A Biden Executive Branch and Its Supporters May Find the Federal Courts an Obstacle

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INTRODUCTION

Relaxing nutrition standards for school meals.1 Removing water-quality protection from a significant percentage of the nation’s waters.2 Allowing employers to pay the sub-minimum wage for tipped employees even when those employees are performing untipped work.3 Loosening restrictions on

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* Alumni, Class of ’36 Professor of Law, the University of Alabama School of Law. Portions of this essay draw on my previous work in Gorsuch v. the Administrative State, 70 Ala. L. Rev. 703 (2019), and Justice Gorsuch’s Would-Be War on Chevron, 21 Green Bag 2d 315 (2018).


toxic air pollutants.4 Weakening workers’ rights to unionize and bargain collectively.5 Abandoning efforts to ensure fair housing opportunities.6 These and dozens more actions were taken by the Trump administration to weaken the workplace, consumer, and environmental regulations through which the federal government, at the behest of Congress, protects the American people.

President Joe Biden issued nearly a score of memoranda in his first weeks in office announcing plans to restore the federal regulations that make America safer, cleaner, and more equitable.7 He ordered his administrative agencies to suspend Trump regulations where possible and to expedite the restoration of rules that protect consumers, workers, children, the environment, poor people, disabled people, and other vulnerable persons and entities.8 Some of those actions, like the Trump actions before them, have already been stymied in court.9

Indeed, the federal courts played a key role in preventing some of the worst of Trump’s abuses.10 Unfortunately, federal courts are likely also to

5. See, e.g., UPMC & Its Subsidiary, UPMC Presbyterian Shadyside, 368 N.L.R.B. No. 2 (2019); Bexar County Performing Arts Center Foundation, 368 N.L.R.B. No. 46 (2019); Kroger Limited Partnership, 368 N.L.R.B. No. 64 (2019).
hinder President Biden’s efforts to return the federal government to its proper role in implementing federal statutes. Some of that judicial interference arises from doctrines that make it difficult for regulatory beneficiaries to defend regulation or to attack deregulation; some of it may arise from a revolution in administrative law doctrine threatened by the current Supreme Court.

First, current Article III standing doctrine throttles lawsuits by those who are protected by regulations while throwing wide the courthouse door for those regulated. As the Court held in *Lujan v. Defenders of Wildlife*, industries and other entities *regulated* by administrative agencies are much more likely to meet standing requirements—and thus have access to the federal courts—than are human beings and other entities *protected* by those administrative agencies. The same asymmetry obstructs suits aimed at suspending deregulatory actions imposed in the last days of Trump’s administration—suits intended to protect regulatory beneficiaries while the Biden administration moves to re-regulate. As a result, citizen suits intended to reinforce the Biden agenda may thus fail at the threshold, while suits challenging Biden regulations will proceed. Even when plaintiffs survive standing hurdles, moreover, the doctrine limits the relief courts may grant, making it more difficult for courts to reinforce regulatory action even when that is what the law demands.

Second, as many commentators have noticed, the Supreme Court seems poised to upset decades of administrative law precedent. Conservative Supreme Court justices criticize *Chevron* and its progeny, cases that require courts to defer to expert agencies when those experts give reasonable interpretations of ambiguous statutes and regulations. If those cases are overturned, Biden-agency expertise will at best have persuasive authority as courts reach their own resolutions of statutory ambiguities—which, given the recent influx of conservative jurists to the federal bench, are likely to narrow the scope of regulatory action.

Finally, some Justices apparently wish to abolish the administrative state itself, despite the essential protections and benefits administrative agencies provide to the American people. Current doctrine requires deference to *Congress*, even when Congress delegates extremely broad policymaking discretion to agencies; several Justices have suggested that such delegation is unconstitutional. Justices Thomas and Gorsuch have even gestured toward a belief that the structure of the administrative state itself unconstitutional.
and the Court has taken small steps in that direction.\textsuperscript{16} Moves to implement such beliefs jeopardize the progressive agenda the Biden administration was elected to pursue.

This Article examines the problems the Biden administration and its supporters face from these doctrines. Part I discusses the obstacles presented by current standing doctrine. Part II discusses threatened abandonment of \textit{Chevron} and other deference doctrines. Part III discusses the broader threat to the administrative state posed by the views of at least four members of the Supreme Court. Finally, Part IV discusses some tools available to would-be litigants and to the Executive Branch itself to succeed in spite of these doctrines: writing statutes and regulations that bolster the standing of regulatory beneficiaries; improving statutes and regulations to survive judicial review, should the Court abolish some or all of the deference doctrines; and expanding the federal judiciary—and potentially the Supreme Court itself—to reduce the politicized nature of the courts. The use of those tools will help the Biden administration restore the federal regulatory safety net.

I. STANDING DOCTRINE WILL INHIBIT PUBLIC INTEREST LITIGATION IN SUPPORT OF THE BIDEN AGENDA

The basics of Article III standing doctrine are “numbingly familiar.”\textsuperscript{17} For a plaintiff to bring suit an Article III court, she must satisfy a three-part test: she must show that (1) that she has suffered (or is threatened with) an injury in fact that is “concrete and particularized” and is “actual or imminent,” not “conjectural or hypothetical”; (2) that at least a portion of her

\textsuperscript{16} The Court recently held that administrative law judges (ALJs) are not “employees” of the Executive Branch but are instead “Officers of the United States” requiring nomination by the President under the Constitution’s Appointments Clause. \textit{Lucia v. SEC}, 138 S. Ct. 2044, 2053 (2018); see also \textit{Carr v. Saul}, 141 S. Ct. 1352, 1359 (2021) (holding that administrative exhaustion was not required in cases challenging status of Social Security disability ALJs under \textit{Lucia}). As Professor Beermann has argued, political appointment poses a threat to the perceived impartiality of ALJs. Jack Beermann, \textit{The Future of Administrative Law Judge Selection}, \textit{Regul. Rev.} (Oct. 29, 2019), https://www.theregreview.org/2019/10/29/beermann-administrative-law-judge-selection/ [https://perma.cc/6KCS-XKR5].

injury is fairly traceable to the actions of the defendant; and (3) that the relief requested in her suit redresses at least some of her claimed injury.18

As the Court held in *Lujan v. Defenders of Wildlife*, industries and other entities regulated by administrative agencies are much more likely to meet these requirements—and thus have access to the federal courts—than are human beings and other entities protected by those administrative agencies.19

As a result, citizen suits intended to reinforce the Biden agenda—whether by suing those who violate Biden rules or by suing to suspend Trump-era deregulations—may fail at the threshold, while suits challenging Biden regulations will almost certainly proceed; even in suits where citizens are able to proceed, standing doctrine limits the relief courts may grant.

### A. The Asymmetry in Court Access Authorized by Standing Doctrine Harms Public-Interest Litigants

In *Lujan v. Defenders of Wildlife*, the Supreme Court emphasized that its Article III standing doctrine gives certain plaintiffs easier access to the federal courts than other plaintiffs. When "the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question that" he has standing.20 When, however, "the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish."21 The doctrine thus permits suits by regulated entities (companies or individuals whose activities will be limited by government regulation) much more readily than it does those by regulatory beneficiaries (those who will benefit from the restrictions imposed by government regulation).

Take, for example, the cases *Steel Co. v. Citizens for a Better Environment*22 and *Bennett v. Spear*.23 *Steel Company* involved an environmental group’s challenge to the Steel Company’s violations of the Emergency Protection and Community Right-to-Know Act (EPCRA), which Congress enacted to provide communities with knowledge about the toxic chemicals used in their midst.24 The environmental group represented precisely the individuals that Congress, in enacting EPCRA, had intended to benefit, and the Steel Company had concededly violated the strictures of the Act. The Court undertook an extraordinarily complicated analysis of the plaintiffs’ claimed injuries, the causal links between those injuries and the defendant Steel Company, and the likely redress provided by the remedies the plaintiffs

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19 Id. at 561–62.
20 Id.
21 Id. at 562.
sought, ultimately rejecting the plaintiffs’ standing and dismissing the case while giving “a narrow, grudging, indeed hostile, reading of Congress’s citizen suit provisions.”

By contrast, in *Bennett v. Spear*, the Court readily found that ranchers had standing to sue under the Endangered Species Act, because their ranching activities were constrained by the Act. This was so even though a victory for the ranchers would harm protected species, showing that the Court had “greater concern for business interests alleging economic harm from government” than for the entities—including endangered species—that Congress intended to protect.

