

THE COMBINATION OF *CHEVRON* AND POLITICAL POLARITY HAS AWFUL EFFECTS

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INTRODUCTION

Courts have always given administrative agencies a healthy degree of deference. In 1984, however, the Court took federal courts on a bold new path by issuing its famous opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹ The Court instructed reviewing courts to reject an agency interpretation of a statute only if it conflicts with the clear meaning of the statute and to uphold the agency interpretation if it is a permissible interpretation of an ambiguous statute.² The Court based its new test on the superior political accountability of agencies headed by people who are appointed by the president and who can be removed by the president in comparison with judges who have life tenure.

Scholars and reviewing courts interpreted the Court's unanimous opinion as an instruction to lower courts to replace the multi-factor test that the Court had announced in *Skidmore v. Swift & Co.*³ with the simple, easy to satisfy *Chevron* test. Under *Skidmore*, reviewing courts were required to consider the quality of an agency's reasoning and the consistency of its interpretations in the process of deciding whether to

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1. *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
2. The Court in *Chevron* explained the test,

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

Id. at 842–43.

3. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

uphold an agency interpretation.⁴ *Chevron* immediately attracted the attention of scholars. Some praised it, while others decried it. *Chevron* has become one of the most frequently cited and intensely debated opinions in history. By 2017, it had been cited in over 15,000 judicial decisions and 17,000 books and law review articles.⁵

For over thirty years, I was one of the strongest supporters of *Chevron* deference. I was initially enthusiastic about the *Chevron* framework because it required courts to give effect to democratic values in the process of reviewing agency decisions. In recent years, however, the increasing political polarity in America makes *Chevron*, as originally envisioned, a source of extreme instability in our legal system. Political polarity combined with *Chevron* will create (and has already created) radical changes in the meaning of numerous laws every few years. Radical and vacillating changes in law deter investment in regulated industries and make it impossible for Americans to be able to rely on any stable legal regime as the basis for their decisionmaking in many important contexts.

The Supreme Court has added qualifications to the original *Chevron* test that make it functionally much closer to the *Skidmore* test. The lower courts have failed to get the message, however. As a result, circuit courts apply *Chevron* with so much deference that it produces undue instability in our legal system. For example, in *Mozilla Corp. v. Federal Communication Commission*,⁶ the D.C. Circuit upheld the Federal Communication Commission's ("FCC") fourth inconsistent interpretation of the same statute in fifteen years.⁷ Because of its unacceptable destabilizing effect, *Chevron* should be replaced with a multi-factor test akin to *Skidmore*, which focuses more on expertise and continuity than expansive deference to politically accountable agencies.

4. The Court in *Skidmore* explained the less deferential standard of review that preceded *Chevron* as follows:

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. The weight of such a judgment in a particular case 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.

Id. at 140.

5. Christopher Walker & Kent Barnett, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 2 (2017).

6. *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

7. *Id.* at 86.

In Part I, I explain why I long supported *Chevron* deference. In Part II, I explain why *Chevron* does not yield acceptable results in today's conditions of political polarity. In Part III, I explain why the multi-factor *Skidmore* test provides a far better means of reconciling the need for deference to agency policy decisions with the extreme and growing polarity that now characterizes the U.S. political environment. In Part IV, I explain why the many controversies about the legitimacy of the administrative state, including the debate about the appropriate amount of deference to confer on agency policy decisions, have a single source—the inability of Congress to engage in bipartisan legislative action. Finally, in Part V, I suggest ways in which Congress can increase its ability to enact bipartisan statutes that reduce the need to rely on agencies to make virtually all major policy decisions.

I. THE ADVANTAGES OF *CHEVRON*

The *Chevron* test has many advantages that explain why I was one of its most enthusiastic supporters for decades.⁸ I was greatly influenced by the reasons the Court gave in support of its new, more deferential approach to judicial review of agency actions, including democratic legitimacy, the proper allocation of policymaking authority, and political accountability for policy decisions. While reviewing courts have always conferred considerable deference on agencies, the prior tests were based primarily on comparative expertise. For example, the Commissioners of the Nuclear Regulatory Commission, who understand nuclear reactors and attempt to make sense of the Atomic Energy Act on a daily basis, are in a better position to adopt a sensible interpretation of the statute they administer than are generalist judges, who know nothing about nuclear reactors and might have occasion to review an agency interpretation of the Atomic Energy Act once every few years. Given that basis for deference, the traditional tests include a reference to the quality of the data and analysis that the agency relied on as the basis for its interpretation. Thus, for instance, the *Skidmore* test instructs a reviewing court to assess “the thoroughness evident in [the agency’s] consideration, and the validity of its reasoning.”⁹

Chevron was the first opinion in which the Court anchored judicial deference to agency policy decisions in constitutional allocations of

8. See generally Richard Pierce, *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988) (praising the *Chevron* doctrine “as an exceedingly important development in administrative law”).

