inviting me to testify today on this crucially important subject: the proper relationship between Congress, the courts, and the modern administrative state.

As the Chief Justice wrote three years ago, "[t]he administrative state wields vast power and touches almost every aspect of daily life. The Framers could hardly have envisioned today's vast and varied federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities."[2] One might further doubt that the Framers could have envisioned the

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[2] *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quotation marks and citations omitted).

federal courts affording such decisive deference to agencies' own interpretations of the statutes and regulations that they administer.

The modern doctrine of *Chevron* deference was expounded for laudable reasons—among them, to create space for agencies to exercise policy discretion within the limits set by broadly worded statutes, part of the Supreme Court's sustained response to lower courts' own efforts to prevent agencies from undertaking the era's politically popular regulatory reforms.[3] But the passage of three decades has made clear the *Chevron* framework's significant costs, both in practice and in principle—costs that were highlighted by Professor Hamburger's

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[3] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) ("[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."); *see also*, *e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 & n.* (1983) (Rehnquist, J., concurring in part and dissenting in part) ("The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration . . . Of course, a new administration may not choose not to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions.").

widely noted book,[4] and in opinions by Justice Thomas and others favoring a significant reconsideration or narrowing of the doctrine.[5]

But the best evidence of *Chevron*'s increasingly apparent flaws may be Justice Antonin Scalia's own shift of *Chevron*, near the end of his life and career. For two decades, until at least 2011, *Chevron* had no stauncher defender than Justice Scalia, who criticized his colleagues harshly for attempting to pare back application of its two-step framework for deference.[6] But in recent years, even Scalia reportedly came to recognize that *Chevron* needed to be recalibrated, a change of mind hinted in an opinion last year.[7]

Perhaps the courts themselves eventually will fix *Chevron*, either by overturning it outright or (more likely) by continuing to limit and recalibrate it. The courts can undertake a much more rigorous analysis of the statute at *Chevron*'s "Step One," applying the "traditional tools of statutory construction," including the clear statement rule and other canons of construction, to decide whether Congress's

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4 Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

5 *See*, *e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2712–2714 (2015) (Thomas, J., concurring).

6 *City of Arlington*, 133 S. Ct. at 1879–80; *United States v. Mead*, 533 U.S. 218, 239–61 (2001) (Scalia, J., dissenting); *Christensen v. Harris County*, 529 U.S. 576, 589–595 (2000) (Scalia, J., concurring in part in judgment).

7 *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, concurring in judgment) ("The problem is bad enough, and perhaps insoluble if *Chevron* is not to be uprooted, with respect to interpretive rules setting forth agency interpretation of statutes.").

statute directly answers the legal question at issue in a case.[8] The courts also can be more rigorous at *Chevron*'s Step Two, in deciding whether an agency's interpretation of an ambiguous statute is unreasonable.[9] And the courts can be more rigorous at *Chevron*'s so-called "Step Zero," in deciding whether Congress actually delegated interpretive authority to the agency in the first place, particularly on matters of significant economic or political significance.[10]

But even if courts could succeed in working out the *Chevron* problem on their own, it is *good* for Congress to intervene in this debate on how the courts should review agencies' statutory interpretations. The Supreme Court repeatedly has stressed that *Chevron* is a doctrine premised upon *Congress's* intent to allocate interpretive power between the courts and the agencies. "We accord deference to agencies under *Chevron*," the Court has explained, "because of a 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 that *Congress* "desired the agency (rather than the courts) to possess

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[8] *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–161 (2000); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166–74 (2001); *ABA v. FTC*, 430 F.3d 457, 468–471 (D.C. Cir. 2005) (Sentelle, J.); *Loving v. IRS*, 742 F.3d 1013, 1016–1022 (D.C. Cir. 2014) (Kavanaugh, J.).

[9] *See, e.g.*, *Util. Air. Reg. Group v. EPA*, 134 S. Ct. 2427, 2442–2446 (2014).