Numerous other cases demonstrate the asymmetry in access created by Article III standing doctrine. To mention just a few: the Court has rejected standing for regulatory beneficiaries in *Sierra Club v. Morton*, where environmental groups sued to protect forest lands; *Allen v. Wright*, where Black parents challenged an IRS policy that allowed tax exemptions for whites-only private schools; *Lujan*, already mentioned, where biologists and others sued to protect endangered species; *City of Los Angeles v. Lyons*, where a Black man who had been subjected to violence at the hands of the Los Angeles Police Department sued to stop the LAPD’s use of chokeholds; and *Summers v. Earth Island Institute*, where an environmental group sued over federal forest policy. The lower courts, of course, follow suit. In recent cases, federal district judges found standing lacking for plaintiffs challenging the deregulation of for-profit tertiary schools and for plaintiffs opposing the lifting of fair housing protections.

This asymmetry in access has been the subject of numerous criticisms. For example, standing doctrine may reinforce the problem of agency “capture” (where an agency, which interacts regularly with those it regulates, comes to see the regulated, rather than those who benefit from regulation, as its constituency). Given standing’s asymmetry, lawsuits against agencies are

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25 Weinberg, supra note 23, at 45.
26 520 U.S. at 166.
28 405 U.S. 727, 735 (1972).
30 504 U.S. at 562.
more likely to proceed when they are filed by regulated industry. To stave off those lawsuits, an agency may craft its regulations in a way that favors the regulated industry. This, in turn, reinforces the capture of agencies by regulated industry; such “capture” is a version of the phenomenon the Framers called ‘factionalism.’ [Standing doctrine thus may] maximize the potential growth of the political pathology the Framers most feared and strived to minimize.

More broadly, standing’s asymmetry “systematically favors the powerful over the powerless.” This bias means that “the power to trigger judicial review is afforded most readily to those who have traditionally enjoyed the greatest access to the processes of democratic government.” Standing doctrine has thus been found more readily not only for regulated entities over regulatory beneficiaries, but also, it has been argued, for the privileged rather than the underprivileged.

Often, the Court has justified denying standing to regulatory beneficiaries on the grounds that large groups of people—such as those who benefit from pollution control laws or workplace regulation—can protect themselves through the political process, and that using the courts to redress widely shared injuries is improper. But, as students of democracy have long

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165 (1992); cf. Hessick, supra note 17, at 327 (noting value of lawsuits in deterring undesirable private conduct).

36 Pierce, supra note 35, at 1194–95.

37 Id. at 1195; see also Sierra Club v. Morton, 405 U.S. 727, 745–46 (1972) (Douglas, J., dissenting) (“The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.”).

38 Gene R. Nichol, Jr., Standing for Privilege: The Failure of Injury Analysis, 82 B.U. L. Rev. 301, 304 (2002); see also Gene R. Nichol, Jr., Justice Scalia, Standing, and Public Law Litigation, 42 Duke L.J. 1141, 1168 (1993) (“Justice Scalia’s view of separation of powers threatens to constitutionalize an unbalanced scheme of regulatory review. . . . The courts can protect the interests of regulated entities, but the interests of ‘regulatory beneficiaries’ are left to the political process.” (footnote omitted)).

39 Nichol, supra note 38, at 333.

40 See id. at 322–29; cf. Bayefsky, supra note 17, at 2292 (noting that courts tend to rely on quantifiable economic and property injuries in finding standing and tend to reject claims of injury that do not involve economic or property-based harms). Justice Douglas raised a similar concern when he dissented in Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 229 (1974) (Douglas, J., dissenting). In preventing citizens from challenging certain actions under the Incompatibility Clause, Justice Douglas argued that standing doctrine “protects the status quo by reducing the challenges that may be made to it and to its institutions. It greatly restricts the classes of persons who may challenge administrative action. Its application in this case serves to make the bureaucracy of the Pentagon more and more immune from the protests of citizens.” Id.

41 See, e.g., Warth v. Seldin, 422 U.S. 490, 500 (1975) (“Without [standing] limitations . . . the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.”); United States v. Richardson, 418 U.S. 166, 179 (1974) (noting that the plaintiff could seek redress through the “traditional electoral process”). Then-Judge Scalia emphasized that standing was necessary to keep the courts from invading the provinces of the other branches.
noted, the mere fact of widespread harm does not lead to political mobilization. Often, regulations protect large swaths of the population from harms that are relatively minor when considered person by person, but that are significant in the aggregate.

For example, EPA has imposed air quality regulations limiting the emissions of particulate matter because such particulates cause adverse health effects. Imagine that an anti-regulatory EPA lifts those restrictions or fails to enforce against those violating them. A political movement can coalesce around these anti-regulatory actions only with a great deal of time and expense, which is unlikely in a world where citizens worry about any number of issues. Yet the aggregate harm from EPA’s action is significant and, if unlawful, should be prevented.

Thus, dismissing a case because an injury is widely shared, on the assumption that the populace will mobilize to obtain redress through the political branches, does not take into account political reality. And the EPA example focuses primarily on transaction costs and other microeconomic aspects of political mobilization; even more problems arise when one takes into account America’s history of excluding certain groups from the political process altogether and of providing disproportionate access to and control over the political process and regulatory agencies to well-organized lobbies who represent the interests of the powerful.

Some have even contended that standing doctrine—and its preference for challenges to regulation over suits to enforce regulation—is a modern version of economic substantive due process. After all, a strict view of standing produces results akin to those of the Lochner era, “when constitutional provisions were similarly interpreted so as to frustrate regulatory initiatives in


As scholars of market failures have shown, certain kinds of injuries shared by large numbers of people are unlikely to give rise to political solutions because of collective action problems such as free riding or the tragedy of the commons. See generally Mancur Olson, *The Logic of Collective Action* (1965).


deference to private-law understandings of the legal system." For this reason, many have criticized standing doctrine as a vehicle for judges to implement hidden assumptions about people and politics—for example, assumptions that economic harm is more important than stigmatic harm—that would be controversial if made plain.

Standing doctrine, then, creates an asymmetry of access: it is easier for those who oppose regulation to challenge regulations than it is for those who support regulation to reinforce it. Of course, that regulated entities have easier access to the courts because of standing doctrine does not mean they will win on the merits. But they will win some or even many of them, especially in the more conservative Article III courts created by President Trump and the Republican-majority Senate since 2016.

B. Standing's Asymmetry Makes Challenging Deregulatory Actions Even More Difficult

Standing's asymmetry not only prevents certain kinds of plaintiffs from suing; it also means that certain types of lawsuits are more likely to fail at the standing threshold. Deregulatory actions, for example, are usually pleasing to regulated entities, who therefore have no reason to sue over such actions. Regulatory beneficiaries harmed by deregulation must thus bring their own lawsuits and, to do so, must satisfy the standing test, even though, for regulatory beneficiaries, standing is "ordinarily substantially more difficult to establish." Some portion of those would-be plaintiffs fail the standing test, meaning that deregulation winds up subject to less judicial scrutiny than regulatory actions; judicial oversight of executive action is asymmetrical. When combined with other obstacles to suits challenging regulatory inaction, deregulation is more likely to continue unchecked.