9. *Skidmore*, 323 U.S. at 140.

decisionmaking power and the basic principles that underlie our constitutional democracy. The Court began by recognizing that, when Congress confers power on an agency in a statute and gives an agency clear instructions with respect to the meaning of the statute, it is the Court's job to enforce the will of Congress and to keep the agency from straying outside the boundaries Congress created.¹⁰ Conversely, when Congress confers power on an agency in a statute and uses language that can bear more than one meaning, Congress has implicitly delegated the power to interpret the ambiguous statutory language to some other institution—either the agency or a reviewing court.¹¹ By interpreting the ambiguous language of the statute, that institution necessarily is making a policy decision on behalf of the government that Congress did not make.¹²

The Court found it easy to choose between courts and agencies in the context of policymaking.¹³ Judges are the least politically accountable government officials. If we dislike a policy decision made by a judge, we cannot change that decision except through the arduous process of persuading Congress to overturn the policy decision through legislative action. Because federal judges have life tenure and can only be removed through the impeachment process, they are more insulated from the views of the public than any other government official. That gives them the freedom to make policy decisions that reflect their personal preferences even if those decisions conflict with the views of the public. The multi-factor *Skidmore* test is malleable enough to allow judges to indulge their understandable tendency to make decisions that reflect their personal policy preferences. The simple two-step *Chevron* test reduced the discretion of judges to substitute their policy preferences for those of an agency.

By contrast, agency heads are accountable to the public through their relationship with the elected president. If we dislike a policy decision made by an agency, we can express our displeasure by voting against the president (or his political party) in the next election. It follows that agencies have a political incentive to make policy decisions that reflect the views of the public. Moreover, if agencies make policy decisions that the public dislikes, the next president can change those policies so that they are consistent with the views of the public.

10. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

11. *Id.* at 843–44, 864.

12. The Court used policy decisions as a synonym for decisions to adopt an interpretation of an ambiguous statute in many places in its opinion. *See, e.g., id.*

13. *Id.* at 865–66.

My enthusiasm for *Chevron* increased when I read the article in which Professor Peter Strauss linked *Chevron* to the geographic scope of federal statutes.¹⁴ The Strauss argument was simple and persuasive. It is highly desirable to have a legal regime in which federal statutes have the same meaning everywhere.¹⁵ By conferring more interpretative deference on agencies, *Chevron* increases the likelihood that a federal statute will be given the same meaning throughout the country.¹⁶ By contrast, the less deferential multi-factor *Skidmore* test conferred de facto discretion on judges to adopt different interpretations of statutes.¹⁷ Since the judiciary is organized by geographic circuits, and the Supreme Court lacks the resources required to resolve all conflicts among the circuits, the *Skidmore* test often produces a legal regime in which the law governing some important area of federal responsibility varies depending on the circuit in which each citizen lives.¹⁸

I also applauded when the Supreme Court issued its decision in *National Cable and Telecommunications Ass'n v. Brand X Internet Services*.¹⁹ The Court held that stare decisis does not preclude an agency from adopting a different permissible interpretation of an ambiguous statute after a court has upheld an inconsistent agency interpretation. The *Brand X* holding follows logically from the test the Court announced in *Chevron*. When a court upholds an agency interpretation of a statute through application of the *Chevron* test, it is necessarily holding only that the statute is ambiguous and that the agency's interpretation is permissible. Both of those holdings are entirely consistent with a holding that the new agency interpretation of the ambiguous statute is also permissible even if it is inconsistent with the prior agency interpretation that the court upheld.

Recent studies have found that the *Chevron* test still has the political accountability advantages and national uniformity advantages

14. See generally Peter Strauss, *One Hundred Fifty Cases a Year: Some Implications of the Supreme Court's Limited Resources for Reviewing Agency Actions*, 87 COLUM. L. REV. 1093 (1987) (noting that the result of *Chevron* would be agency deference, and in turn creating a uniform interpretation of the law as created by the agency).

15. *Id.* at 1105.

16. *Id.* at 1120–21.

17. *Id.*

18. *Id.* at 1117–20.

19. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). I argued in support of the approach the Court later took in *Brand X*. Richard Pierce, *Reconciling Chevron and Stare Decisis*, 85 GEO. L. J. 2225, 2258–60 (1988).

that it had when the Court issued the opinion.²⁰ The political accountability advantages may actually have increased as a result of the series of opinions that the Court has issued since *Chevron* that increased the degree of control that the president can exercise over agency decisionmakers.²¹ Yet, I have changed my opinion about the desirability of the *Chevron* test over the last few years. Starting in the next Part, I will explain why I have decided that we can no longer afford to bear the costs of the *Chevron* test.

II. CHEVRON AND POLITICAL POLARITY

Political polarity has increased dramatically over the last thirty years.²² The election and impeachment of President Donald Trump are symptoms of that political polarity. Even after the recent election of a president who is committed to an effort to bring Americans closer together, there is no reason to believe that the decades-long trend toward increased political polarity will stop any time soon. The combination of the election of a Democratic President by a narrow margin with Republican gains in House seats in an election characterized by an unprecedented level of animosity reflects the continued existence of fundamental disagreements about the policies the government should implement in the future.