[10] *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015); *U.S. v. Mead*, 533 U.S. 218, 227–234 (2001). But note that the Court has been inconsistent in prescribing the standard of review that applies when *Chevron* does not. In *Mead*, the Court rejected *Chevron* deference but applied the lesser "*Skidmore*" deference; more recently, in *King*, the Court applied *de novo* review.

whatever degree of discretion the ambiguity allows."[11] Similarly, Justice Scalia repeatedly urged that the purpose of *Chevron* has been to "provid[e] a stable background rule against which Congress can legislate" when Congress so desires.[12]

Simply put, in *Chevron* the courts have been deferring not in spite of Congress's (presumed) intent, but *because* of it. It is now well past time for Congress to plainly announce its present intent. And I believe that Justice Scalia's own writings exemplify the cast of mind with which Congress should approach this task.

I. Reforming *Chevron* requires Congress to strike a prudential balance between judicial decisionmaking and democratic policymaking.

The Constitution neither requires nor prohibits *Chevron* deference. Nor does the Administrative Procedure Act (APA) expressly prohibit it: while the APA's Section 706 directs the courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action," it does not expressly require the courts to do so without deference, and indeed the APA's legislative history seems to include at least

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[11] *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–741 (1996) (emphasis added); *see also*, *e.g.*, *King*, 135 S. Ct. at 2488–89 ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.").

[12] *City of Arlington*, 133 S. Ct. at 1868; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (1989) ("any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate").

some indications that the APA's drafters expected courts to apply some measure of interpretive deference in some cases.[13]

Being neither prescribed nor proscribed by law, *Chevron* reflects the Court's striking of a balance between two competing constitutional values: the courts' "province and duty . . . to say what the law is,"[14] but also the republican notion that policy judgments should be made by the more politically accountable executive and legislative branches, not the insulated judicial branch.[15]

This prudential balance was best described by Justice Scalia himself, in his 1989 *Duke Law Journal* article defending *Chevron*. He conceded that it is at best a legal fiction to ascribe to Congress a specific intent to commit interpretive authority to an agency with a given statute. But it was, at that time, a *justifiable* legal fiction:

> Surely . . . it is a more rational presumption today than it would have been thirty years ago—which explains the change in the law. Broad delegation to the Executive is the hallmark of the modem administrative state; agency rulemaking powers are the rule rather than, as they once were, the exception; and as the sheer number of modern departments and agencies suggests, we are awash in agency "expertise." If the *Chevron* rule is not a 100% accurate estimation of

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[13] *See, e.g.*, Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. at 511–12 (discussing the APA's legislative history); *cf. Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in judgment) ("As I have described elsewhere, the rule of *Chevron*, if it did not comport with the APA, at least was in conformity with the long history of judicial review of executive action, where '[s]tatutory ambiguities . . . were left to reasonable resolution by the Executive.'" (quoting *Mead*, 533 U.S. at 243 (Scalia, J., dissenting))); *but see Mead*, 533 U.S. at 241–42 (Scalia, J., dissenting) ("There is some question whether *Chevron* was faithful to the text of the [APA], which it did not even bother to cite. But it was in accord with the origins of federal-court judicial review." (footnote omitted)).

[14] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[15] *TVA v. Hill*, 437 U.S. 153, 195 (1978), *quoted in Chevron*, 467 U.S. at 866.

> modern congressional intent, the prior case-by-case evaluation was not so either—and was becoming less and less so, as the sheer volume of modem dockets made it less and less possible for the Supreme Court to police diverse application of an ineffable rule. And to tell the truth, the quest for the "genuine" legislative intent is probably a wild-goose chase anyway. 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. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.[16]

That last sentence was key to Scalia's thought. By his estimation, *Chevron*'s most valuable role was not in deciding cases *per se*, but rather in its providing *Congress* a stable background rule against which to legislate. As he further explained, "Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known."[17] Thus, he explained, "[t]he legislative process becomes less of a sporting event when those supporting and opposing a particular disposition do not have to gamble upon whether, if they say nothing about it in the statute, the ultimate answer will be provided by the courts or rather by the Department of Labor."[18]

But crucially, Scalia stressed that this approach was not to be carved permanently in stone, but rather was an experiment to be measured by the results

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[16] Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. at 516–17.

[17] *Id.* at 517.

[18] *Id.*

it ultimately produced. Scalia believed that *Chevron* would ultimately justify itself: "I tend to think . . . 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 its needs."[19] Which is why he noted, at the outset of the long quote above, that *Chevron*'s presumption regarding legislative intent was "a more rational presumption today than it would have been thirty years ago—which explains the change in the law."

