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THE IMPACT OF WEAKENING *CHEVRON* DEFERENCE ON ENVIRONMENTAL DEREGULATION

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INTRODUCTION

President Donald Trump has quickly marshalled the powers of the presidency to challenge President Barack Obama's environmental legacy.[1] Facing an increasingly intransigent Congress, the Obama Administration placed significant emphasis on rulemaking and other administrative actions to push its progressive agenda.[2] Whatever the merits of this approach,[3] many of these actions are not safe from a new administration hostile to what it views as oppressive environmental regulation.[4] But it remains to be seen how effectively the Trump Administration, faced with the prospect of waning deference to prior agency interpretations, can dismantle environmental agency actions taken under Obama.[5] The purpose of this Comment is to consider the interaction between these trends in administrative law and the impact of those trends on Obama's environmental legacy. This Comment ultimately

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1. Trump has stated repeatedly, both during the campaign and since, that he plans to drastically cut environmental regulations. See, e.g., Timothy Cama & Devin Henry, Trump Outlines 'America First' Energy Plan, Hill (May 26, 2016), http://thehill.com/policy/energy-environment/281430-trump-outlines-america-first-energy-plan [http://perma.cc/3EUA-Z8YS].

2. See Matthew Oakes et al., The Future of Administrative Law, 47 Envtl. L. Rep. 10,186, 10,189 (2017) (paraphrasing former Solicitor General Donald Verrilli as saying "[i]n a world in which Congress rarely passes new legislation to address pressing problems, and routinely fails to update obsolete regulatory schemes, it is reasonable to expect that the executive branch will try to do so"). In another context, Obama made this approach clear when he announced the Deferred Action for Childhood Arrivals (DACA) program. See Press Release, White House, Remarks by the President on Immigration (June 15, 2012), http://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration [http://perma.cc/6QN9-S2K7] (providing deferred action from deportation and renewable work permits for immigrants who entered the United States as minors).

3. Then-Dean Elena Kagan wrote about the legitimacy of presidential administration during times of divided government. See Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2311–12 (2001).

4. See Tracking Trump's Campaign Promises, PolitiFact, http://www.politifact.com/truth-o-meter/promises/trumpometer/browse/ [http://perma.cc/37FV-96H6] (last visited Oct. 11, 2017) (quoting Trump as promising to "cancel every needless job-killing regulation and put a moratorium on new regulations until our economy gets back on its feet" (internal quotation marks omitted)).

5. See infra section I.A (describing recent attacks on *Chevron*).

shows that some of the core Obama-era environmental policies are more secure than the popular discourse suggests and provides guidance for litigators challenging Trump's deregulatory agenda.

Trump and the Republican Congress seem especially hostile to environmental regulation. In his 2017 budget proposal submitted to Congress, Trump called for cutting thirty-one percent of EPA's budget.[6] This would have slashed all funding for the Clean Power Plan and international climate change programs, and cut 3,200 agency positions.[7] A number of pending bills in Congress also seek to drastically undercut EPA's regulatory authority. Most recently, Representative Gary Palmer introduced the Stopping EPA Overreach Act of 2017.[8] The bill would change the definition of "air pollutant" in the Clean Air Act to exclude carbon dioxide, which would halt all greenhouse gas regulation and invalidate the Clean Power Plan.[9]

The goal of this Comment is to consider how Trump's deregulatory agenda, particularly with respect to environmental rules, may fare in judicial challenges if administrative law principles of deference are altered.[10] *Chevron*'s norm of deference to agency interpretations of statutes has recently come under fire from the Republican Congress, as well as now-Justice Gorsuch.[11] The Supreme Court is unlikely to overrule *Chevron* outright, but the shift of votes suggests that the Court may begin to apply a less robust form of *Chevron* deference. The remainder of the Comment proceeds as follows: Part I considers existing law on deregulation, including the Administrative Procedure Act's (APA) arbitrary and capricious standard and the contours of the *Chevron* doctrine, to explain why undermining *Chevron* would have less impact on environmental deregulation than one might expect. Part II considers how the legislative and judicial challenges to *Chevron* would impact various environmental rules currently under fire from the Trump Administration.

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6. Office of Mgmt. & Budget, America First: A Budget Blueprint to Make America Great Again 41–42, http://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf [http://perma.cc/2EYP-D7HJ] (last visited Oct. 11, 2017).

7. Id. The budget approved by Congress spared EPA from these cuts, at least for now. See Ari Natter & Jennifer A Dlouhy, EPA, Clean Energy Spared Trump's Ax in $1.1 Trillion Budget Deal, Bloomberg (May 1, 2017), http://www.bloomberg.com/news/articles/2017-05-01/epa-clean-energy-spared-trump-s-ax-in-1-1-trillion-budget-deal [http://perma.cc/39FV-DLMY].

8. H.R. 637, 115th Cong. (2017).

9. Id. § 3(a)(1). The bill would also restrict EPA's authority to act on climate change in various other environmental statutes. Id. § 3(a)(2). The bill would also void the Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (June 3, 2016) (to be codified at 40 C.F.R. pt. 60). Id. § 3(b).

10. This Comment does not seek to answer the normative question of whether *Chevron* itself has merit, either from a policy perspective or a constitutional one. See infra section I.A.2 (addressing these arguments briefly).

11. See infra notes 26–36.

I. *CHEVRON*, ARBITRARY AND CAPRICIOUS REVIEW, AND DEREGULATION

Challenges to agency action, whether deregulatory or otherwise, typically revolve around two questions: whether the agency has interpreted its statute properly (a *Chevron* challenge), and whether the agency has acted in an arbitrary and capricious manner (an APA challenge). This Part begins by considering the *Chevron* doctrine and how it has faltered since its inception. Next, this Part examines the contours of arbitrary and capricious review as applied to regulatory change. Finally, this Part concludes by exploring the interaction between *Chevron* and arbitrary and capricious review. The *Chevron* question goes to how cemented Obama-era interpretations actually are; the arbitrary and capricious question could potentially stop the Trump Administration from using this interpretive malleability to deregulate.