Chevron deference and high political polarity are incompatible. For present purposes, I am referring to the original version of the *Chevron* test. Over the decades in which the Court has applied the *Chevron* test, it has qualified the test in many ways.²³ That highly

20. See, e.g., Christopher Walker, Kent Barnett & Christina Boyd, *Administrative Law: Political Dynamics*, 71 VAND. L. REV. 1463, 1523–26 (2018) (finding that *Chevron*'s goals to reduce political partisanship in judicial decisionmaking and to promote national uniformity are quite effective).

21. See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010) (holding that an officer of the United States cannot be insulated from presidential control by two or more layers of statutory “for cause” limits on the president’s power to remove the officer).

22. *In a Politically Polarized Era, Sharp Divides in Both Partisan Coalitions*, PEW RSCH. CTR. (Dec. 17, 2019), <https://www.pewresearch.org/politics/2019/12/17/in-a-politically-polarized-era-sharp-divides-in-both-partisan-coalitions> [https://perma.cc/DL9R-U8B7]; Frank Newport, *The Impact of Increased Political Polarization*, GALLUP (Dec. 5, 2019), <https://news.gallup.com/opinion/polling-matters/268982/impact-increased-political-polarization.aspx> [https://perma.cc/Q5UQ-N6U8]; *The Shift in American Public Political Values*, PEW RSCH. CTR. (Oct. 20, 2017), <https://www.pewresearch.org/politics/interactives/political-polarization-1994-2017> [https://perma.cc/JR7F-QWWM].

23. Scholars and courts consider the *Chevron* test, and the test the Court announced for application to agency interpretations of agency rules in *Auer v. Robbins*, 519 U.S. 452 (1997), to be analogous. The Court has applied identical limits to each test over the years. See generally Kristin E. Hickman & Mark R. Thomson, *The Chevronization of Auer*, 103 MINN. L. REV.

qualified version of the *Chevron* test might produce acceptable results if lower courts correctly applied it. My concerns about the adverse effects of continued application of the *Chevron* test are based on my belief that circuit courts are continuing to apply the test in roughly the same manner and with about the same results as they did when the Court first issued the *Chevron* opinion. I have two types of evidence to support that belief.

The first type of evidence is the work of Professors Kent Barnett and Chris Walker, who have conducted by far the most comprehensive study of circuit court applications of *Chevron*. In their study, Barnett and Walker found that circuit courts uphold agency statutory interpretations twenty percent more often when they apply *Chevron* than when they apply the traditional *Skidmore* test.²⁴ Second, that finding is illustrated by some of the most important recent appellate cases. The D.C. Circuit's 2019 opinion in *Mozilla Corp. v. FCC*, is one of many opinions that illustrate the unfortunate results of the combination of *Chevron* and political polarity.

In *Mozilla*, the D.C. Circuit had to decide whether to uphold or reject the FCC's interpretation of the Communications Act of 1934. The FCC had interpreted the statute to exempt the internet from regulation.²⁵ The over 100 pages the court devoted to discussion of that question demonstrates the challenging nature of the issue. The interpretative question was particularly difficult to resolve for two reasons. First, the court was required to decide whether internet service providers are "common carriers," as that term is used in the Communications Act of 1934,²⁶ when Congress could not possibly have contemplated the existence of the internet when it enacted the statute eighty-five years ago. Second, the FCC had been remarkably inconsistent with respect to this interpretative issue. It had resolved the issue four times over the prior fifteen years. On each occasion, it reversed its prior interpretation.²⁷

The D.C. Circuit finally concluded that it had no choice but to uphold the FCC's most recent interpretation notwithstanding the agency's remarkable record of inconsistency with respect to both the

HEADNOTES 103 (2019) (noting the convergence of the application of *Auer* with the application of *Chevron*); Christopher Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y. 103 (2018). The Court described the limits it has applied on the *Auer* test in the majority opinion in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019).

24. Walker & Barnett, *supra* note 5, at 30.

25. *Mozilla Corp. v. FCC*, 940 F.3d 1, 17 (D.C. Cir. 2019).

26. *Id.*

27. *Id.* at 17–18.

interpretation and the agency's reasoning in support of the interpretation.²⁸ The court concluded that it was bound to uphold the agency's interpretation through application of the *Chevron* test, particularly because of the Supreme Court's decision in *Brand X*.²⁹ In that case, the Ninth Circuit held that a prior FCC interpretation of the same statute in the same context was arbitrary and capricious because the agency had previously adopted an inconsistent interpretation and a circuit court had upheld the prior inconsistent interpretation.³⁰ The Supreme Court reversed the Ninth Circuit and instructed it to apply *Chevron* on remand.³¹ Not surprisingly, the Ninth Circuit upheld the FCC's new interpretation on remand notwithstanding its inconsistency with the prior interpretation.³² The D.C. Circuit concluded that it was required to follow the lead of the Ninth Circuit and to uphold the FCC interpretation even though the result was to allow the FCC to adopt a new interpretation every time a president of one party replaces a president of the other party.