The Trump administration engaged in deregulatory efforts starting in 2017 (in the form of both deregulatory rules and lack of enforcement) and

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48 Cass R. Sunstein, Standing and the Privatization of Public Law, 88 COLUM. L. REV. 1432, 1458 (1988); see also Fletcher, supra note 18, at 233.
49 E.g., Bayefsky, supra note 17, at 2323–422; Daniel A. Farber, Standing on Hot Air: American Electric Power and the Bankruptcy of Standing Doctrine, 121 YALE L.J. ONLINE 121 (2011).
50 This, of course, is not always true. See Am. Chemistry Council v. Dep't of Transp., 468 F.3d 810, 811 (D.C. Cir. 2006) (a regulated entity sought further regulation from the Department of Transportation because of a troublesome lacuna in the existing regulations; the court inexplicably found that they lacked standing).
52 See Sunstein, supra note 27, at 666.
53 See generally Regulatory Rollback Tracker, supra note 7.
continued to issue deregulating rules up to the days before President Biden was inaugurated.56 Lame duck rules, issued after a president has lost an election for a second term, have been called “midnight regulation” — or, in the context of deregulatory actions, midnight deregulation.57 As Professor Beer- mann has argued, midnight deregulation “is more likely to be contrary to the public interest” than midnight regulation, “benefiting narrow interests at the expense of the health and welfare of the general public” and “reflect[ing] favors to special interests that would not be palatable absent timing that reduce[s] the political consequences.”58

But, despite the harm midnight deregulation causes, such deregulation is harder to challenge in the federal courts because of the Supreme Court’s constitutional standing doctrine. Regulated entities are likely to be quite happy with midnight actions that lessen regulatory burdens; they will not bring suit. Those harmed by the deregulatory action—those who would have benefited from the higher regulatory burdens—must pass a tougher test to gain access to the federal courts. As I discussed above,59 the Supreme Court has made clear that standing doctrine requires much more of regulatory beneficiaries. This is not to say that judicial review is unavailable; there may be plaintiffs with standing. The issue is one of likelihood: a midnight deregulation is more likely to avoid court oversight than a midnight regulation. Thus, Trump-era deregulatory rules will be less likely to be overturned in court, allowing such rules—antithetical to the Biden administration’s agenda—to persist into the Biden-Harris years.

And it is likely not possible for the Biden administration to swiftly replace Trump administration deregulatory rules with new, re-regulatory rules. Since the Seatbelts case, the Supreme Court has essentially required a complete new rulemaking if an agency seeks to revise or rescind an existing rule.60 Thus Biden’s agencies will be required to go through the full Administrative Procedure Act process to replace Trump’s deregulatory actions (though the agencies may in some cases be able to springboard off Obama-era rulemak-

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58 Id.

59 See supra Section I.A.

60 Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 45 (1983). In this case, the Reagan administration attempted to relax a rule promulgated under President Carter that imposed stringent requirements on automakers to provide seatbelts and air bags. The Supreme Court held that the new rule could survive only if supported by evidence of changed circumstances; it was not enough that the Reagan administration would have decided the matter differently, had it conducted the original rulemaking.
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Moreover, the Biden rules—because they will presumably impose more burdens on regulated entities—will be challenged in court by plaintiffs that have almost unquestioned standing to sue.62

C. Standing Doctrine Also Constrains the Relief Courts Can Award

Standing doctrine does not only constrain would-be plaintiffs; it also constrains the courts themselves. The Court has held since the early 1980s that a party must show standing for every form of relief sought.63 And, in 2017, the Court held that intervenors, if they seek relief different at all from that sought by the original plaintiff, must independently satisfy Article III standing requirements.64 This prevents a regulatory beneficiary from intervening as a party in a suit brought by a regulated entity if, as would usually be the case, the would-be intervenor seeks relief different from that requested by the regulated entity, and the court concludes that the regulatory beneficiary lacks standing. Standing doctrine thus prevents a federal court exercising its discretion as to what relief best resolves the case before it.

Why does this matter? Imagine a case in which a chemical manufacturer is challenging a Biden administration regulation that limits the use of certain toxic substances. The manufacturer will have almost unquestioned standing, because its freedom of action is constrained by the regulation, and it will seek to have the regulation reversed. An environmental group seeks to intervene to defend the regulation and to seek penalties against the manufacturer for violating the regulation. If the environmental group cannot show independent standing, the court cannot impose penalties on the manufacturer; at best it can uphold the regulation.

II. Possible Abandonment of Judicial Deference Would Imperil Biden Agenda

As the previous Part demonstrates, federal courts are more hospitable to suits by regulated entities than to those brought by regulatory beneficiaries.

61 The Administrative Procedure Act requires an agency seeking to promulgate a regulation to publish a notice of proposed rulemaking, to receive public comment on the proposed rule, and to publish a final rule with a justification that includes the expert basis for the rule and explanations of how the agency considered and responded reasonably to public comment. See generally TORD GAREY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW (2017). Because many of the rules overturned by the Trump administration had only recently been adopted by the Obama administration, the administrative records of at least some of the Obama rulemakings should require only minimal updating and could be reissued relatively swiftly. However, experts note that Trump’s gutting of agency staff will slow agencies down even in rulemakings where little updating is required. E.g., Coral Davenport, Restoring Environmental Rules Rolled Back by Trump Could Take Years, N.Y. TIMES (Jan. 22, 2021), https://www.nytimes.com/2021/01/22/climate/biden-environment.html [https://perma.cc/628P-CUE7].

62 See supra Section I.A.


64 Town of Chester, N.Y. v. LAROE ETS., INC., 137 S. Ct. 1645, 1651 (2017).
Since the early 1980s, however, a regulatory beneficiary seeking to defend a regulation could, if it survived the standing threshold, have some confidence that the court would uphold the regulation. For decades, federal doctrine has required federal courts to defer to many types of administrative action. That required deference has, at least to some extent, limited court authority to stymie executive policy.

But a revolution in administrative law doctrine may be imminent. At least four members of the current Court have expressed a desire to overturn cases such as Chevron, City of Arlington, Brand X, and Auer, all of which require deference to agency interpretation of ambiguous statutes and regulations. If deference is abandoned, a court, rather than accepting the expert agency’s resolution of statutory ambiguity, establishes a single judicial interpretation—perhaps consistent with the agency view, perhaps not—that only Congress may alter.

While, in the absence of mandatory deference, an agency interpretation can persuade a court to view a statute a particular way, the judge is free not to be persuaded. Given the number of conservative judges installed on the bench during the Trump administration, an abandonment of Chevron deference means that, in many cases, conservative, anti-regulatory, anti-federal-government judges would provide authoritative interpretations of ambiguous statutes and would presumably choose the interpretations that narrow the scope of agency action and limit the regulatory protections provided to the American people. President Biden may therefore face significant challenges in implementing his agenda, if his agencies do not receive the deference courts have accorded for the last four decades.

A. Current Doctrine Requires Extensive Deference to Agency Decisionmaking

Chevron, U.S.A., Inc. v. Natural Resources Defense Council famously requires courts to defer to an agency’s reasonable interpretation of an ambiguous statute the agency is charged with implementing. The case involved the calculation of emissions from power plants. A Carter administration rule

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United States v. Mead Corp., 533 U.S. 218, 221 (2001) (holding that Chevron deference was not applicable to tariff classifications and that classifications deserved, at best, “respect according to [their] persuasiveness”); see also Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference.”); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (“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.”).

resulted in stricter emissions controls, while the newer Reagan rule permitted more pollution. Environmentalists sued, arguing that the Clean Air Act forbade increased pollution. The Court held that Clean Air Act did not, by its terms, preclude either interpretation. Under existing doctrine governing the standard of review, the Court could have interpreted the Act de novo; instead, the Court held that courts should defer to an agency's reasonable resolution of statutory ambiguity. Once ambiguity is found, the court must guard against unreasonable interpretations, but its role goes no further. That approach to review of agency statutory interpretation has been the law since 1984.

City of Arlington further broadened the scope of deference to agency interpretations of ambiguous statutes. There, the statutory provision at issue affected the scope of the agency's authority. If the statute was interpreted one way, then the agency had power to act; if it was interpreted another way, then the agency lacked power. The question was whether the jurisdictional nature of the question counseled against deference (after all, one might expect the agency to self-deal in making a decision about the boundaries of its own power). The Court found that \textit{Chevron} deference applied even to questions about the boundaries of the agency's jurisdiction. Chief Justice Roberts (joined by Justices Kennedy and Alito) dissented: courts must "ensur[e] that the Legislative Branch has in fact delegated lawmaking power to an agency within the Executive Branch, before the Judiciary defers to the Executive on what the law is." Another expansion of \textit{Chevron} deference emerged in Brand X. \textit{Chevron} Step Two requires a court to defer to an agency's reasonable resolution of statutory ambiguity. But some ambiguous statutes have not yet been inter-

\begin{itemize}
  \item Id. at 859–60 (interpreting 42 U.S.C. § 7411).
  \item Id. at 327 (Roberts, C.J., dissenting).
  \item Id. at 308, 327 (Scalia, J., writing for the court, held that courts must, when there is ambiguity, defer to an agency interpretation of its own authority).
\end{itemize}
preted by agencies, and a lawsuit involving that statute, then, requires the court to interpret the ambiguous provision. What is the status of that interpretation going forward? The Supreme Court in *Brand X* said that *Chevron* required the earlier judicial interpretation to give way to the later administrative interpretation. If the earlier court opinion made clear that the statute was ambiguous, Justice Thomas wrote for the Court, then the agency remains free to interpret the statute for itself. Otherwise, “allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court’s interpretation to override an agency’s.”