A. Chevron *Doctrine*

1. *Traditional* Chevron *Two Step.* — *Chevron*'s two-step deference scheme provides a framework for courts to review an agency's interpretation of a statute. *Chevron* itself considered whether the Reagan EPA properly interpreted the term "stationary source" in the Clean Air Act to encompass an entire plant rather than a single smokestack.[12] At step one, the question is "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."[13] At step two, if the court finds that "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."[14] Importantly for present purposes, *Chevron* itself recognized that an agency could change its interpretation of a statute, so long as it picks from a menu of reasonable interpretations.[15]

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12. See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

13. Id. at 842–43.

14. Id. at 843. The framework described above suggests a more coherent version of *Chevron* than what often exists in practice. Many scholars have argued that the Court has applied *Chevron* inconsistently at best. See, e.g., Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 998 (1992). Courts also regularly conflate the two steps of *Chevron*. See Matthew C. Stephenson & Adrian Vermeule, *Chevron* Has Only One Step, 95 Va. L. Rev. 597, 598 (2009) (arguing that *Chevron* calls for "a single inquiry into the reasonableness of the agency's statutory interpretation"). Finally, some have suggested that courts are truly applying *Skidmore* deference, see infra notes 98–101, but merely citing *Chevron* when the government wins the case. See Oakes et al., supra note 2, at 10,190. For the purpose of this Comment, however, it is useful to lay out the basic framework as articulated in *Chevron* itself.

15. *Chevron*, 467 U.S. at 863–64 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."); see

The theory behind *Chevron* has been expressed in a number of ways. *Chevron* itself discussed one of the more fundamental ideas—that Congress has (explicitly or implicitly) *delegated* authority to the agency to interpret the provision at issue or fill any gaps.[16] Justice Scalia often wrote that *Chevron* is premised on the realization that there may not be a single correct interpretation of a statute and that the proper exercise of judicial restraint is to allow the agency to make those policy decisions.[17] The Court in *Chevron* also explicitly noted the *expertise* of an agency like EPA to implement a "technical and complex" regulatory scheme.[18] Whatever the core justification, the Supreme Court has remained (relatively) committed to *Chevron* since its decision over thirty years ago.[19]

2. *Attacks on* Chevron *over the Years.* — Despite its general acceptance, *Chevron* has faced criticism since its inception. Most of the critiques fall into two general categories: First, some scholars have claimed that *Chevron* requires judges to abdicate their role to "say what the law is."[20] Without claiming that *Chevron* is unconstitutional, Professor Thomas Merrill has argued that "*Chevron* seeks to resolve the central theoretical problems of the modern administrative state by adopting a dubious fiction of delegated authority and by reducing the role of the courts to a point that threatens to undermine the principal constitutional

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also Barnhart v. Walton, 535 U.S. 212, 226 (2002) (Scalia, J., concurring in part and concurring in the judgment) (noting that *Chevron* accepted "that [statutes have] a range of permissible interpretations, and that the agency is free to move from one to another").

16. *Chevron*, 467 U.S. at 843–44 (recognizing both implicit and explicit delegation and finding no functional difference between the two); see also Cass R. Sunstein, Beyond *Marbury*: The Executive's Power to Say What the Law Is, 115 Yale L.J. 2580, 2590 (2006) ("Hence the most natural justification for deference is that certain grants of authority, in organic statutes such as the Clean Air Act, implicitly contain interpretive power as well.").

17. *Barnhart*, 535 U.S. at 226 (noting that *Chevron* allows agencies to "move from one [interpretation] to another").

18. *Chevron*, 467 U.S. at 863, 856–66 (discussing expert agencies and the province of the Executive Branch to make competing policy decisions within the confines of the statute); see also Ronald J. Krotoszynski, Jr., Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of *Skidmore*, 54 Admin. L. Rev. 735, 750 (2002) ("Both *Chevron* and *Mead* fail to accord adequate weight to the expertise rationale for affording deference to agency interpretations of ambiguous texts."). For an argument in favor of limiting the expertise rationale, see Merrill, supra note 14, at 1009.

19. The Court has taken an expansive view of *Chevron* in a few areas. First, the Court in *Brand X* held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only* if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (emphasis added). That is, the original court decision must have found that its reading was the "*only permissible* reading of the statute," not just "the *best* reading." Id. at 984. Second, the Court held in *City of Arlington v. FCC* that "a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority (that is, its jurisdiction)." 133 S. Ct. 1863, 1868 (2013).

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

constraint on agency misbehavior."[21] While the Court has never recognized this view explicitly, Professor Merrill claims that this explains why the "Court often seems wary of the *Chevron* doctrine, applying it inconsistently at best."[22]

Second, scholars have also recognized tension between *Chevron* and the APA. Section 706 of the APA provides that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action."[23] Even at a first pass, the command that courts "interpret . . . statutory provisions" could easily be read to undercut *Chevron*'s conception of deference to reasonable agency interpretations of statutes.[24] Despite this tension, recognized (and perhaps dubiously justified) by scholars over the years,[25] there appears to be little pushback on this particular issue from the judiciary.

Chevron has also faced significant criticism from Congress and courts in recent years. The House of Representatives currently has a bill pending to overrule *Chevron* by requiring de novo review of constitutional and statutory provisions.[26] The House Subcommittee on Regulatory Reform, Commercial and Antitrust Law is also considering a bill that would require an automatic sixty-day stay of "high-impact rules."[27] Congress has not yet advanced these bills beyond the early stages.

Judicial attacks on *Chevron* have received more press with the nomination (and eventual confirmation) of Justice Gorsuch to the Supreme Court.[28] Then-Judge Gorsuch wrote a concurring opinion in

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21. Merrill, supra note 14, at 994–98; see also Nicholas Quinn Rosenkranz, Federal Rules of Statutory Interpretation, 115 Harv. L. Rev. 2085, 2130–31 (2002) (noting "deep tension between nondelegation principles and *Chevron*" and suggesting that the doctrine "may well be wrongly decided as a matter of constitutional law").

22. Merrill, supra note 14, at 998.

23. 5 U.S.C. § 706 (2012).

24. See id.; see also Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

25. Professor Sunstein has grappled with this issue, and while he recognizes the tension, he explains *Chevron* as a pragmatic understanding "that assessments of policy are sometimes indispensable to statutory interpretation." Sunstein, supra note 16, at 2587; see also Gillian E. Metzger, Foreword, Embracing Administrative Common Law, 80 Geo. Wash. L. Rev. 1293, 1300–01 (2012) (arguing that *Chevron* represents a form of administrative common law).