The FCC's history of vacillation in this context and the decisions of the courts to uphold each of the FCC's inconsistent interpretations illustrate the effects of retaining the *Chevron* test in today's conditions of extreme and growing political polarity. The formal legal issue before the court in each of the cases in which it upheld the FCC's inconsistent interpretations of the Communications Act of 1934 was whether an internet service provider is a "common carrier" under the act. In political parlance, the issue in each of those cases was whether the FCC should apply the principles of "net neutrality" to the internet. That is one of the hundreds of policy issues on which the two political parties are hopelessly divided. Democrats strongly support net neutrality, while Republicans oppose it with equal vigor. Not surprisingly, every time the White House changes hands, the newly elected president appoints FCC commissioners who dutifully reverse the interpretation adopted by their predecessors of the opposing party and adopt a new interpretation that reflects the policy preference of the party that elected the new president.

Whether net neutrality is a good or bad policy, we have chosen the worst possible policy in this context. Net neutrality discourages

28. *Id.* at 86.

29. *Id.* at 84.

30. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1130–32 (9th Cir. 2003) (per curiam), *rev'd sub nom.* *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

31. *Brand X*, 545 U.S. at 980, 1003.

32. *Brand X*, 435 F.3d at 1054.

investment by internet service providers by subjecting them to strict regulation, but it encourages investment by content providers by assuring them of equal access to the internet. Conversely, deregulation of the internet discourages investment by content providers because they cannot be confident that they will have access to the internet on fair and impartial terms, but it encourages investment by internet service providers by assuring them that they will have the freedom to use the assets in which they invest in ways that maximize the return on their investments. By combining *Chevron* with political polarity, we have adopted a policy that discourages investment by both content providers and internet service providers.

Our policy of flip-flopping between net neutrality and deregulation of internet service providers every time the White House changes hands discourages all investments in the internet. Policy uncertainty discourages investment.³³ Prospective investors hate uncertainty. They discount any potential return on investment significantly if they foresee a substantial risk that they will not be able to earn an adequate return on their investment because of the risk that the government will change its policies in ways that reduce or eliminate their return on that investment.³⁴ In the context of the internet, prospective investors must decide whether to make an investment in conditions in which they know that the government policies that have a material effect on their investment returns will change with each change in administration. That is a policy environment that is far worse than either consistent application of the principles of net neutrality or consistent rejection of those principles.

The powerful beneficial effects of stable policy on investment were illustrated well by the changing position of electric utilities in the context of the Environmental Protection Agency's ("EPA") decision to adopt a limit on mercury emissions that cost utilities billions of dollars.³⁵ The utilities joined coal producers and coal-producing states in opposing the limits at the EPA and initially in litigation in both the D.C. Circuit³⁶ and the Supreme Court.³⁷ When the Supreme Court reversed the rule and remanded the case to the D.C. Circuit to decide

33. Hong Bo & Robert Lensin, *Is the Investment-Uncertainty Relationship Nonlinear?*, 72 *ECONOMICA* 307, 328 (2005).

34. Mark J. Koetse, Henri L.F. de Groot & Raymond J.G.M Florax, *A Meta-Analysis of the Investment-Uncertainty Relationship*, 76 *S. ECON. J.* 283, 301–02 (2009).

35. The Supreme Court discussed the process of issuing the limit and the ensuing litigation in *Michigan v. EPA*, 576 U.S. 743, 750 (2015).

36. *Id.*

37. *Id.*

whether to vacate the rule, however, the court refused to vacate the rule for a good reason.³⁸ All but one of the utilities had changed sides and urged the court to allow EPA to keep the emissions limit in effect to protect the investments the utilities had made in the pollution control technology that they had purchased and installed to comply with the emissions limit.

I was not surprised by that change of position. I have attended many conferences in which utility executives said that, while they oppose the issuance of a strict limit on mercury emissions, they would much prefer issuance of such a limit to continued uncertainty. They explained that they did not know which of two alternative sets of major investments in generating technology they should make until they knew what EPA was going to do with respect to mercury emissions. As a result, they were deferring many important investment decisions. The decision to defer important investments created a high risk that the utilities would be unable to meet the needs of their customers at a reasonable cost under either an EPA decision to adopt a strict limit on mercury emissions or an EPA decision *not* to adopt such a limit.

The same analysis applies in each of the hundreds of contexts in which Democrats and Republicans have opposing and uncompromising preferences with respect to policy issues on which investment decisions depend. Three other contexts—healthcare, immigration, and climate change—illustrate the scope and severity of the problems created by the combination of extreme political polarity and *Chevron*. In each, it is clear to me that a *Skidmore*-type test, which focuses more on continuity than political deference, would produce results that are preferable to the results of application of the *Chevron* test.

First, most Democrats support Obamacare, while most Republicans disapprove of Obamacare. The Supreme Court is about to decide the fourth case in which an issue of statutory interpretation will determine the fate of Obamacare.³⁹ I was delighted when the five-justice majority that originally upheld the validity of Obamacare applied the major question exception to the *Chevron* doctrine.⁴⁰ I hope that the Court continues to take that approach.