In 1997, in *Auer v. Robbins*, the Court established an even stronger category of deference when agencies are interpreting their own ambiguous regulations. Such interpretations are “controlling unless ‘plainly erroneous or inconsistent with the regulation.’” And agencies are “free to write the regulations as broadly as [they] wish[ ], subject only to the limits imposed by the statute.”

Taken together, *Chevron*, *City of Arlington*, *Brand X*, and *Auer* establish a regime of deference to expert regulatory agencies. Courts police the margins of agency statutory and regulatory interpretation, ensuring that those interpretations are reasonably supported by statutory and regulatory text, but courts do not “say what the law is.” Instead, according to *Chevron*, Congress has deemed that agencies have that duty.

*Chevron* and its follow-on cases are not inherently pro-regulation: as *Chevron* itself shows, an interpretation adopted by a conservative administration—one that interprets the statute narrowly and lessens regulatory protections—will receive deference. But the deference doctrines do create a pro-regulation bias when applied to progressive regulation. Under those cases, the Biden administration can expect that its expert actions, when based on reasonable statutory interpretation, will survive judicial scrutiny.

An abandonment of *Chevron* deference, however, threatens Biden regulatory actions. Take the facts of *Chevron* itself. The Reagan administration had narrowed a Carter administration rule. Had Carter been returned to office in 1985, his administration could have re-imposed the more protective regulation, and, under *Chevron*, that interpretation would have been upheld. Without *Chevron*, however, the federal court decides for itself the meaning of the Clean Air Act provision at issue, considering the agency position as only one factor in many in interpreting the law. If a federal court in 1985 were to adopt a conservative interpretation, the second Carter administration

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76 See id.
77 Id. at 982.
78 Id.
79 519 U.S. 452, 461 (1997)
80 Id. (internal quotation marks omitted) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).
81 Id. at 463.
82 See supra note 66 (describing *Mead-Skidmore* “deference,” under which the agency view is at best persuasive authority).
would have been required to regulate according to that conservative approach. Likewise, in a no-*Chevron* world, the Biden administration would be at the mercy of statutory interpretations adopted by federal judges—more than a quarter of whom have now been appointed by Donald Trump.83 What’s more, once the courts adopted a resolution of the statutory ambiguity, that resolution would bind the agency: it could not revisit the ambiguity. Only Congress could amend the statute to change its meaning.

**B. Current Threats to Abandon the Deference Doctrines are a Threat to the Biden Agenda**

The Court has already narrowed the application of *Chevron*. Courts are now required to ascertain whether Congress empowered the agency to take on the interpretive role before giving deference,4 and courts are to look skeptically on an agency’s interpretative role when a rule with major consequences is at issue.85 Several members of the Court have expressed desire to further narrow or even abandon *Chevron* and its children.

Most vehement is Justice Gorsuch. While on the Tenth Circuit, then-Judge Gorsuch wrote a lengthy concurrence in a case called *Gutierrez-Brizuela v. Lynch* that lays out his position: “[T]he fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”86 Indeed, he says, “*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty.”87 He describes *Chevron* ultimately as a threat to the constitutional structure:

> After all, *Chevron* invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law. Under its terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive). Add to this the fact that today many administrative agencies “wield[ ] vast power” and are overseen by political appointees (but often receive little effective oversight from the chief executive to whom they nominally report), and you have a pretty potent mix. Under any conception of our separation of powers, I would have thought powerful and centralized authorities like

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86 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

87 Id. at 1152.
today's administrative agencies would have warranted less deference from other branches, not more.\footnote{Id. at 1155 (citation and footnote omitted).}

Likewise, Justice Gorsuch would abandon City of Arlington: “[I]f an agency can interpret the scope of its statutory jurisdiction one way one day and reverse itself the next (and that is exactly what City of Arlington’s application of Chevron says it can), you might well wonder: where are the promised ‘clearly delineated boundaries’ of agency authority?\footnote{Id. at 1154–55 (citing Mistretta v. United States, 488 U.S. 361, 372–73 (1989)).} Justice Thomas is also on record as an opponent of Chevron deference. He wrote in Michigan v. EPA that “we seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency ‘interpretations’ of federal statutes.”\footnote{576 U.S. 743, 760–64 (2015) (Thomas, J., concurring); see also PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2057 (2019) (Thomas, J., concurring).}

One might think that Justice Thomas, as the author of Brand X, would not be a vote to overturn it. But, Justice Thomas wrote in 2020 with regard to Brand X, “it is never too late to surrender former views to a better considered position.”\footnote{See infra Section II.C.} Moreover, he wrote, “Chevron arguably sets out an interpretive tool and so may not be entitled to stare decisis treatment. . . . The same can be said of . . . Brand X . . . .”\footnote{Id. at 690 (internal quotation and citation omitted).}

Chief Justice Roberts may be a potential opponent of Chevron as well: he has certainly narrowed Chevron’s application, developing the “major questions” doctrine mentioned above.\footnote{Id. at 691 n.1 (2020) (Thomas, J., dissenting from denial of certiorari).} And he has joined in some of the dissents from denial of certiorari and statements upon denial of certiorari that criticize Chevron.\footnote{Id. at 690 (internal quotation and citation omitted).} But it is unclear whether he would take the step of overturning a forty-year-old precedent.\footnote{See supra note 85 and accompanying text.}

Indeed, in June Medical Services v. Russo, the Chief Justice voted to strike down a Louisiana abortion statute,\footnote{Cf June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, J., concurring in the judgment) (applying stare decisis to strike down a statute that he would have upheld if no precedent had existed).} even though he had dissented in a case that struck down a virtually indistinguishable Texas statute.\footnote{Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292, 2330 (2016) (Alito, J., dissenting, joined by Roberts, C.J., and Thomas, J.).} After a discussion of the importance of precedent and
stare decisis, the Chief Justice concluded that “[b]ecause Louisiana’s admitting privileges requirement would restrict women’s access to abortion to the same degree as Texas’s law, it also cannot stand under our precedent.”

Similarly, Justice Alito has joined in a few opinions at the margins—for example, rejecting the extension of *Chevron* to certain fact patterns—but does not appear to share the desire to overturn *Chevron* in full. Commentators have suggested that Justice Kavanaugh is likely to vote to change the deference doctrines. In particular, they note a book review then-Judge Kavanaugh wrote in 2016 that suggested the need to “rein in” *Chevron* and emphasized that the rule of law “depends on neutral, impartial judges who say what the law is, not what the law should be.” We do not yet know about Justice Barrett, who wrote only two opinions applying *Chevron* during her brief tenure on the Seventh Circuit, and who has participated in no Supreme Court case involving a debate over *Chevron* since she was confirmed.

In perhaps a hopeful outcome for the Biden administration, the Court squarely faced the opportunity to abandon Auer deference and decided not to. Instead, it complicated Auer deference in *Kisor v. Wilkie*, listing a variety of conditions for applying Auer deference: is the regulation “genuinely ambiguous”; even if so, is the agency’s interpretation reasonable; even if so, does the interpretation “reflect an agency’s authoritative, expertise-based, fair, or considered judgment?” Auer deference is thus presumably less deferential than before, but it is still good law.

Concurring in the judgment in *Kisor*, Justice Gorsuch argued that Auer should simply be overruled. He wrote an extensive opinion that criticizes Auer much as his concurrence in *Gutierrez-Brizuela* criticized *Chevron*.

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4. Id. (citing Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118 (2016)).

5. *See* Cook Cty., Ill. v. Wolf, 962 F.3d 208, 235 (7th Cir. 2020) (Barrett, J., dissenting) (stating her conclusion, contrary to the panel majority, that Department of Homeland Services interpretation would be upheld at Step Two of *Chevron*); Ruderman v. Whitaker, 914 F.3d 567, 573 (7th Cir. 2019) (Barrett, J.) (giving *Chevron* deference to a Board of Immigration Appeals decision regarding the meaning of a provision of the Immigration and Nationality Act). She also mentions *Chevron* in *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020), but only in the process of stating that Auer, not *Chevron*, deference was relevant to the interpretive question.