26. H.R. 76, 115th Cong. (2017).

27. A "high-impact" rule is one that costs more than $1 billion annually. H.R. 3438, 114th Cong. (2016).

28. For a broader look at how Justice Gorsuch's views on *Chevron* could impact administrative law and environmental law broadly, see Philip J. McAndrews III, What SCOTUS Nominee Neil Gorsuch's Interpretation of *Chevron* Could Mean for Environmental Administrative Law, Geo. Envtl. L. Rev. Online (Mar. 5, 2017), http://gelr.org/2017/03/05/what-scotus-nominee-neil-gorsuchs-interpretation-of-chevron-could-mean-for-environmental-administrative-law/ [http://perma.cc/RR2C-DAY8].

2016 that questioned the basic constitutionality of *Chevron*.[29] He later claimed during his confirmation hearings that although he had reservations about *Chevron*, he would approach the issue with an open mind.[30] Importantly, Judge Gorsuch's concurrence in *Gutierrez-Brizuela* specifically questioned the ability of agencies to reverse prior interpretations of statutes.[31]

Now-Justice Gorsuch is not the only Supreme Court Justice to express reservations about *Chevron*. Justice Thomas has specifically questioned *Chevron* deference in concurring opinions.[32] Justice Breyer famously criticized *Chevron* prior to his appointment to the Court,[33] though he is generally seen as quite deferential to agencies.[34] Then-Dean Kagan also expressed skepticism of *Chevron*,[35] though not to the same degree as some of her peers. Whether the Court will seriously reconsider *Chevron* remains to be seen, but it seems at least possible that the existing chinks in *Chevron*'s armor will get deeper and more pronounced.[36]

Ultimately, it seems unlikely that Congress could muster the votes to require complete de novo review of agency statutory interpretation.[37] And it seems somewhat unlikely that the Court would overrule *Chevron* explicitly. What does seem likely, or at least possible, is that the inclusion

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29. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) ("In this way, *Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty.").

30. See Debra Cassens Weiss, Live Blog of Confirmation Hearings, Day 2: Gorsuch Condemns Attacks on the Judiciary, ABA J. (Mar. 21, 2017), http://www.abajournal.com/news/article/confirmation_hearings_day_2_aba_will_present_gorsuch_rating_is_he_a_real_li [http://perma.cc/35XD-AW5E].

31. *Gutierrez-Brizuela*, 834 F.3d at 1152 ("Even if the people somehow manage to make it through this far unscathed, they must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail.").

32. E.g., Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (arguing *Chevron* "is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies").

33. Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 373 (1986) (criticizing *Chevron* as "seriously overbroad, counterproductive and sometimes senseless").

34. Oakes et al., supra note 2, at 10,191. This suggests that support for *Chevron* as the proper rule of deference is not inevitably tied to deference to agency expertise generally. Id.

35. David J. Barron & Elena Kagan, *Chevron*'s Nondelegation Doctrine, 2001 Sup. Ct. Rev. 201, 242–44 (arguing *Chevron* should be limited to statutory delegates—the decisionmakers named by statute and confirmed by the Senate, rather than lower-level bureaucrats).

36. See Oakes et al., supra note 2, at 10,189 (quoting Professor Richard Pierce as saying "I don't think the Court's going to overrule either *Chevron* or deference. . . I think what's far more likely is we're going to see a lot more qualifications of" *Chevron* and *Auer*).

37. See H.R. 76, 115th Cong. (2017).

of now-Justice Gorsuch leads to a significantly less robust version of *Chevron*.[38]

B. *Arbitrary and Capricious Review and Deregulation*

Any deregulatory action would also face a challenge under the APA's arbitrary and capricious standard. Section 706(2)(A) of the APA provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[39] As a general matter, this is typically referred to as "hard look" review.[40] As the Court wrote in *State Farm*:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made."[41]

In *State Farm*, the Court engaged in a searching review of the record in holding that the National Highway Traffic Safety Administration (NHTSA) had failed to adequately explain its revocation of its passive restraint rule.[42] *State Farm* instructs courts to apply *the same* arbitrary and

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38. See Oakes et al., supra note 2, at 10,189–90. For instance, in an opinion written by Justice Scalia, the Court in *City of Arlington v. FCC* held 5-4 that agencies also receive *Chevron* deference for interpretations that go to their *jurisdiction*. 133 S. Ct. 1863, 1868–71 (2013). Questions like this may flip with Justice Gorsuch on the Court.

39. 5 U.S.C. § 706(2)(A) (2012).

40. See John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 662–63 (1996) (describing the "so-called 'hard-look' doctrine, which provides that agency action is arbitrary and capricious if 'the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making'" (quoting Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970))).

41. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

42. Id. at 51. Some might argue that the Court in *State Farm* applied an unusually searching form of review that is not compatible with *Chevron* or, for that matter, later cases like FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009). See Metzger, supra note 25, at 1299 n.22 ("To be sure, courts apply the arbitrary and capricious standard with varying degrees of rigor and invoke *State Farm* inconsistently."); see also Charles Christopher Davis, The Supreme Court Makes It Harder to Contest Administrative Agency Policy Shifts in *FCC v. Fox Television Stations, Inc.*, 62 Admin. L. Rev. 603, 614 (2010) (explaining that, in contrast to the Court's approach in *State Farm*, "[j]udicial review in this area is now very deferential" after *FCC v. Fox Television*). For arguments that *State Farm* and *Chevron* can be read coherently, see Merrick B. Garland, Deregulation and Judicial Review, 98 Harv. L. Rev. 505, 549–53 (1985) (arguing that *State Farm* and *Chevron* can be "harmonized" based on *Chevron*'s focus on statutory purpose); Scott A. Keller, Depoliticizing Judicial Review of Agency Rulemaking, 84 Wash. L. Rev. 419, 450–51 (2009) (arguing that "Chevron actually involved a specific type of arbitrary and capricious review—review of an agency's interpretation of a statute it administers," which "revitalized the minimum rationality

capricious standard of review for *rescinding* regulations as for promulgating them in the first instance.[43]

Even in *State Farm*, the Court "recognize[d] that '[r]egulatory agencies do not establish rules of conduct to last forever[]' and that an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'"[44] The Court further clarified (and perhaps weakened) this standard in *FCC v. Fox Television Stations, Inc.*[45] In *FCC v. Fox Television*, the Court clearly held that there is "no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to *more searching review*."[46] The Court went on to write that although an agency must