The nation can survive either a decision that upholds Obamacare or a decision that forces Congress to adopt an alternative to

38. *White Stallion Energy Ctr. v. EPA*, No. 12–1100, 2015 WL 11051103, at *1 (D.C. Cir. Dec. 15, 2015).

39. *Petition for Writ of Certiorari, Texas v. California*, 140 S. Ct. 1262 (2020) (No. 19-1019).

40. *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

Obamacare. I am not at all sure that the nation can survive a decision that places Obamacare in the same situation as net neutrality—it is legal and in effect when a Democrat is president but it is illegal and void when a Republican is president. It is easy to predict that such a policy environment would minimize total investment in healthcare at great cost to the nation—in dollars and lives. It also would make it impossible for individuals to make wise decisions about the actions that they should take to be confident that they will have access to adequate healthcare.

Similarly, most Democrats strongly support Deferred Action for Childhood Arrivals (“DACA”) and Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”), two immigration programs that President Barack Obama adopted to protect “dreamers” and their families from the risk of deportation.⁴¹ The Trump administration attempted to rescind DACA and DAPA, but states led by Democratic governors challenged that decision.⁴² The Trump administration argued that the challenge to the validity of that rescission decision is barred by a provision of the Immigration and Naturalization Act.⁴³ I was pleased when the Supreme Court strongly suggested that either interpretation might be valid *if but only if* the agency provides an adequate explanation for the interpretation it adopts.⁴⁴ That result illustrates one of the main virtues of the *Skidmore* test—it instructs a court to consider the quality of an agency’s reasoning when it reviews an agency’s interpretation of an ambiguous provision in an agency-administered statute.

If the Court had merely relied on *Chevron* as the basis for a decision in which it held that both the Trump administration’s interpretation and the Democrats’ interpretation are permissible readings of the statute, it would have created an unstable legal environment. Dreamers and their families would be protected from deportation during a Democratic administration but could be deported at any time during a Republican administration. That kind of radical policy vacillation would make it impossible for dreamers, their families,

41. The Fifth Circuit held that DACA and DAPA were illegal in *Texas v. United States*, 809 F. 3d 134, 187–88 (5th Cir. 2015). An equally divided Supreme Court upheld the Fifth Circuit decision in *United States v. Texas*, 136 S. Ct. 2271, 2271 (2016).

42. See *Regents of the Univ. of Calif. v. Dep’t of Homeland Sec.*, 908 F. 3d 476 (9th Cir. 2018), *vacated in part and rev’d in part*, 140 S.Ct. 1891 (2020).

43. See Oral Argument of Solicitor General Noel Francisco, *Dep’t of Homeland Sec. v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891 (2020) (No. 18-587), <https://www.oyez.org/cases/2019/18-587> [<https://perma.cc/M7MK-AUZ6>].

44. *Regents of the Univ. of Calif.*, 140 S. Ct. at 1907.

and their employers to make decisions that are likely to further their interests in the future. Thus, for instance, the many hospitals that rely heavily on dreamers to provide healthcare services during the pandemic⁴⁵ would have no way of knowing whether they will continue to have access to that valuable pool of talent.

Climate change is another important context in which the policy preferences of Republicans and Democrats differ completely. The Obama administration issued an aggressive plan to mitigate anthropogenic climate change called the Clean Power Plan (“CPP”).⁴⁶ The CPP has never been the subject of any court opinion. The Supreme Court divided in the process of staying it without opinion,⁴⁷ and the Trump administration withdrew it before any court had an opportunity to review it on the merits.⁴⁸ The legality of the CPP is certain to come before the courts again, now that a Democrat has been elected president.

Dean Emily Hammond and I wrote an article at a time when we thought that a court decision with respect to the legality of the CPP was imminent.⁴⁹ We identified a difficult issue of statutory interpretation that a reviewing court must address in the process of reviewing the CPP.⁵⁰ We expressed our support for a decision upholding the CPP, but we also urged a reviewing court not to apply the *Chevron* test in the process of reviewing the agency’s interpretation of the statute.⁵¹ We expressed our belief that a decision that upheld the legality of the CPP, but did so in a way that invited any Republican president to reject its validity, would be even worse than a decision in which a court held that the CPP and the statutory interpretation on which it is based are invalid.⁵²

A decision upholding the CPP through application of the *Chevron* test would have had the effect of discouraging electric utilities from

45. See Maria Sacchetti, ‘Dreamers’ Risk Lives on Pandemic’s Front Lines While They Await a Decision on Their Own Futures, WASH. POST (Apr. 11, 2020, 11:58 AM), https://www.washingtonpost.com/immigration/dreamers-risk-lives-on-pandemics-front-lines-while-they-await-court-ruling/2020/04/11/d34a7b58-76c4-11ea-85cb-8670579b863d_story.html [<https://perma.cc/VM7A-SCKK>].

46. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,663 (Oct. 23, 2015).

47. *North Dakota v. EPA*, 136 S. Ct. 999, 999 (2016) (mem.).