8. Id. (Gorsuch, J., concurring).
Justices Thomas, Alito, and Kavanaugh joined part or all of that concurrence. While the Chief Justice, concurring in part with the majority opinion, wrote that “the distance between the majority and Justice GORSUCH is not as great as it may initially appear,” Justice Gorsuch’s concurrence in the judgment made clear his desire that, in the future, “this Court will find the nerve it lacks today and inter Auer at last.”

Say a majority of the Court does emerge to abandon one or more of the deference doctrines. What are the consequences for the Biden administration? As already noted, a return to de novo review of statutes altogether—thus completely abandoning Chevron deference—is likely harmful to the Biden regulatory agenda, especially given the increasing conservatism of the federal bench: federal judges, sans Chevron, would be the sole interpreters of federal statutes, finding Biden regulatory interpretations at best persuasive. Conservative judges would presumably interpret ambiguous statutes in a way hostile to federal regulatory power.

Even without changes in the deference doctrines, some lower courts have already blocked Biden actions. A Trump-appointed judge enjoined the Biden administration’s pause on immigration deportations, for example, applying an interpretation of the Immigration and Naturalization Act that seems inconsistent with the text of the statute itself, with prior precedent, and with the longstanding policy of leaving immigration decisions almost entirely to the President. Similarly, a Trump-appointed judge vacated the CDC’s moratorium on evictions during the Covid-19 pandemic (albeit staying his ruling pending appeal), despite broad statutory language

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109 Id. at 2424 (Roberts, C.J., concurring in part).
110 Id. at 2426 (Gorsuch, J., concurring). Then-Judge Barrett wrote only one opinion that even mentioned Auer, and that opinion was decided after Kisor; the opinion contains little to no hint at now-Justice Barrett’s views on Auer deference. See Meza Morales v. Barr, 973 F.3d 656, 664 (7th Cir. 2020) (noting that Kisor “recently warned us not to leap too quickly to the conclusion that a rule is ambiguous”).
111 See supra note 66 (describing Mead-Skidmore “deference,” under which the agency view is at best persuasive authority).
113 See 8 U.S.C. § 1231 (while stating in paragraph (a)(1)(A) that aliens “shall” be removed within 90 days of being ordered removed, the provision in paragraph (a)(3) also authorizes extensions of that 90 days and anticipates that they will be common enough to require a regulatory structure: “If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General.”).
114 E.g., Zadvydas v. Davis, 533 U.S. 678, 682 (2001) (noting that the Immigration & Naturalization Act contemplates deportable aliens remaining in the United States after the 90 day period); see also Shalini Bhargava Ray, Immigration Law’s Arbitrariness Problem, 121 COLUM. L. REV. (forthcoming 2021) (discussing the myriad ways the immigration bureaucracy has long exercised discretion in deciding whether and when to deport those who have violated immigration laws, including in deferring deportation past the 90-day deadline).
115 E.g., Trump v. Hawaii, 138 S. Ct. 2392, 2409 (2018) (noting “the deference traditionally accorded the President in this sphere”).
empowering the CDC to prevent the transmission of disease. In June 2021, a Trump-appointed judge enjoined President Biden’s suspension of the sale of new oil and gas leases, applying a dubious interpretation of the Outer Continental Shelf Lands Act. If conservative judges are willing to make such strained interpretations of statutory text in a world where deference to administrative action is required, it is easy to imagine how badly the Biden administration would fare in a world without deference.

III. SOME JUSTICES WANT TO ABOLISH THE ADMINISTRATIVE STATE ALTOGETHER

More concerning than potential revamping of the deference doctrines is the possibility that the Court would take more drastic measures against the administrative state itself. Recent opinions by several Justices echo early New Deal cases that severely limited the powers of the federal government. While a return to pre-1937 understandings of the constitutional structure seems unlikely, that the possibility even exists is frightening.

One merely need think of the state of the nation in the early 20th century to understand the devastating consequences of such a move. In the years
preceding the Great Depression, the *Lochner* Court struck down law after law meant to protect workers, consumers, women, and children. To note just a few: *Lochner* itself struck down limits on weekly working hours for laborers;¹²¹ *United States v. E. C. Knight Co.* (the Sugar Trust Case) limited Congress’s power to regulate monopolistic practices in manufacturing;¹²² *Adair v. United States* and *Coppage v. Kansas* allowed railroad companies to prohibit union membership among their employees;¹²³ *Hammer v. Dagenhart* and *Bailey v. Drexel Furniture Co.* struck down federal legislation prohibiting child labor;¹²⁴ and *Adkins v. Children’s Hospital* struck down a federal minimum-wage law.¹²⁵

China also provides a cautionary and contemporary comparative. Chinese workers famously enjoy few to no protections from exploitation by employers;¹²⁶ a recent exposé of working conditions in China describes the use of forced labor and even torture in the manufacture of many goods we purchase here in the United States.¹²⁷ China’s environment is famously poisoned, with poor air quality, contaminated soil, and nonpotable water.¹²⁸ Critics describe China’s current regulatory structure as similar to that in the United States before the explosion of consumer and environmental regulations in the late 1960s: laws exist, but enforcement is left to localities, which do little to enforce.¹²⁹ In the United States, this approach led famously to

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¹²¹ 198 U.S. 45 (1905).
¹²² 156 U.S. 1 (1895).
¹²³ 208 U.S. 161 (1908); 236 U.S. 1 (1915).
¹²⁴ 247 U.S. 251 (1918); 259 U.S. 20 (1922).
¹²⁵ 261 U.S. 525 (1923).
¹²⁸ E.g. Mervyn Piesse, *China Continues to Confront Steep Environmental Challenges*, Future Directions Int’l. (Nov. 5, 2020), https://www.futuredirections.org.au/publication/china-continues-to-confront-steep-environmental-challenges/ [https://perma.cc/XAD8-R7QC] (noting for example that, in 2013, particulate-matter air pollution in Beijing “had surpassed 800, far exceeding the 500-point scale used to measure air pollution internationally” and that 20 percent of China’s rivers “are so severely polluted that they are too toxic for physical contact”).
rivers that were so polluted they could catch on fire, it killed people, and levels of lead so high they caused increased criminality in generations of Americans.

A decision finding unconstitutional the current delegation of power to federal agencies would thus undo decades of progress in consumer, environmental, and workplace protection: our currently broken Congress can’t even pass a budget, much less adopt complicated regulatory provisions. Of course, states should be free to step in (although the Lochner Court struck down state regulations as well). But not all states will act to protect the vulnerable. Remember, for example, that more than half of the states seized the opportunity to be “right to work” — i.e., anti-labor-union — states, once the law permitted such a move.

What is the argument against the federal administrative state? To be sure, it has long been clear that administrative agencies are constitutionally fraught. Administrative agencies appear to make law (exercising legislative power), enforce that law (executive power), and adjudicate disputes under that law (judicial power). This combination of powers raises structural constitutional concerns, concerns that peaked in the mid-1930s as a result of

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130 Id. (describing the Cuyahoga River in 1969 as “carr[y]ing so much oil and debris that . . . it erupted into flames”).

131 Jim Dwyer, Remembering a City Where the Smog Could Kill, N.Y. TIMES (Feb. 28, 2017), https://www.nytimes.com/2017/02/28/nyregion/new-york-city-smog.html (citing Thanksgiving weekend in 1966 was warm, and a haze of smog — sulfur dioxide and carbon monoxide — wrapped around the city. About 200 people died, a toll similar to a smog crisis in 1953.).

132 Alex Knapp, How Lead Caused America’s Violent Crime Epidemic, FORBES (Jan. 3, 2013), https://www.forbes.com/sites/alexknapp/2013/01/03/how-lead-caused-americas-violent-crime-epidemic/?sh=E946cb412c48 (citing violent crime rose as a result of lead poisoning because of leaded gasoline. It declined because of lead abatement policies.).

133 Jennifer Scholtes & Caitlin Emma, ‘Going to Be a Long Winter’: Congress Hits Snooze on Funding the Government, POLITICO (June 15, 2021), https://www.politico.com/news/2021/06/15/going-to-be-a-long-winter-congress-hits-snooze-on-funding-the-government-494410 (noting that Congress has not passed a regular appropriations bill on time in over a decade and uses continuing resolutions as stop-gaps “that spell budgetary turmoil for the Pentagon, not to mention every non-defense agency at the whim of the fickle spending process”).