> display awareness that it *is* changing position . . . it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.[47]

Particularly relevant here, the Court went on to hold that an agency will often need to "provide a more detailed justification than what would suffice for a new policy created on a blank slate . . . when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy."[48] Despite language suggesting that *FCC v. Fox Television* was consistent with the Court's approach in *State Farm*, most commenters have interpreted *FCC v. Fox Television* as weakening judicial review of regulatory changes.[49]

The Court's decision in *FCC v. Fox Television* was sharply divided. Justice Breyer wrote in dissent that the agency must do more than simply be aware of its prior decision—it "must explain *why* it has come to the

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approach to arbitrary and capricious review in the context of agency statutory interpretation"). Professor Keller also argues that *FCC v. Fox Television* implicitly rejects much of the "hard-look" aspects of *State Farm*, further bringing the two doctrines into sync by reducing the degree to which courts second-guess substantive decisions of agencies. Id. at 452–57.

43. See *State Farm*, 463 U.S. at 46–57 (holding that NHTSA's rescission of the passive restraint requirement as applied to airbags and seatbelts was arbitrary and capricious).

44. Id. at 42 (second alteration in original) (citation omitted) (first quoting Am. Trucking Ass'ns, v. Atchison, Topeka & Sante Fe Ry., 387 U.S. 397, 416 (1967); then quoting In re Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968)).

45. 556 U.S. 502. The case involved an FCC order changing its longstanding policy not to take enforcement action for "fleeting expletives" on television and radio. Id. at 512.

46. Id. at 514 (emphasis added).

47. Id. at 515.

48. Id. at 515–16 (requiring only "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy").

49. See, e.g., Davis, supra note 42, at 614 ("The Court has now made clear that an administrative agency changing its policies should face little resistance from the Judiciary.").

conclusion that it should now change direction."[50] Justice Kennedy, concurring in the judgment, agreed with Justice Breyer that an "agency must explain why 'it now reject[s] the considerations that led it to adopt that initial policy.'"[51] In practice, lower courts seem to have adopted Justice Scalia's formulation described above and applied relatively deferential review to agency decisions to change regulatory policy.[52] This suggests that deregulation premised on evidentiary or policy considerations alone would face relatively limited scrutiny.

C. *Interaction Between* Chevron *and the Arbitrary and Capricious Standard*

The most difficult remaining issue is the interaction between the Supreme Court's *Chevron* doctrine and the APA's arbitrary and capricious standard. Given the way the two doctrines overlap, undermining one of them would undoubtedly affect the Trump Administration's deregulatory agenda. Two guiding principles stem from this section, but the diversity of cases makes generalizations suspect.

First, courts typically use the arbitrary and capricious standard to review the evidentiary basis and reasoning of agency decisions[53] and apply *Chevron* to police agency interpretations of statutes.[54] But courts often conflate the analyses. The D.C. Circuit's opinion in *Arent v. Shalala* provides a useful example.[55] Recognizing potential overlap, Chief Judge Harry Edwards wrote for the majority that arbitrary and capricious review, not *Chevron*, should apply.[56] He argued that "*Chevron* is principally concerned with whether an agency has authority to act under a statute" or "discerning the boundaries of Congress' delegation of

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50. *Fox Television*, 556 U.S. at 550 (Breyer, J., dissenting).

51. Id. at 535 (Kennedy, J., concurring in part and concurring in the judgment) (alteration in original) (quoting id. at 550 (Breyer, J., dissenting)). Justice Kennedy adopted part of Justice Breyer's approach to changes in regulation but thought that the FCC decision, while not a "model for agency explanation," was sufficient. Id. at 538.

52. See, e.g., Mingo Logan Coal Co. v. EPA, 829 F.3d 710, 726–27 (D.C. Cir. 2016) (finding EPA properly exercised its discretion under the Clean Water Act to change a section 404 permit decision based on new scientific evidence); Hermes Consol., LLC v. EPA, 787 F.3d 568, 576 (D.C. Cir. 2015) (finding EPA's change in policy with respect to evaluating cost of compliance under a renewable fuels program was valid and "readily explained"); Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032, 1036–39 (D.C. Cir. 2012) (upholding EPA's elimination of an opt-out provision for owner-occupied housing under the Toxic Substances Control Act).

53. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983) (preventing an agency from, for instance, "entirely fail[ing] to consider an important aspect of the problem"). In fact, the Court did not even cite *Chevron* in its most recent statement of the law in *Fox Television*, 556 U.S. at 502. This suggests that the Court perhaps intends the two doctrines to be analyzed separately.

54. See supra section I.A.1.

55. 70 F.3d 610 (D.C. Cir. 1995). *Arent* involved a challenge to regulations concerning nutritional labeling of raw produce and fish promulgated by the Food and Drug Administration. Id. at 612.

56. Id. at 614–16.

authority."[57] The majority instead focused on arbitrary and capricious review, considering "whether the FDA's discharge of that authority was reasonable."[58]

Second, while courts have tried to maintain some analytical clarity between the two doctrines, in *Arent* the D.C. Circuit recognized that "*Chevron* review and arbitrary and capricious review overlap at the margins."[59] In some sense, it is difficult to imagine how an agency's unreasonable interpretation of a statute (on *Chevron* step two) is not *also* arbitrary and capricious. The Supreme Court itself has contributed to this confusion, implying that an inconsistent statutory interpretation would be grounds for arbitrary and capricious reversal.[60] Especially in cases involving changes in agency policy, courts at all levels have invoked *Chevron* and *State Farm* almost interchangeably.[61] In fact, challengers to agency action often make both arguments simultaneously.[62] The two doctrines often seem to work together in deregulatory challenges, picking up each other's slack and allowing the agency to justify a shift in policy. Given the perhaps unusually searching review in *State Farm*, one might reasonably argue that *Chevron*'s review of statutory interpretation and *State Farm*'s arbitrary and capricious review are inconsistent or even incompatible.

To many scholars, the upshot of this comingling of doctrines is that the courts are, in the end, engaging in reasonableness analysis of agency action.[63] *Chevron* and arbitrary and capricious review work together to

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57. Id. at 615.