In other words, *Chevron* was justifiable in 1984, thought not necessarily in 1954—or today. This practically minded approach exemplified Scalia's writings on regulation and administrative law throughout that great period of change in the 1980s—including his pre-judicial writings. In an essay marking President Reagan's first inauguration, then-Professor Scalia wrote an essay in AEI's *Regulation* magazine, urging his fellow conservatives to reconsider their approach to regulation in light of new political realities. To persist with the same policies and rules, in a markedly different legislative, regulatory, and legal era, would be utterly counterproductive: "Regulatory reformers who do not recognize this fact, and who continue to support the unmodified proposals of the past as though the fundamental game had not been altered, will be scoring points for the other team."[20]

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[19] *Id.* at 521.

[20] Antonin Scalia, "Regulatory Reform—The Game Has Changed," *Regulation*, Jan./Feb. 1981, p. 14; *cf.* Antonin Scalia, *The Two Faces of Federalism*, 6 Harv. J. L.

Perhaps this practical mindset was what led Justice Scalia to begin to change his mind on *Chevron* near the end of his life, at a time when agencies assert unprecedented powers with barely even a pretense of heeding statutory restraints.[21] Presumptions about the respective intentions of the legislative and executive branches that may have been justifiable in 1985 or 1989 seem far less so today.[22] But by the same token, I would urge Congress to adopt the same practical mindset in crafting its own reforms to *Chevron* and the Administrative Procedure Act today.

II. *Chevron* affects not just the work of courts, but also the work of Congress and agencies—and so will its reform.

Debates over *Chevron* tend to be first and foremost debates about the courts—namely, debates over whether judges are adequately discharging the constitutional responsibilities of the judicial branch, as a check and balance against

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& Pub. Pol'y 19, 20 (1982) ("Since the 1930's, the policies that have come from [the federal government] have been policies that conservatives disfavor. That is surely an understandable tactical reason for opposition to the exercise of federal power. Unfortunately, a tactic employed for half a century tends to develop into a philosophy.").

[21] Thus the problem is not simply one of wanting to defer to Republican Presidents but not to Democrats; were it so, Scalia and others would have changed their positions on *Chevron* in 1993. The problem is one of a startling change in the fundamental nature of the modern administrative state, a problem of a much more recent vintage, exemplified by agencies that expect courts to meekly "stand on the dock and wave goodbye as [the agency] embarks on this multiyear voyage of discovery," agencies who do not hesitate to "rewrite clear statutory terms to suit [their] own sense of how the statute should operate." *Util. Air Reg. Group*, 134 S. Ct. at 2446.

[22] I elaborated upon this point in a handful of essays following Justice Scalia's passing: "The American Constitutionalist," *Weekly Standard*, Feb. 29, 2016; "Antonin Scalia, Reform Conservative," *Weekly Standard Online*, Feb. 22, 2016; "Scalia and *Chevron*: Not Drawing Lines, But Resolving Tensions," *Yale Journal on Regulation: Notice and Comment Blog*, Feb. 23, 2016.

administrative agencies. As important as the courts are, I would caution you to focus also on the ramifications that *Chevron*—and its reform—has on Congress and the agencies.

Justice Scalia recognized that *Chevron*'s ultimate aim is Congress, not the courts—in that, as noted above, *Chevron* established a stable, predictable background rule of law against which Congress can legislate. And as Professors Abbe Gluck and Lisa Schultz Bressman found in their empirical study, Congress (or at least congressional staff) is well aware of *Chevron* as it drafts legislation, and indeed often drafts legislation with *Chevron* in mind: the staffers whom they surveyed "understood the consequences of *Chevron*" and further indicated "that knowing the canon affects the degree of specificity they use while drafting," such that *Chevron* often functions "as a reminder about the consequences of ambiguity and as an incentive to think about the level of detail in a statute."[23]

Similarly, the agencies' rule-writing personnel are well aware of *Chevron*, too. As Professor Christopher Walker found in his own empirical study, 94% of the rule-drafters whom he surveyed knew *Chevron* deference by name, and 90% indicated that they draft rules with *Chevron* in mind. They also indicated overwhelmingly that they are aware of the circumstances making it more or less

[23] Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 996 (2013); *see generally id.* at 995–98.

likely that a court would grant the rule's statutory interpretations *Chevron* deference in the first place.[24]

Because *Chevron* exerts a significant "gravitational pull" on both Congress's drafting of statutes and agencies' process of interpreting them, eliminating *Chevron* would have significant impacts on both legislation and administration.