135 In 1947, the Taft-Hartley Act outlawed closed union shops (in which the union’s collective bargaining contract with the employer authorized hiring only of union members), 29 U.S.C. §§ 158(a)(3), 158(b)(2), and also authorized individual states to prohibit union security clauses (in which employees could refuse to join the union but were required to contribute financially to the work of the union), 29 U.S.C. § 164(b). Twenty-seven states have exercised their authority to prohibit union security clauses. See Right to Work States Timeline, NAT’L RIGHT TO WORK COMM. (2018), https://nrtwc.org/facts/state-right-to-work-timeline-2016/ (noting that Congress has not passed a regular appropriations bill on time in over a decade and uses continuing resolutions as stop-gaps “that spell budgetary turmoil for the Pentagon, not to mention every non-defense agency at the whim of the fickle spending process”).

New Deal economic regulation adopted to address the unprecedented challenges of the Great Depression.\textsuperscript{137}

The Supreme Court initially rejected key New Deal legislation, some on the ground that it exceeded Congress's authority to permit administrative agencies to take action that looked like legislation. In \textit{Panama Refining Co. v. Ryan}, the Court struck down a provision of the National Industrial Recovery Act (NIRA) as an impermissible delegation of legislative authority.\textsuperscript{138} And in \textit{A.L.A. Schechter Poultry Corp. v. United States}, the Court struck down the heart of the NIRA, finding that it gave essentially standardless authority to the Executive Branch to regulate the economy.\textsuperscript{139} As Justice Cardozo wrote in his concurrence, "[t]his is delegation running riot. No such plenitude of power is susceptible of transfer."\textsuperscript{140} And, indeed, NIRA not only delegated essentially unconstrained powers to the Executive Branch, but also delegated authority to private industry trade groups to develop codes of fair competition for the President to approve.\textsuperscript{141}

\textit{Schechter}'s nondelegation doctrine was essentially moribund within a couple of years,\textsuperscript{142} however, as the Court issued the opinions that would establish the broad Commerce Clause power that characterizes modern federal legislation.\textsuperscript{143} In the succeeding decades, the Court upheld statute after statute that gave agencies broad authority to regulate, so long as it could discern

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\begin{itemize}
  \item \textsuperscript{137} See, e.g., Robert L. Rabin, \textit{Federal Regulation in Historical Perspective}, 38 \textit{Stan. L. Rev.} 1189, 1248 (1986) (claiming that New Deal programs reveal "a belief that comprehensive government intervention was not only a useful corrective but an essential ingredient for maintaining a general state of equilibrium in the economy").
  \item \textsuperscript{138} 293 U.S. 388, 432–33 (1935).
  \item \textsuperscript{139} 295 U.S. 495, 541–42 (1935).
  \item \textsuperscript{140} Id. at 553.
  \item \textsuperscript{141} See Rabin, \textit{supra} note 137, at 1243–44 ("Section 3 of the NIRA granted authority to the President to approve 'codes of fair competition' submitted by industry trade groups. The codes were to be promulgated by industry groups that were 'truly representative' and were not to 'promote monopolies.' But beyond these cautionary terms, the statute contained virtually no limiting language. . . . [T]he Act left the content of the codes purposely vague. . . . With so little substantive constraint, the codes could address a vast range of business practices, including price levels, wage and hour provisions, price discrimination, advertising practices, and output restrictions." (footnote omitted)).
  \item \textsuperscript{142} Lisa Schultz Bressman, \textit{Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State}, 109 \textit{Yale L.J.} 1399, 1401 (2000) (pointing out that, after Schechter, "[t]he Court never again expressly applied the nondelegation doctrine to invalidate a statute"). Of course, Congress has never again tried to delegate the authority to regulate the economy to private industry trade groups; presumably that would not fly even in the modern administrative state. \textit{See Rabin, supra} note 137, at 1257 ("Schechter arguably retains its authority as a statement of the outer limits of federal regulatory power. Even today, a congressional act which set up a business regulatory commission with plenary power to establish 'fair competitive practices' enumerated by industry trade groups would be of doubtful validity. In \textit{Schechter}, the nondelegation doctrine found its home as a residual check on wholesale amalgamation of public and private spheres of activity").
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an “intelligible principle” laid down by Congress to constrain agency discretion. 144

An effort to revive the nondelegation doctrine in the late twentieth century was rejected by a unanimous Court in Whitman v. American Trucking Associations, Inc. 145 Justice Scalia wrote for the Court:

In the history of the Court we have found the requisite “intelligible principle” lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring “fair competition.” We have, on the other hand, . . . found an “intelligible principle” in various statutes authorizing regulation in the “public interest.” In short, we have “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” 146

Justice Scalia wrote for a unanimous Court in rejecting the D.C. Circuit’s effort to revive Shechter and Panama Refining. And his opinion on the matter had been clear from his confirmation hearing for the Supreme Court: “[I]t is very difficult for the courts to say how much delegation is too much. It is a very, very difficult question, and I think it expressed the view that, in most cases, the courts are just going to have to leave that constitutional issue to be resolved by Congress.” 147

Justice Gorsuch would apparently take a different approach. In his Tenth Circuit Gutierrez-Brizuela concurrence, he revealed a largely nineteenth century perspective on the administrative state. 148 Indeed, Judge Gorsuch seems to be staking out a pre-New Deal view of the delegation of

144 Bressman, supra note 142, at 1404–05.
146 Id. at 474–75 (citations omitted).
148 For example, in his view, the kinds of things Congress can delegate to agencies are quite limited: “Congress may condition the application of a new rule of general applicability on factual findings to be made by the executive (so, for example, forfeiture of assets might be required if the executive finds a foreign country behaved in a specified manner),” Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring) (citing Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 388 (1813)), and “Congress may allow the executive to resolve ‘details’ (like, say, the design of an appropriate tax stamp),” id. (citing In re Kollock, 165 U.S. 526, 533 (1897)). This view, based on cases from 1813 and 1897, would rule out the work of almost all regulatory agencies and their organic acts. Making factual findings regarding asset forfeiture and designing tax stamps are a far cry from regulating “in the public interest,” as many twentieth century statutes authorize. See, e.g., Nat’l Broad. Co. v. United States, 319 U.S. 190, 224–25 (1943) (upholding Federal Communications Commission’s power to regulate airwaves to serve the “public interest, convenience or necessity”); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932) (upholding Interstate Commerce Commission’s power to approve railroad consolidations if in the “public interest”), or setting national ambient air quality standards at a level “requisite to protect the
legislative power. Elsewhere he refers to “so-called ‘delegated’ legislative authority.” He has written that “[s]ome thoughtful judges and scholars have questioned whether standards like [the intelligible principle doctrine] serve as a ... license for [the improper delegation of legislative authority], undermining the separation between the legislative and executive powers that the founders thought essential.” Here is how he put it while on the Tenth Circuit:

[C]an Congress really delegate its legislative authority — its power to write new rules of general applicability — to executive agencies? The Supreme Court has long recognized that under the Constitution “congress cannot delegate legislative power to the president” and that this “principle [is] universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.” Yet on this account of Chevron we’re examining, its whole point and purpose seems to be exactly that — to delegate legislative power to the executive branch.

Justice Gorsuch has now brought these views to the Supreme Court in Gundy v. United States. The case involved the Sex Offender Registration and Notification Act (SORNA), which established registration criteria for sex offenders convicted after the statute’s enactment and, for those already convicted, delegated authority to Attorney General “to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter and to prescribe rules for the registration of any such sex offender.” Four Justices found that this latter “delegation easily passes constitutional muster.”

Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented. “[I]t would frustrate ‘the system of government ordained by the Constitution,’” Gorsuch wrote, “if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.” The intelligible-principle test “has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional.” Justice Gorsuch notes that the intelligible-principle test was first stated in the 1920s and would take the doctrine back to those roots, when the Court would ask:

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151 Gutierrez-Brizuela, 834 F.3d at 1154 (Gorsuch, J., concurring).

152 Id. at 1153–54 (Gorsuch, J., concurring) (quoting Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892)) (citation and emphasis omitted).


154 34 U.S.C. § 20913(d).