58. Id. at 616.

59. Id. at 615. Judge Wald's concurrence perhaps best summarizes the overlap and distinctions. She recognized that "there are certainly situations where a challenge to an agency's regulation will fall squarely within one rubric, rather than the other . For example, we might invalidate an agency's decision under *Chevron* as inconsistent with its statutory mandate, even though we do not believe the decision reflects an arbitrary policy choice." Id. at 620 (Wald, J., concurring) (citation omitted). However, Judge Wald noted that many cases will involve overlap between the two tests "because both standards require the reviewing court to ask whether the agency has considered all of the factors made relevant by the statute." Id.

60. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.").

61. See Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125–26 (2016) (citing both *Chevron* and *State Farm* for the proposition that agencies may change their interpretations of statutes as long as they justify the change); Rust v. Sullivan, 500 U.S. 173, 184–87 (1991) (same).

62. Respondent EPA's Initial Brief at 23, 44–46, West Virginia v. EPA, No. 15-1363 (D.C. Cir. filed Mar. 28, 2016) (making both *Chevron* and arbitrary and capricious arguments in defense of the Clean Power Plan).

63. See, e.g., Elizabeth V. Foote, Statutory Interpretation or Public Administration: How *Chevron* Misconceives the Function of Agencies and Why It Matters, 59 Admin. L. Rev. 673, 710 (2007) ("In recent years, some lower federal courts seem to stretch the inquiry into the reasonableness of an agency's 'construction of a statute' under step two of

give agencies fairly broad authority to change statutory implementation strategy,[64] perhaps even based on political changes within an administration.[65] If the Court undermines *Chevron*, the Trump Administration's ability to quickly shift among reasonable interpretations of a statute would fall apart. But the following analysis shows that the degree to which this matters practically depends on whether a policy is based primarily on statutory interpretation or on evidence and reasoning.[66] To the extent that a regulatory change involves fact-gathering, Obama-era environmental policies may prove much more durable than one might expect.

II. CHANGING *CHEVRON* AND TRUMP'S DEREGULATORY AGENDA

The Trump Administration has made its environmental policy clear—it plans to attempt swift, across-the-board deregulation by reconsidering most of the Obama Administration's environmental rules. Rolling back the Court's *Chevron* doctrine would undoubtedly impact the Trump Administration's ability to accomplish these regulatory goals, but the impact of undermining *Chevron* is complicated by two factors: first, *Chevron*'s interaction with the Court's arbitrary and capricious jurisprudence for regulatory changes; and second, uncertainty surrounding

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Chevron into something similar to an arbitrary and capricious test."); Ronald M. Levin, The Anatomy of *Chevron*: Step Two Reconsidered, 72 Chi.-Kent L. Rev. 1253, 1263–77 (1997) (discussing conflation of *Chevron* step two and the arbitrary and capricious standard).

64. This is highlighted by the Federal Register notice for reconsideration of the Clean Power Plan, which intertwines *Chevron* and arbitrary and capricious cases. See Review of the Clean Power Plan, 82 Fed. Reg. 16,329 (proposed Apr. 4, 2017) (to be codified at 40 C.F.R. pt. 60). EPA made essentially the same legal argument in its proposal to repeal the Clean Power Plan. See Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,039 (proposed Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 60) (stating that "EPA has inherent authority to reconsider, repeal, or revise past decisions to the extent permitted by law so long as the Agency provides a reasoned explanation").

65. This precise issue is still contested. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("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."); see also FCC v. Fox Television Stations, Inc., 556 U.S. 502, 523 (2009) (recognizing that "the precise policy change at issue here was spurred by significant political pressure from Congress").

66. The notion that courts are ultimately engaging in some form of reasonableness analysis for regulatory change does not resolve the remaining ambiguity in *Chevron* itself, nor does it address the potential inconsistency between *State Farm* and *Chevron*. This Comment does not seek to present a unifying theory of the *Chevron* doctrine, much less a perfect way of understanding the two doctrines together. But the guiding principles described above present the most workable structure for analyzing the obstacles to the environmental deregulation that the Trump Administration appears poised to implement. This is true even to the extent that courts are ultimately analyzing agency actions for reasonableness.

what would fill the void left by *Chevron*. This section considers the durability of individual rulemakings that appear to be in the Trump Administration's crosshairs. While this section focuses on the statutory interpretation question, it is worth keeping in mind that any of these deregulatory measures would also face an arbitrary and capricious challenge under *State Farm* and *FCC v. Fox Television*.[67]

In March 2017, Trump issued Executive Order 13,783, which provides a comprehensive view of precisely how the Trump Administration plans to alter Obama's environmental rulemaking legacy. This Part first considers a potential challenge to the Obama Administration's Endangerment Finding, which the Trump Administration did not target in the Executive Order.[68] Next, this Part considers the Executive Order's directive to EPA to review the Clean Power Plan.[69] Finally, this Part will address the Trump Administration's reconsideration of the midterm review of the light-duty fuel economy standards, which is widely considered the most important U.S. program targeting climate change.[70]

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67. This Comment does not focus closely on arbitrary and capricious challenges for a few reasons. First, *Chevron* appears vulnerable on multiple fronts, but the general APA standard does not. Second, arbitrary and capricious challenges are much more fact-based—a thorough analysis of the evidentiary basis and reasoning of each rule is not possible here. Finally, in the wake of *FCC v. Fox Television*, courts have taken a relaxed approach to reviewing regulatory change—at the very least, they are not applying any form of heightened review for regulatory shifts. See supra note 52 and accompanying text.

68. According to recent reporting, it appears that EPA Administrator Scott Pruitt "successfully argued against including language revoking the agency's 2009 'endangerment finding'" because the "legal hurdles to overturning the finding were massive, and the administration would be setting itself up for a lengthy court battle." Andrew Restuccia & Alex Guillén, Pruitt Takes Fire from Conservatives in Climate Showdown, Politico (Mar. 28, 2017), http://www.politico.com/story/2017/03/pruitt-climate-change-236572 [http://perma.cc/DF99-VHRQ]. It remains to be seen whether the Administration will remain on this path.