With respect to legislation, if *Chevron* were eliminated then Congress would have to draft statutes knowing that *courts*—not agencies—would be their most significant interpreters. Because courts are less politically responsive than agencies, Congress would need to take much greater care in writing statutes, to express its legislative intent much more clearly, because Congress would no longer be able to rely on agencies to vindicate legislative intent expressed with insufficient clarity in the actual statutory text.

The removal of *Chevron* would also affect Congress's view of statutes already on the books. Because of *Chevron*, in conjunction with the *Brand X* doctrine (in which an agency can overturn its own prior interpretation of an ambiguous statute and replace it with a new reasonable interpretation),[25] Congress faces less urgency to amend statutes currently being misapplied by agencies: if Congress is dissatisfied with an agency's interpretation of a law, Congress may place its hopes disproportionately in a change of administrations, to be followed by a change of interpretations. But without *Chevron*, there will be greater incentive for Congress to

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[24] Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1059–1065 (2015).

[25] *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

take matters into its own hands by beginning a sustained push to amend the statute, even if amendment ultimately requires the signature of the current President's successor.

Similarly, the removal of *Chevron* deference would require agencies to improve the substance and process of their statutory interpretations, in order to convince the courts to affirm their interpretation of ambiguous statutes. Under *Chevron*, an agency's interpretation will be sustained by the courts even if it is not the "best" available interpretation; it need only be a *reasonable* interpretation.[26] If Congress replaces *Chevron* with "*de novo*" review by the courts, then the agency would prevail in court only if its interpretation actually is the best of all available interpretations.[27] And even if Congress were to soften the removal of *Chevron* with legislative imposition of something approaching the rather tautological *Skidmore* standard (which I discuss more thoroughly in Part III, below), the agency would still need to convince the court that its interpretation warrants judicial deference in light of the agency's interpretation's "power to persuade"—namely, its

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[26] *Id.* at 980; *see also Chevron*, 467 U.S. at 843 n.11 ("The 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 reached if the question initially had arisen in a judicial proceeding."); *Van Hollen v. FEC*, 811 F.3d 486, 492 (D.C. Cir. 2016) (*Chevron* Step Two "does not require the best interpretation, only a reasonable one . . . We are bound to uphold agency interpretations . . . regardless whether there may be other reasonable, or even more reasonable, views[.]").

[27] *King*, 135 S. Ct. at 2488–2489, 2492–96.

"thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight."[28]

In sum, removing *Chevron* would challenge both Congress and the agencies. It would challenge Congress to be clearer in writing statutes, and it would require agencies to become more credible in interpreting them.

III. Supplanting *Chevron* with a codified version of *Skidmore* would raise significant questions.

H.R. 4768 proposes to amend Section 706 of the APA to require that the courts review agencies' legal interpretations *de novo*—that is, without any deference at all. On its face, this would appear to foreclose not just *Chevron* deference, but also the lesser (and older) form of deference known as *Skidmore* deference.

In *Skidmore*, the Court explained that the degree of deference to be afforded to an agency's statutory interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[29] The standard might seem basically a tautology, or as Justice Scalia called it, an "empty truism": the Court can be persuaded by an agency's interpretation, but only to the extent that the Court finds the agency's

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[28] *Mead*, 533 U.S. at 235 (applying *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

[29] *Skidmore*, 323 U.S. at 140, *quoted in Mead*, 533 U.S. at 228.

interpretation persuasive.[30] Yet other justices have urged that *Skidmore*'s standard does have substance above and beyond *de novo* review.[31] Accordingly, if the APA is amended to require *de novo* review of legal questions, then *Skidmore* will be eliminated along with *Chevron*, because *Skidmore* is not "*de novo*."

One might ask whether the APA should be further amended not just to eliminate *Chevron* per se, but also to codify the standards of *Skidmore*.[32] This could have benefits: it would eliminate *Chevron* while preserving space for courts to still give substantive weight to an agency's interpretation. Or, to put a more cynical spin on this, codifying *Skidmore* might be a concession to the possibility that courts would persist in deferring *sub silentio* to an agency's position even when such deference is prohibited by a new APA requirement of *de novo* review.