155 Gundy, 139 S. Ct. at 2121.

156 Id. at 2133 (quoting Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892)).

157 Id. at 2140.

158 Id. at 2138–39.
Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.158

He concludes by writing, “I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation’s chief prosecutor the power to write his own criminal code. That ‘is delegation running riot.’”159

Justice Alito concurred in the judgment but wrote separately to state “since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards.” He then made clear that he was open to revisiting nondelegation doctrine: “If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.”160

As indicated by his joining the Gundy dissent, Justice Thomas would take extreme steps to limit the authority that Congress can confer on administrative agencies. In Whitman, he stated “On a future day, . . . I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.”161 Unlike Justice Scalia, who described himself as a “fainthearted originalist” because there were certain cases where he would not be able to bring himself to vote for the originalist view,162 Justice Thomas has repeatedly suggested he

158 Id. at 2141.
159 Id. at 2148.
160 Id. at 2130–31.
161 Whitman v. Am. Trucking Ass’ns, Inc., 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (“I am not convinced that the intelligible principle doctrine serves to prevent allessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than ‘legislative.’”). Cf. Wellness Intern. Network, Ltd. v. Sharif, 575 U.S. 665, 709 (2015) (Thomas, J., dissenting) (“Our Constitution is not a matter of convenience, to be invoked when we feel uncomfortable with some Government action and cast aside when we do not.”).
162 See generally Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 864 (1989). He gives flogging as an example; flogging would not be cruel and unusual punishment on an originalist view, but he still could not see himself voting to affirm a law that imposed flogging as a punishment. Given Justice Scalia’s firm support for the administrative state, see generally Elliott, supra note 65.
is willing to burn down various longstanding structures of constitutional law. And he appears to be inviting nondelegation challenges.

Justice Kavanaugh did not participate in Gundy, but in a more recent concurrence to a denial of certiorari, he indicated he would be willing to limit Congress's authority to delegate rulemaking power to agencies, at least when "a major policy question of great economic and political importance" is at stake. Justice Barrett had not yet joined the Court when Gundy was decided, but, in previous academic writing, she sounds more like Justice Scalia in Whitman: "The Suspension Clause stands as an exception to the nondelegation doctrine, which emphasizes the extremely broad leeway that Congress enjoys in assigning responsibilities to the Executive Branch. . . . The notoriously lax 'intelligible principle' test reflects the Court's conclusion that the decision of how to carry out routine social and economic policy belongs almost entirely to Congress."

In the end, four clear votes exist for a revolution in nondelegation doctrine, and Justice Kavanaugh is apparently a fifth vote for at least a constriction of Congress's authority to delegate. It remains to be seen how Justice Barrett will influence the debate. The Court has, however, recently rejected other invitations to rewrite the constitutional law of the Executive Branch. At the same time, the conservative majority created by the Trump adminis-

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164 See Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2382 (2020) (noting that "[n]o party has pressed a constitutional challenge to the breadth of the delegation involved here").


167 For example, in one recent decision, a majority of the Court took a modest step to constrain the administrative step but refused to take the bold step: Justices Thomas and Gorsuch would have been bold. See Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020) (striking down provision of the Dodd-Frank Act that prevented the president from freely removing the director of the Consumer Financial Protection Bureau but refusing to overturn Humphrey's Executor v. United States, 295 U.S. 602 (1935), which allows restrictions on the President's power of removal when the agency is headed by a multi-member panel); id. at 2211–12 (Thomas, J., joined by Gorsuch, J. concurring in part) ("The decision in Humphrey's Executor poses a direct threat to our constitutional structure and, as a result, the liberty of the American people. The Court concludes that it is not strictly necessary for us to overrule that decision. . . . But with today's decision, the Court has repudiated almost every aspect of Humphrey's Executor. In a future case, I would repudiate what is left of this erroneous precedent."). Interestingly, Justice Kavanaugh did not join Justice Thomas's dissent even though Kavanaugh had written a D.C. Circuit opinion finding the CFPB's structure unconstitutional and had noted strong criticisms of Humphrey's Executor. See PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 34 n.15 (D.C. Cir. 2016), rev'd en banc 881 F.3d 75 (2018). In the en banc opinion reversing, Judge Pillard noted the seeds of destruction that would be sown by affirming Justice Kavanaugh's opinion: "A constitutional analysis that condemns the CFPB's for-cause removal provision provides little assurance against—indeed invites—the judicial abolition of all independent agencies." Id. at 133. Given that the Supreme Court has now condemned the for-cause provision, independent agencies are a threatened species.
IV. WAYS TO COUNTER THESE POTENTIAL PROBLEMS

The Biden administration and Democrats in Congress could and should pursue several avenues to address the problems I have described. First, when agencies adopt new rules and regulations to replace Trump-era deregulatory measures, the agencies should include factual findings that make it harder for the federal courts to dismiss cases based on Article III standing doctrine. Second, Congress should write clearer statutes, and agencies should root their regulations, to the extent possible, in strong interpretations so that Biden policies can survive judicial review, should the Court abolish some or all of the deference doctrines. Third, Congress should add many judges to the lower federal courts; President Biden should then nominate judges who take broader views of standing doctrine, deference to administrative agencies, and the constitutionality of the administrative state; and the Senate should confirm these judges as quickly as possible. Finally, Congress and President Biden should take steps to alter the politicization of the Supreme Court, which could include expanding the size of the Court itself.

A. Addressing Standing Issues Through Regulation

While I have argued that the Court would push back against legislative and executive efforts to alter Article III standing (by, e.g., abolishing the injury-in-fact requirement), some aspects of the doctrine can be exploited by the Biden administration and Democrats in Congress to allow standing to more plaintiffs. First, as Mark Seidenfeld and Allie Akre argue, "Congress can influence standing by explicitly recognizing actual harms and causal connections." On their view, Congress can use statutory language to identify the concrete interests protected by the legislation (thus helping the federal

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168 For example, in July 2021, the conservative wing of the Court dismantled most of the rest of the Voting Rights Act, clearing the way for most of the anti-democratic voting laws being enacted in Republican states. Brnovich v. Democratic National Committee, 141 S. Ct. 2321 (2021) (decided 6–3 along straight party lines). See also Adam Liptak, Supreme Court Upholds Arizona Voting Restrictions, N.Y TIMES (July 1, 2021), https://www.nytimes.com/2021/07/01/us/politics/supreme-court-arizona-voting-restrictions.html [https://perma.cc/VW7D-MYMD] (“The Supreme Court on Thursday gave states new latitude to impose restrictions on voting, using a ruling in a case from Arizona to signal that challenges to laws being passed by Republican legislatures that make it harder for minority groups to vote would face a hostile reception from a majority of the justices.”).

169 Heather Elliott, Congress’s Inability to Solve Standing Problems, 91 B.U. L. REV. 159, 190 (2011) (in part invoking City of Boerne v. Flores to argue that the Court will no more let Congress alter Article III standing doctrine than it would let Congress alter First Amendment doctrine).

courts understand that a plaintiff suing under the statute has suffered an injury in fact), can trace the causal chain between a statutory violation and that injury in fact, and can explain why statutory remedies redress that injury.\textsuperscript{171} The Biden administration could thus work with Congress to amend existing statutes and write new statutes that contain explicit language supporting the standing of citizens who would sue to enforce those statutes.

Second, Biden administrative agencies may also take steps to facilitate standing for those who would sue in the federal courts. As Rachel Klarman and Will Dobbs-Allsopp argue in a forthcoming essay, agencies can “design regulations so as to increase the likelihood advocates can establish standing in the event of future rollbacks, thereby empowering progressive groups to more robustly challenge the next conservative administration’s inevitable deregulatory agenda.”\textsuperscript{12} The authors seize on two wrinkles in the Court’s standing jurisprudence: injury caused by the denial of information,\textsuperscript{173} and injury caused to organizations by interference with their organizational mission.\textsuperscript{174} Agencies, they argue, should craft regulations that create a right to information in individual citizens or groups, that mandate input from advocacy organizations in administering agency programs, or that allow advocacy organizations to enforce regulatory requirements through agency procedures, enabling regulatory beneficiaries in later lawsuits to satisfy Article III standing requirements by pointing to concrete injuries caused by denial of information, denial of the opportunity to provide input, or denial of agency procedures.