69. Exec. Order No. 13,783, Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093, 16,095 (Mar. 31, 2017). The Order also called for the Attorney General to seek a stay of the pending D.C. Circuit litigation on the Clean Power Plan, which was granted. See Per Curiam Order, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Apr. 28, 2017). The Order also calls for reconsideration of EPA's Methane Rule and Bureau of Land Management's Methane Waste Rule. 82 Fed. Reg. at 16,096. The Order also "disbands the Interagency Working Group on the Social Cost of Carbon and rescinds the federal estimates for the social cost of carbon, methane, and nitrous oxide." Trump Issues Executive Order on Climate Change, Sabin Ctr. for Climate Change Law (Mar. 28, 2017), http://columbiaclimatelaw.com/climate-deregulation-tracker/trump-issues-executive-order-on-climate-change/ [http://perma.cc/YZ98-PQWE]. It also "revokes the Council on Environmental Quality (CEQ)'s guidance on climate change and National Environmental Policy Act (NEPA) reviews" and ends the moratorium on federal coal leasing. Id.

70. See infra section II.C.

A. *Endangerment Finding*

In the wake of *Massachusetts v. EPA*,[71] EPA issued its Endangerment Finding under the Clean Air Act,[72] which determined that greenhouse gases may "reasonably be anticipated to endanger public health or welfare."[73] Following years of litigation, the bulk of the Endangerment Finding and accompanying rules were upheld in *Coalition for Responsible Regulation v. EPA*.[74] As the following analysis shows, the Endangerment Finding would likely survive an attempt at deregulation even without *Chevron*.[75]

Challengers to the Endangerment Finding made statutory interpretation and arbitrary and capricious arguments, as they have against many environmental rules.[76] EPA's core finding, one that environmentalists sought for years, was that greenhouse gases may "reasonably be anticipated to endanger public health or welfare" within the meaning of the Clean Air Act.[77] One might assume, then, that the focus of the litigation would turn on the meaning of the statute. But the bulk of industry challenge to the rule centered on the adequacy of the record evidence supporting EPA's determination.[78] The only statutory interpretation question was whether EPA properly refused to consider "policy concerns and regulatory consequences," or whether it was limited to a "science-based judgment."[79] The D.C. Circuit not only sided with EPA on this point—it appears to have decided the issue on *Chevron* step one. The Court wrote that "[t]he plain language of § 202(a)(1) of that Act does not leave room for EPA to consider" regulatory consequences.[80] Even under modern *Chevron* doctrine, EPA cannot reconsider its interpretation of the Clean Air Act.[81]

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71. The Supreme Court in *Massachusetts v. EPA* held that greenhouse gases were "air pollutants" subject to Clean Air Act regulation. 549 U.S. 497, 532 (2007).

72. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,523 (Dec. 15, 2009) (codified at 40 C.F.R. ch. 1).

73. Id. at 66,515; see also 42 U.S.C. § 7521(a)(1) (2012).

74. 684 F.3d 102 (D.C. Cir. 2012). A portion of the series of rules was appealed to the Supreme Court and struck down, but the Supreme Court did not grant cert on the arbitrary and capricious or core statutory interpretation questions relevant to the Endangerment Finding. See Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2438 (2014).

75. At least for now the Trump Administration seems to agree, but clamoring among the Republican base could shift the winds on this issue. See Restuccia & Guillén, supra note 68.

76. *Coal. for Responsible Regulation*, 684 F.3d at 117.

77. 42 U.S.C. § 7521(a)(1).

78. See *Coal. for Responsible Regulation*, 684 F.3d at 117 (describing various industry arguments).

79. Id.

80. Id. at 119.

81. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction

On the arbitrary and capricious challenge, the D.C. Circuit fully upheld EPA's scientific judgment against all industry challenges.[82] Although *FCC v. Fox Television* opens some door for reconsideration, the incredible amount of scientific evidence marshalled in the Endangerment Finding makes this unlikely. Even under Justice Scalia's relaxed requirement that an agency display awareness of its regulatory change, it is hard to imagine how Administrator Pruitt's EPA could justify departing from the vast weight of scientific evidence. This is only bolstered by the D.C. Circuit's finding that such evidence was credible, especially given that EPA cannot consider policy or regulatory issues in reconsidering the Endangerment Finding.[83]

B. *Clean Power Plan*

Following the Endangerment Finding, EPA began rulemaking to regulate greenhouse gas emissions.[84] This culminated in the Clean Power Plan (CPP).[85] Pursuant to Executive Order 13,783, EPA is reconsidering the CPP,[86] and the D.C. Circuit recently granted the government's motion to reconsider the rule and halt the litigation.[87] On October 16,

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otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

82. *Coal. for Responsible Regulation*, 684 F.3d at 119–26 (rejecting, among other things, a challenge "to both the type of evidence upon which EPA relied and EPA's decision to make an Endangerment Finding in light of what Industry Petitioners view as significant scientific uncertainty").

83. Id. at 119.

84. The D.C. Circuit has explained that the Endangerment Finding "triggered an affirmative statutory obligation to regulate greenhouse gases." See Per Curiam Order at 2, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Aug. 8, 2017).

85. The CPP, promulgated as Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60), regulates greenhouse gas emissions at existing power plants under section 111(d) of the Clean Air Act. See 42 U.S.C. § 7411(d) (2012). EPA also promulgated New Source Performance Standards and New Source Methane Standards, but this Comment does not focus on these rules in detail. See Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (June 3, 2016) (to be codified at 40 C.F.R. pt. 60); Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98).

86. See Review of the Clean Power Plan, 82 Fed. Reg. 16,329 (proposed Apr. 4, 2017) (to be codified at 40 C.F.R. pt. 60); see also Review of the 2016 Oil and Gas New Source Performance Standards for New, Reconstructed, and Modified Sources, 82 Fed. Reg. 16,331 (proposed Apr. 4, 2017) (to be codified at 40 C.F.R. pt. 60); Review of the Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units, 82 Fed. Reg. 16,330 (proposed Apr. 4, 2017) (to be codified at 40 C.F.R. pt. 60). The wording of the three notices, apart from the procedural history, is essentially identical.