48. Repeal of the Clean Power Plan, 84 Fed. Reg. 32,520 (July 8, 2019).

49. Emily Hammond & Richard J. Pierce, Jr., *The Clean Power Plan: Testing the Limits of Administrative Law and the Electric Grid*, 7 GEO. WASH. J. ENERGY & ENV’T L. 1, 3 (2016).

50. *Id.* at 4–5.

51. *Id.* at 7–8.

52. *Id.* at 6–7.

making *any* of the hundreds of billions of dollars of investments in generating units that are required to provide adequate electricity at a reasonable cost. The expectation that the CPP will be in effect in the future would channel investment in one direction while the expectation that it will not be in effect in the future would channel investment in a different direction. Uncertainty about whether the CPP will be in effect in the future discourages investment of all types.

I have reached the conclusion that we can no longer afford *Chevron* with regret. The *Chevron* test continues to have two important beneficial effects. It increases political accountability for policy decisions, and it increases the number of federal statutes that have the same meaning throughout the country.⁵³ However, when *Chevron* is combined with extreme political polarity, it has effects that are even worse than adoption of bad policies or uncertainty with respect to the geographic scope of some national policies. The combination of *Chevron* and political polarity makes it certain that government policies in many important contexts will change dramatically every four to eight years. That effect is intolerable. It makes it impossible for individuals, corporations, and prospective investors to make wise decisions.

III. THE *SKIDMORE* TEST IS SUPERIOR TO THE *CHEVRON* TEST

The multi-factor *Skidmore* test⁵⁴ is a much better fit with an environment of extreme political polarity for two reasons. First, the test refers to an agency interpretation's "consistency with earlier and later pronouncements" as a factor a court should consider in deciding whether to uphold an agency interpretation of an ambiguous statute.⁵⁵ The *Skidmore* test places a high value on policy continuity. In many contexts, continuity is critically important to wise decisionmaking. Individuals, corporations, and prospective investors are often better off having to find ways of coping with a bad policy than trying to make wise decisions in an environment in which they can predict reliably only that government policy will change dramatically every four to eight years. The Supreme Court recently recognized the importance of

53. See Walker & Barnett, *supra* note 5, at 65 ("*Chevron* recognized that the political branches had more accountability than unelected judges and were in a better position to make policy choices inherent in interpretive issues."); Walker et al., *supra* note 20, at 1479–82 (discussing the political accountability and national uniformity rationales underpinning the *Chevron* doctrine).

54. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (2014).

55. *Id.*

stable policies. In its opinion with respect to the legality of the decision of the Trump administration to rescind the DACA and DAPA programs, the Court explicitly imposed a duty on the agency to explain why its change in policy was sufficiently important to justify the adverse effects it would have on the expectations of the many individuals and institutions that had relied on the programs.⁵⁶

Second, by referring to “the thoroughness evident in its consideration [and] the validity of its reasoning,”⁵⁷ the *Skidmore* test places a high value on the quality of an agency’s reasoning in support of its interpretation of an ambiguous statute. There are many situations in which an agency can argue successfully that the *language* of a statute can support two or more interpretations, but in which the agency can support only one of those interpretations with *data and analysis*. The *Skidmore* test tells courts to focus on the quality of the data and analysis that an agency relies on as the basis for its interpretation and to uphold an agency interpretation only if it is supported by reliable data and analysis.

The *Skidmore* test combines the values of reasoned decisionmaking and policy continuity to create a policy environment in which individuals, corporations, and prospective investors can make wise decisions. If a court upholds an agency interpretation of an ambiguous statute based on its conclusion that the agency has supported its interpretation with adequate data and analysis, that court decision should qualify as *stare decisis*. A policy adopted by the agency and upheld by a court through application of the *Skidmore* test can only be changed if the agency uses data and analysis to persuade a reviewing court to uphold a change in policy. That can happen either as a result of changes in the factual context to which a policy applies or changes in our understanding of that context. Thus, for instance, the EPA’s decision to interpret the term “pollutant” in the Clean Air Act not to include carbon dioxide was supportable until it became clear that emissions of carbon dioxide are causing catastrophic changes in the earth’s climate.⁵⁸ The Supreme Court has endorsed the healthy way in which the *Skidmore* test blends the values of continuity and reasoned decisionmaking in a long line of opinions.⁵⁹

56. Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913–15 (2020).

57. *Skidmore*, 323 U.S. at 140.

58. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court held that EPA was required to interpret “pollutant” to include carbon dioxide because of its adverse effects on climate change. *Id.* at 528–32.

59. Thus, for instance, in *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2120 (2016), and in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), the Court held that an agency

IV. ADDRESSING THE DEFERENCE DEBATE AT ITS SOURCE — INADEQUATE CONGRESSIONAL CAPACITY TO LEGISLATE

The lively debate about the propriety of conferring a high degree of deference on agency interpretations of ambiguous statutes is only one of many debates that have occupied the attention of scholars, courts, and politicians in recent years. Similar debates about the legitimacy of the administrative state have focused on whether to reinvigorate the nondelegation doctrine⁶⁰ and whether to make it more difficult for agencies to change their policies by adding procedural hurdles to the rulemaking process or by requiring congressional ratification of agency rules.⁶¹ All of those controversies are rooted in concern that the president has too much power. Many of the participants in the debates overlook an even more basic source of the controversies about the legitimacy of the administrative state, however. Presidents have no choice but to assert unprecedented power to act in response to serious national problems because Congress has lost its ability to address problems by enacting legislation.