\textbf{B. Writing Clearer Statutes and More Persuasive Regulations}

If the Supreme Court abandons some or all of the deference doctrines, the Biden administration can, first, ask Congress to enact statutes that authorize the Biden regulatory agenda. After all, \textit{Chevron}, \textit{Brand X}, and \textit{City of Arlington} apply only when statutes are ambiguous. While Congress often writes vague statutes and leaves the details to regulatory agencies, legislators

\begin{itemize}
  \item \textsuperscript{171} \textit{Id.} at 749–52.
  \item \textsuperscript{173} \textit{E.g.}, \textit{FEC v. Akins}, 524 U.S. 11, 21 (1998) (“this Court has previously held that a plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute”) (citing \textit{Public Citizen v. Dep’t of Just.}, 491 U.S. 440, 449 (1989)).
  \item \textsuperscript{174} \textit{E.g.}, \textit{Havens Realty Corp. v. Coleman}, 455 U.S. 363, 379 (1982) (“concrete and demonstrable injury to the organization’s activities—with the consequent drain on the organization’s resources—constitutes” injury in fact for Article III standing purposes).
\end{itemize}
are free to adopt more detailed statutes. Indeed, Congress could incorporate Biden regulations as those details.

Enacting such statutes would almost certainly require abolishing the filibuster, given that the current Republican members of the Senate would otherwise obstruct any such efforts. To abolish the filibuster is to make it easier not only for the current Democratic Congress to pass laws but also for a later Republican Congress to do the same. Democrats should therefore think carefully about whether the near-term advantage of a filibuster-free Senate is worth the long-term costs of losing a powerful tool to obstruct future Republican lawmaking.

Agencies can also promulgate regulations with especial care, knowing that (in the absence of Chevron) a regulation must persuade the courts. In this regard, remember that Skidmore “deference” is not solely about a regulation’s persuasive logic; the Court in Skidmore emphasized that courts should recognize agency expertise and should seek to make court actions consonant with agency enforcement. Agencies could therefore craft regulations with an eye toward persuading federal judges that jettisoning agency interpretations would violate Skidmore.

C. Expanding the Lower Federal Courts

President Trump appointed 226 judges to the federal bench, including 54 appeals court judges. In doing so, he altered the political balance of the Second, Third, and Eleventh Circuits. As discussed above, some of these new judges have already blocked regulatory actions of the Biden administration. Because federal judges are appointed for life, they are immovable obstacles (at least as long as their opinions are consistent with Supreme Court precedent).

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177 E.g., Carl Hulse & Nicholas Fandos, Democrats and Activists Focus on the Filibuster After a Defeat on Voting Rights, N.Y. Times (June 23, 2021), https://www.nytimes.com/2021/06/23/us/politics/filibuster-elections-bill.html [https://perma.cc/P3K3-S2JQ] (“Democrats and activists say the increasing Republican reliance on the filibuster will only intensify calls to jettison it and potentially bring about critical mass for a rules change as Democrats remain determined to pass some form of the elections measure and other parts of their agenda opposed by Republicans.”).

178 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (“[G]ood judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons.”).

179 Gramlich, supra note 83.


181 See supra notes 112–19 and accompanying text.
One avenue for ameliorating the influence of these judges is to expand the number of seats on the lower federal courts. This is not a partisan suggestion: the caseload of the federal judiciary has expanded significantly over the last three decades while the number of judges has stayed the same. The Judicial Conference of the United States in 2020 recommended adding judges to the Ninth Circuit, adding new judges to the district courts, and making temporary district court judgeships permanent, noting that case filings from 1990 to 2018 had increased 39 percent in the district courts and 15 percent in the appeals courts. By March 2021, the Judicial Conference had upped the district court numbers to 77 new seats and 9 temporary seats made permanent.

Both Democratic and Republican lawmakers agree on the need to increase the size of the federal judiciary. The Biden administration should work with Congress to add these new judgeships. President Biden should then appoint, and the Senate confirm, judges with approaches to constitutional law, statutory interpretation, and administrative law that will serve to counterbalance the extreme conservatives appointed by President Trump and the McConnell-led Senate.

D. Altering the U.S. Supreme Court

The current Supreme Court includes two justices whose presence results from appalling political manipulations by Republicans. Justice Gorsuch holds a seat that should have been filled by then-Chief-Judge of the D.C. Circuit Merrick Garland, who was nominated by President Obama after Justice Antonin Scalia’s death. Then Senate majority leader Mitch McConnell refused to hold hearings on the Garland nomination, kept the seat empty for 422 days, and led Republicans to confirm Gorsuch after Donald Trump took the Presidency. McConnell argued that the presidential election—nine months away—was too close to justify President Obama’s filling the seat.
Then, when Justice Ruth Bader Ginsburg died only 45 days before the 2020 presidential election, McConnell rushed to install Justice Amy Coney Barrett, who was confirmed on October 26, 2020, barely a month after Justice Ginsburg’s death.188

The Biden administration has been urged to take steps to redress this malfeasance. Professor Klarman has written that, “[e]ssentially, Democrats face a choice between responding to norm violations in kind, which risks furthering a vicious cycle to the bottom that eventually will destroy democracy, or adhering to the norms while Republicans systematically violate them—a sort of unilateral disarmament that rarely works out well for the disarming party.”189 Professor Grove, on the other hand, has cautioned that the very independence of the federal judiciary is at stake.190

The question, then, is what, if anything, to do. In April 2021, Democrats in both houses of Congress introduced bills to expand the size of the Supreme Court from nine to thirteen seats.191 Structural proposals have been floated that would make the Supreme Court even larger,192 would do away with the idea of permanent Supreme Court justices (instead rotating lower court judges on and off the Court),193 would impose term limits on the justices,194 would give each President two appointments,195 or would change the
selection process to make nominations less political. Critics have also suggested altering the power of judicial review or stripping the Court of jurisdiction over certain types of cases.

Even in early 2021, I would have been reluctant to recommend any significant changes to the Court, on the ground that such changes would lead to a continual tit-for-tat competition between Democrats and Republicans as power switched between the parties election by election. Now that the current Court has legitimized the Republican assault on democracy, however, it seems that the nation stands on a knife-edge between democracy and one-party rule. President Biden’s Supreme Court commission may arrive at sensible solutions, but seems unlikely to reach any definitive answers in time to save the 2022 primaries from the machinations of antidemocratic Republicans. The Biden administration and the Democratic Congress need either (1) to abolish the filibuster and enact the For the People Act of 2021 and the John Lewis Voting Rights Act or (2) add at least two seats to the Supreme Court.

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195 Alicia Bannon, An Overlooked Idea for Fixing the Supreme Court, BRENNAN CTR. FOR JUST. (Mar. 12, 2021), https://www.brennancenter.org/our-work-analysis-opinion/overlooked-idea-fixing-supreme-court (proposing a 15-member Court, five appointed by Democrats, five appointed by Republicans, and five selected unanimously, or by super-majority, by those ten justices from existing circuit and district court judges).

196 E.g., Epps & Sitaraman, supra note 193, at 193 (proposing a 15-member Court, five appointed by Democrats, five appointed by Republicans, and five selected unanimously, or by super-majority, by those ten justices from existing circuit and district court judges).

197 Charlie Savage, Experts Debate Reducing the Supreme Court’s Power to Strike Down Laws, N.Y. TIMES (June 30, 2021), https://www.nytimes.com/2021/06/30/us/politics/supreme-court-commission.html ("Nikolas Bowie, a Harvard Law School professor, denounced the power of the Supreme Court to strike down laws enacted by Congress as an ‘antidemocratic superweapon’ and said, ‘I encourage you to advocate for reforms that will abolish the practice.’").


199 See supra note 168.

200 Savage, supra note 197 (“Mr. Biden has charged the 36-member, ideologically diverse commission — which is led by Bob Bauer, an N.Y.U. Law professor who served as a White House Counsel under President Barack Obama, and Cristina M. Rodriguez, a Yale Law School professor and former Justice Department official — with producing a report assessing ideas for changing the court.”)


Conclusion

Joe Biden and Kamala Harris were elected with over 81 million votes to Trump and Pence's 74 million, and with an Electoral College vote of 306 to 232. Biden and Harris are thus entitled to pursue the agenda on which they ran, which includes a restoration of a wide variety of strong federal regulatory protections for consumers, workers, and the environment. Yet existing Supreme Court doctrine, as well as doctrinal changes that may occur in the future, threaten to derail that agenda. The Biden administration should take steps—from the relatively minor (taking especial care in writing regulations, given the threats posed by later judicial review) to the unprecedented (adding several seats to the U.S. Supreme Court)—to protect the American people.