87. The per curiam order issued on April 28, 2017 holds the consolidated cases in abeyance, requires EPA to file status reports every thirty days, and orders briefing on

2017, EPA unsurprisingly announced its intention to repeal the CPP outright.[88] This section considers the new Administration's ability to reconsider, and ultimately repeal, the CPP.[89]

Administrator Pruitt's EPA has already previewed its legal argument supporting its authority to revoke the regulations. In its Federal Register notice stating its intention to reconsider the CPP, EPA cited *FCC v. Fox Television* and *Chevron* for the proposition that agencies have a free hand in updating regulations so long as they provide a reasoned explanation for doing so.[90] EPA correctly noted that courts allow agencies to change their interpretations "in response to . . . a change in administrations."[91] This combination of arguments from the Court's *Chevron* and arbitrary and capricious cases was expected, but it highlights the difficulty in untangling the two analyses.[92]

The first relevant question for present purposes is whether the litigation surrounding these rules focused on statutory interpretation or arbitrary and capricious issues. Challenges to the CPP were already well underway prior to EPA's reconsideration,[93] and the briefs from the litigation provide insight into the focus of the litigation and how supporters of these rules would counter reconsideration. The original challenge filed by opponents of the CPP, not surprisingly, raised both challenges, claiming that the CPP is "in excess of the agency's statutory authority . . . and otherwise is arbitrary, capricious, an abuse of discretion and not in accordance with law."[94] But the petitioner's brief in the D.C. Circuit focuses primarily on EPA's interpretation of sections 111(d) and

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whether to remand to EPA for reconsideration. See Per Curiam Order at 2, West Virginia v. EPA, No. 15-1363 (Apr. 28, 2017).

88. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035 (proposed Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 60).

89. It appears that Democratic-leaning states will defend the CPP. See Press Release, State of Cal. Dep't of Justice, Attorney General Becerra, Along with Broad Coalition, Prepared to Defend America's Clean Power Plan, State of Cal. Dep't of Justice (Mar. 28, 2017), http://oag.ca.gov/news/press-releases/attorney-general-becerra-along-broad-coalition-prepared-defend-america%E2%80%99s-clean [http://perma.cc/ML6J-L48K].

90. Review of the Clean Power Plan, 82 Fed. Reg. at 16,330. EPA made a similar argument in its proposal to repeal the CPP entirely. See Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. at 48,039.

91. Review of the Clean Power Plan, 82 Fed. Reg. at 16,330 (internal quotation marks omitted) (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)). *Chevron* deference clearly applies to changes in administrative interpretation—*Chevron* itself involved just that. See *Brand X*, 545 U.S. at 981.

92. See supra section I.C (describing the conflation of the two doctrines).

93. The Supreme Court stayed the CPP pending the outcome of litigation, West Virginia v. EPA, 136 S. Ct. 1000, 1000 (2016) (mem.), and the D.C. Circuit held oral arguments on September 27, 2016.

94. Petition for Review at 2, West Virginia v. EPA, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015).

112, which gives EPA authority to regulate existing stationary sources.[95] This suggests that EPA's attempt to revoke the CPP, would be grounded in reinterpreting § 111(d) in light of new policy considerations. EPA all but confirmed its intention to do just that in its proposal to revoke the CPP.[96] Of course, any deregulatory action by the Trump Administration's EPA would also be challenged as arbitrary and capricious.[97] But the original litigation briefs and EPA's Federal Register notices suggest that changing the CPP would involve a drastic shift in statutory interpretation.

The CPP litigation—which is primed to involve a vulnerable *Chevron* step-two question—makes it important to imagine the consequences of a relaxed *Chevron*. If *Chevron* is diminished (but Congress does not demand complete de novo review[98]), one could easily imagine a return to the Court's *Skidmore* approach. *Chevron*'s predecessor, the often-derided *Skidmore* doctrine, also considers the reasonableness of an agency's interpretation, but in a more searching fashion.[99] But *Skidmore*'s list of

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95. The challengers primarily argued that EPA's "generation shifting" approach violated the language of section 111(d) and that section 112's exclusion foreclosed EPA's interpretation. See Opening Brief of Petitioners on Core Legal Issues at 29–74, West Virginia v. EPA, No. 15-1363 (D.C. Cir. filed Feb. 19, 2016). The petitioners also made statutory federalism and constitutional commandeering claims. Id. at 74–86.

96. See Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,036 (proposed Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 60) (stating that after reviewing the CPP, "EPA proposes a change in the legal interpretation as applied to section 111(d) of the Clean Air Act" based on "the CAA's text, context, structure, purpose, and legislative history, as well as with the Agency's historical understanding and exercise of its statutory authority").

97. EPA attempted to cement its evidentiary position just before Obama left office, which could aid challengers to any deregulatory action in an arbitrary and capricious challenge. See Denial of Reconsideration and Administrative Stay of the Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units, 82 Fed. Reg. 4864, 4864 (Jan. 17, 2017); see also EPA, Basis for Denial of Petitions to Reconsider and Petitions to Stay the CAA Section 111(d) Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units 3 (2017), http://www.courthousenews.com/wp-content/uploads/2017/01/epa_ghg.pdf [http://perma.cc/NAH2-2WNN] (providing additional details on the denial of petitions for reconsideration).

98. A bill currently pending in the House Subcommittee on Regulatory Reform, Commercial and Antitrust Law, would require de novo review for "all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies." H.R. 76, 115th Cong. (2017).

99. Skidmore v. Swift & Co., 323 U.S. 134 (1944). Justice Jackson's *Skidmore* opinion provides that:

> 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.

factors plainly considers an agency interpretation's "consistency with earlier and later pronouncements."[100] Given that EPA would have to completely reverse course on its interpretation of the Clean Air Act, a return to *Skidmore* would likely doom a complete repeal of the CPP. Of course, *Skidmore* includes other factors, including "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, . . . and all those factors which give it power to persuade, if lacking power to control."[101] A very thorough EPA process could still revoke the CPP, but doing so would certainly be much more difficult without a robust version of *Chevron*.

C. *Midterm Evaluation of Light-Duty Vehicle Emissions Standards*

Corporate Average Fuel Economy (CAFE) standards remain the most significant U.S. policy combatting climate change, requiring fleets of new vehicles to increase fuel efficiency over time.[102] EPA and the NHTSA share authority to set the standards, the most recent of which were released through a negotiated process with the industry in 2012.[103] The most recent rule called for EPA to conduct a midterm review process by April 1, 2018 to determine whether the standards remained technically feasible and economically desirable.[104] Apparently in an effort to cement these rules from reconsideration, the Obama Administration

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Id. at 140.