Conservative Republican politicians and scholars spent the eight years of the Obama administration criticizing President Obama's attempts to expand his power to regulate. Most Democrats defended those exercises of presidential power until President Trump was elected. As they watched President Trump attempt to exercise unprecedented power to deregulate, Democrats became the primary critics of presidential power. It has now become clear to everyone that presidential power has expanded dramatically in ways that give the president policymaking discretion that is no longer subject to adequate limits imposed by the other branches of government. As a result of that realization, scholars with widely varying ideological perspectives have

decision to change its interpretation of a statute without providing an adequate explanation for the change is arbitrary and capricious. See also the recent opinions discussed in Richard J. Pierce, Jr., *Reason Trumps Pretext*, REGULATORY REV. (July 30, 2020), <https://www.theregreview.org/2020/07/30/pierce-reason-trumps-pretext> [<https://perma.cc/3U74-HSNS>]. Courts could incorporate this requirement in applying Step Two of the *Chevron* test, but they rarely do so. See Christopher Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1445 (2018).

60. The justices engaged in a lively debate about whether to reinvigorate the nondelegation doctrine in *Gundy v. United States*, 139 S. Ct. 2116 (2019).

61. The Center for the Study of the Administrative State sponsored a symposium to discuss the many congressional proposals to add procedures to the rulemaking process. *Congress and the Administrative State: Delegation, Nondelegation and Un-Delegation*, C. BOYDEN GRAY CTR. FOR STUDY ADMIN. STATE (Feb. 22, 2019), <https://administrativestate.gmu.edu/events/congress-and-the-administrative-state-delegation-nondelegation-and-un-delegation> [<https://perma.cc/W7AR-4LR9>].

joined to criticize the growing power of the president and to search for ways of limiting the exercise of that power.⁶²

Concern about the growing and increasingly unchecked power of the president has its roots in increased political polarity and in the legislative impotence that is spawned by political polarity. It is easy to see the relationships among political polarity, the growing power of the president, and legislative impotence by imagining that you are an adviser to a newly elected president in two different periods of time.

First, imagine that you are an adviser to a president who takes office in the 1960s. Your boss asks you how he can implement his policy agenda. Your answer would have focused primarily on the prospect of legislative action. In the 1960s, it was realistic to expect that Congress would engage in the compromises required to enact a major piece of legislation with the votes of a bipartisan majority of the members of both houses of Congress. Thus, for instance, President Richard Nixon was successful in implementing his environmental policy objectives by persuading large bipartisan majorities of both houses of Congress to enact the Clean Air Act and the statute that created the EPA.

Now, imagine that you are an adviser to a president who is elected in 2020. You would have to begin by telling your boss that he has no realistic chance of persuading a bipartisan majority of the members of Congress to enact major legislation in any context. If he is lucky enough to hold office in some two-year period in which his party controls both the House and the Senate, he might be able to persuade Congress to enact one or two pieces of major legislation on straight, party line votes, with the opposition party vowing to repeal the legislation as soon as it regains control of the White House, the House, and the Senate. Thus, for instance, President Obama was able to get Congress to enact his signature healthcare legislation with no Republican votes and President Trump was able to persuade Congress to enact his signature tax cut bill by relying entirely on Republican votes. If the president is in the more common situation in which either the House or the Senate is controlled by the opposing party, he has no realistic chance of persuading Congress to enact any major legislation.

In today's political environment you would have to advise your boss that a president has no choice but to rely on some combination of executive orders and agency actions to implement his policy agenda.

62. See, e.g., Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549, 562–607 (2018) (criticizing both the Obama administration and the Trump administration for the excessive role that both presidents played in immigration and healthcare decisionmaking).

Moreover, you would have to advise him that he will need to support those policy decisions as exercises of power that Congress delegated to the president or to agencies in statutes that were enacted thirty to eighty years ago. In most cases, the statutes were enacted to address problems that differ significantly from the problems that the nation faces today and in conditions that differ significantly from the conditions that exist today.

V. WAYS OF INCREASING CONGRESSIONAL CAPACITY TO LEGISLATE

There is a broad consensus among scholars that we would be better off if we could return to a political environment in which a president could expect to be able to address major policy problems by working with Congress to craft bipartisan solutions that can be enacted in statutes. No one has yet identified ways in which we can reverse the trend toward political polarity in the general public. However, we can change the methods we use to choose candidates for office and leaders of the House and Senate in ways that will reduce the adverse effects of political polarity on the ability of Congress to enact legislation.