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[30] *Mead*, 533 U.S. at 250 (Scalia, J., dissenting) ("Justice Jackson's eloquence notwithstanding, the rule of *Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers."); *see also* Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 Duke L.J. 1933, 2001 (2008) ("the empty tautology into which some courts have made *Skidmore*"); Michael Herz, *Chevron Is Dead: Long Live Chevron*, 115 Colum. L. Rev. 1867, 1890 (2015) ("The Supreme Court has done much to sow this confusion. For example, *Mead* identifies 'the persuasiveness of the agency's position' as one of the *Skidmore* factors. But this is not what *Skidmore* actually says. On Justice Jackson's formulation, the *Skidmore* factors are the things that give the agency's interpretation 'the power to persuade'; to say that the 'persuasiveness' of the agency's position is one of the things that give it 'the power to persuade' is tautological.").

[31] *Mead*, 533 U.S. at 234-38; *see also* Kristen E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235 (2007).

[32] *Cf.* Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. Rev. 1 (2015).

That said, I believe that amending the APA to eliminate *Chevron* while codifying the *Skidmore* standard would entail significant costs of its own:

1. First, categorically replacing *Chevron* with *Skidmore*'s mushier approach would eliminate one of *Chevron*'s cardinal virtues: stability and predictability.

Chevron and its progeny, though certainly flawed, offer Congress a relatively stable and predictable background law against which to legislate, as Justice Scalia recognized. *Skidmore*, by contrast, offers no such stable background principle. Legislative drafters will have much less clear an idea of how *Skidmore*'s open-ended standards for deference might play out in practice for a given statute, and so they will have to draft against a presumption of only minimally restrained deference. It is difficult to see how this improves upon our present situation.

2. Second, replacing *Chevron* with *Skidmore* would give immense power to the administration that initially interprets a statute, at the expense of subsequent administrations that might want to re-interpret the statute in light of new political or substantive realities.

As noted above, *Chevron* and its progeny preserve space for agencies to reinterpret ambiguous statutes even after a court blesses a prior interpretation.[33] But this is a feature of *Chevron* specifically: as the Court explained in *Brand X*, "the

[33] *Brand X*, 545 U.S. at 980–86.

whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency."[34]

And such flexibility is *not* a point (let alone the "main point") of *Skidmore*, because *Skidmore* does not share *Chevron*'s presumption that Congress vests the agency, not the court, with primary interpretive authority. Instead, *Skidmore* is undertaken by a court acting as the statute's primary interpreter, looking to the agency for advice but nothing more.[35]

Thus, as Professors Hickman and Krueger have suggested, when the courts adopt an agency's interpretation through *Skidmore* instead of *Chevron*, the court's decision takes on a much stronger *stare decisis* effect than *Chevron* Step Two decision does.[36] Justice Scalia warned of precisely this problem, in *Mead*:

> *Skidmore* deference gives the agency's current position some vague and uncertain amount of respect, but it does not, like *Chevron*, leave the matter within the control of the Executive Branch for the future. Once the court has spoken, it becomes unlawful for the agency to take a contradictory position; the statute now says what the court has prescribed.[37]

In short, replacing *Chevron* with a codified *Skidmore* standard would sacrifice *Chevron*'s virtues of *ex ante* transparency and *ex post* republican

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[34] *Id.* at 981.

[35] *Skidmore*, 323 U.S. at 140 ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not *controlling* upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (emphasis added)).

[36] Hickman & Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. at 1304–05.

[37] *Mead*, 533 U.S. at 247 (Scalia, J., dissenting).

policymaking flexibility, while leaving courts with immense discretion to defer on a case-by-case basis in the name of *Skidmore*'s extremely malleable standards. This is precisely the problem that Justice Scalia warned against in *Mead*: if you replace *Chevron* with "some indeterminate amount of so-called *Skidmore* deference," then "the uncertainty is not at an end—and indeed is just beginning. Litigants cannot then assume that the statutory question is one for the courts to determine, according to traditional interpretive principles and by their own judicial lights."[38] Nor, for that matter, can Congress.

In short, if Congress amends the APA to end *Chevron* but codify *Skidmore*, then it will have "largely replaced *Chevron*, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test."[39]

Again, I believe the time has come for Congress to weigh in on the proper relationship between Congress, agencies, and the courts. But it should do so in a way that makes the background principle of law going forward more stable, not less.

Thank you for inviting me to testify.

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[38] *Id.* at 239, 240–41.

[39] *Id.* at 241.