Skidmore is often seen as a more searching form of judicial review, when compared to *Chevron*, by focusing on reasonableness. The shift away from *Skidmore* toward *Chevron* was later seen as a way of giving space to agencies to choose among reasonable interpretations of a statute. Justice Scalia made this point, and justified the shift away from *Skidmore*, in his concurrence in Barnhart v. Walton, 535 U.S. 212, 226–27 (2002) (Scalia, J., concurring in part and concurring in the judgment). There, he argued that any consideration of consistency with prior agency action in the majority opinion "is an anachronism—a relic of the pre-*Chevron* days, when there was thought to be only one 'correct' interpretation of a statutory text." Id. at 226. Instead, he argued that "once it is accepted, as it was in *Chevron*, that there is a range of permissible interpretations, and that the agency is free to move from one to another, so long as the most recent interpretation is reasonable its antiquity should make no difference." Id. This suggests that *Chevron* was designed as a more flexible form of judicial review intended to provide more leeway to agencies to shift among reasonable interpretations of a statute for policy reasons. Some have suggested that in reality, courts are "applying *Skidmore*, and if the government wins, then they cite *Chevron*." Oakes et al., supra note 2, at 10,190 (quoting Professor Richard Pierce).

100. *Skidmore*, 323 U.S. at 140. Indeed, one of now-Justice Gorsuch's chief complaints about *Chevron* is the ability of agencies to reverse course on statutory interpretation questions. See Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

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

102. See EPA, Final Determination on the Appropriateness of the Model Year 2022–2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards Under the Midterm Evaluation 5–6 (2017) [hereinafter Obama EPA Midterm Review] (on file with the *Columbia Law Review*).

103. 40 C.F.R. § 86.1818-12 (2016).

104. Id. § 86.1818-12(h).

conducted this midterm review over a year early, releasing it just days before Trump took office.[105] Despite this, Administrator Pruitt quickly notified the public that EPA planned to reconsider the midterm review, threatening one of the most important rules that reduces greenhouse gases.[106]

The core question, then, is whether undermining *Chevron* would have any impact on Administrator Pruitt's ability to reconsider the light-duty emissions standards. Ultimately, a less-robust *Chevron* would likely have little impact on the outcome of the litigation. The documents released by the Obama Administration's EPA as part of the midterm review reveal that, while EPA relies on section 202(a)(1) for the authority to set CAFE standards, this is fundamentally an evidentiary question most amenable to arbitrary and capricious review.[107] Although the most recent CAFE standards were not challenged in court, litigation from 2008 against the Bush Administration's EPA confirms that the core issue does not hinge on statutory interpretation.[108]

EPA's midterm review Final Determination lists a series of factors it must consider in making the determination,[109] but these factors come

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105. See Obama EPA Midterm Review, supra note 102, at 1 (explaining EPA's decision to release the midterm review early). There is a threshold question of whether the midterm review should receive *Chevron* deference at all under *Mead*essentially limits *Chevron* to "adjudication or notice-and-comment rulemaking," or those actions that are not "far removed . . . from notice-and-comment process." United States v. Mead Corp., 533 U.S. 218 (2001). Given the publication and public comment process, the midterm review almost certainly qualifies for *Chevron*.

106. Notice of Intention to Reconsider the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light Duty Vehicles, 82 Fed. Reg. 14,671 (Mar. 22, 2017). In July 2017, NHTSA announced its intent to prepare an Environmental Impact Statement (EIS) (in accordance with the National Environmental Policy Act) to analyze the environmental effects of changing the CAFE Standards. NHTSA invited comments to "determin[e] the scope of considerations to be addressed in the EIS and for identifying any significant environmental matters related to the proposed action." See Notice of Intent to Prepare an Environmental Impact Statement for Model Year 2022–2025 Corporate Average Fuel Economy Standards, 82 Fed. Reg. 34,740 (July 26, 2017). This past summer, EPA and the Department of Transportation recently announced the opening of the public comment period on this issue. See Request for Comment on Reconsideration of the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles; Request for Comment on Model Year 2021 Greenhouse Gas Emissions Standards, 82 Fed. Reg. 39,551 (Aug. 21, 2017). These are merely the first steps in what will likely be a protracted regulatory process.

107. Obama EPA Midterm Review, supra note 102, at 2 (explaining the statutory basis under section 202(a)(1) and detailing EPA's Midterm Review considerations).

108. See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1198–203 (9th Cir. 2008) (finding that NHTSA's decision not to monetize the climate change benefits of increasing CAFE standards was arbitrary and capricious).

109. Obama EPA Midterm Review, supra note 102, at 2 (including "availability and effectiveness of technology, . . . cost on the producers or purchasers of new motor vehicles[,] . . . [and] feasibility and practicability of the standards," among other considerations).

from the 2012 rule, not the statute itself.[110] With no challenge to the original rule on the horizon, the real question is whether EPA adequately applied the standards and can support its decision under arbitrary and capricious review. The Ninth Circuit decision from 2008 suggests that it would be arbitrary and capricious not to consider climate change benefit in its reasoning,[111] and EPA would certainly have to "display awareness" of the prior evidence supporting its decision.[112] But the midterm review is ultimately the kind of policy conclusion that cases like *FCC v. Fox Television* allow agencies to reconsider, even without *Chevron*'s deference to statutory interpretation changes. Although it is often difficult to tease out the statutory interpretation questions from the arbitrary and capricious issues,[113] *Chevron* would likely not play a substantial role in litigation from either side.

CONCLUSION

The Trump Administration's environmental policy is clear—it plans to swiftly reconsider nearly all of the Obama Administration's efforts to combat climate change. Reconsidering *Chevron*'s norm of deference to statutory interpretation questions would represent a sea change in administrative law, and it would undoubtedly undercut the Trump Administration's ability to change certain parts of the Obama Administration's climate policy. But this Comment shows that the conflation of *Chevron* and the Supreme Court's arbitrary and capricious doctrine would reorient many deregulatory challenges into arbitrary and capricious cases, unless the agency action rested purely on statutory interpretation. This suggests that, while important in some deregulatory actions, a change in *Chevron*'s deference model would have less impact on environmental deregulation than one might expect.

110. Id.; see also 40 C.F.R. § 86.1818-12(h)(1) (2016).

111. See *Ctr. for Biological Diversity*, 538 F.3d at 1198–203.

112. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514–15 (2009).

113. See supra section I.C (describing tension between the two doctrines).