We can begin by changing the way we choose candidates for office. We rely on party-based primaries as our most frequent method of choosing candidates for office. That method of choosing candidates maximizes the adverse effects of political polarity on the performance of Congress. Party-based primaries are low turn-out elections that favor candidates whose views lie at the ideological extremes of the range of views held by the members of their party.⁶³ The small group of voters who participate in party-based primaries consist disproportionately of highly partisan activists who support candidates with extreme views.⁶⁴

Reliance on party-based primaries also deters members of the House and Senate from engaging in the compromises that are essential in the process of persuading a bipartisan majority to support a proposed statute. A large majority of the seats in the House and the Senate are “safe seats,” in the sense that the incumbent’s party is

63. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 298 (2011); see generally ELAINE C. KAMARCK, PRIMARY POLITICS: EVERYTHING YOU NEED TO KNOW ABOUT HOW AMERICA NOMINATES ITS PRESIDENTIAL CANDIDATES (3d ed. 2018) (discussing the effects of primary elections).

64. See *supra* note 63 and accompanying text.

virtually certain to win all general elections for the foreseeable future.⁶⁵ Those seats are not “safe” in the context of a party-based primary, however.

The only realistic political risk that most members of the House and Senate face is the risk of losing a primary. For Republicans, that risk comes mainly from the right. For Democrats, the risk comes mainly from the left. Republicans who move toward the center to compromise on a bill risk losing a primary to a candidate who is to their right. Democrats who move to the center to compromise on a bill risk losing a primary to a candidate who is to their left. The only way that incumbents can protect themselves from being “primaried” is to take extreme partisan positions and to avoid compromises.

Members of the House and Senate must be willing to compromise in order to enact bipartisan legislation. In today’s conditions of extreme political polarity, it is impossible to put together a bipartisan majority to enact a statute that has been created through the process of compromise. If we want to return to a political environment in which a bipartisan coalition of members of Congress can enact, amend, or repeal legislation, we must identify and implement an alternative to party-based primaries.

The two most promising alternatives are the peer-based systems that most democracies use to choose candidates for office and the bipartisan primaries that some states are now using for that purpose.⁶⁶ Either of those alternatives is far more likely to produce candidates whose views are closer to the center of the range of views of the members of their party. Either will also produce members of the House and Senate who are far more willing to negotiate the compromises that are essential to successful enactment of statutes because they will not be in constant fear that they will be “primaried” by more extreme and less compromising candidates.

We also must change our method of choosing leaders of the House and Senate. We now use methods of choosing the leaders of the House and Senate that maximize the adverse effects of political polarity on the legislative process. The leaders of both Houses of Congress regularly refuse to allow members to vote on legislation that is supported by a majority of House or Senate members and by a majority

65. See *2020 House Race Ratings*, COOK POL. REP. (Nov. 2, 2020), <https://cookpolitical.com/ratings/house-race-ratings> [https://perma.cc/NA3U-HWHB]; *2020 Senate Election Forecasts*, 270TOWIN (June 1, 2020), <https://www.270towin.com/2020-senate-election-predictions> [https://perma.cc/8YZS-X8A4].

66. See *supra* note 63 and accompanying text.

of the general public. These party leaders have no choice but to engage in that undemocratic pattern of conduct because they are elected by a majority of the members of their party—who are in turn fearful of being “primaried.”

Thus, for instance, if Republicans control 51 Senate seats, 26 Republicans can successfully block a vote on a bill that would be enacted by a vote of 74 to 26 if it was subject to a floor vote. The Republican leader of the Senate knows that he would risk losing his leadership position if he angers a majority of the members of his party by allowing the Senate to vote to enact a statute that is opposed by a majority of Republican members of the Senate.

Similarly, if Democrats control 218 House seats, the Speaker of the House cannot allow a floor vote on a bill that would be enacted by a vote of 325 to 110 if the 110 who oppose the bill are members of the Democratic Party. The Democratic Speaker knows that she would risk losing her position if she allowed a vote on a bill that is opposed by a majority of the members of her party. We can eliminate this undemocratic roadblock to legislation by requiring a vote by a super majority of each house of Congress to elect a leader. Such a leader would have an incentive to allow members to vote on any bill that has the support of most of the members of the House and Senate and, presumptively, of the public.

Some people will object to proposed changes of this type based on a claim that they are undemocratic. They will argue that all decisions should be made by majority vote in a democracy. That is a specious argument. It should be apparent to anyone who gives the question serious thought that our present methods of choosing candidates for office combined with our present methods of choosing the leaders of the House and the Senate produce undemocratic results. They allow a small minority of the members of each party to block the enactment of legislation that is supported by a large majority of the public.

CONCLUSION

I look forward to the day when we can reduce the level of controversy that surrounds the administrative state by returning to a political environment in which Congress is capable of enacting bipartisan legislation. Congress should be willing and able to enact statutes that empower agencies to implement solutions to the many serious problems that the nation confronts within judicially enforceable boundaries. Until we can restore the capacity to legislate, courts must adopt and apply legal doctrines that produce acceptable

results in an extremely polarized political environment. *Chevron* is not capable of producing acceptable results in today's political environment. The Court should replace the *Chevron* test with the *Skidmore* test.