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Longstanding Agency Interpretations

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ARTICLES

LONGSTANDING AGENCY INTERPRETATIONS

*Anita S. Krishnakumar**

How much deference—or what kind—should courts give to longstanding agency interpretations of statutes? Surprisingly, courts and scholars lack a coherent answer to this question. Legal scholars long have assumed that longstanding agency statutory interpretations are treated with heightened deference on judicial review, and federal courts sometimes have made statements suggesting that this is the case. But in practice, federal court review of longstanding agency interpretations—at both the U.S. Supreme Court and courts of appeals—turns out to be surprisingly erratic. Reviewing courts sometimes note the longevity of an agency's statutory interpretation as a plus factor in their deference analysis but at other times completely ignore or dismiss an agency interpretation's longevity. Moreover, judicial rhetoric about the relevance of longevity in the review of agency statutory interpretations is inconsistent from case to case.

*What makes this doctrinal incoherence particularly remarkable is that courts usually care much more about the predictability of statutory interpretations and about upsetting settled institutional practices. In fact, in two analogous contexts—*judicial *interpretations of statutes and historical executive branch practice in the* constitutional *arena—courts accord strong precedential effect, or a presumption of correctness, to established legal constructions. This Article provides the first detailed study of federal court treatment of longstanding agency statutory interpretations, illuminating doctrinal inconsistencies and examining longevity-related factors that both favor and disfavor deference. The Article also compares federal courts' chaotic treatment of longstanding* agency *statutory interpretations with the precedential effect that courts give to longstanding judicial interpretations of statutes and the historical*

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"gloss" effect that courts give to past executive practice in constitutional interpretation. Ultimately, the Article argues that longstanding agency interpretations of statutes are at least as deserving of heightened judicial deference and that, at a minimum, federal courts' disparate treatment of such interpretations—without acknowledging or justifying the distinction—is troubling. The Article advocates that longstanding agency interpretations should be entitled to precedential effect by reviewing courts and outlines how such an approach might work.

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INTRODUCTION

Judges and commentators grapple endlessly with the appropriate standards for judicial review of agency statutory interpretations. Courts have devised multiple tests[1] and produced a list of myriad factors to weigh when evaluating agency interpretations,[2] and legal scholars have debated

1. *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005); United States v. Mead Corp., 533 U.S. 218, 226–27 (2001); Auer v. Robbins, 519 U.S. 452, 461 (1997); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500–01 (1978); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936). For a discussion of the substance of these tests, see *infra* Part I.A and accompanying notes.

2. *See Skidmore*, 323 U.S. at 140 (stating that deference to agency statutory interpretation depends on "thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements"). Later cases have added the formality of the agency's procedure, the agency's relative expertness, and the longevity or contemporaneousness of the interpretation to the list of so-called *Skidmore* factors. *See, e.g.*, Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487 (2004)

and dissected the nuances of these tests and factors almost incessantly.[3] But despite the considerable ink spent on this subject in the U.S. Reports and law reviews, an important interpretive question remains unexplored: how much deference—or what kind—should courts give to longstanding agency interpretations of statutes? Surprisingly, courts and scholars lack a coherent theory for how to treat such longstanding agency interpretations.[4] In principle, virtually everyone seems to agree that longstanding agency statutory interpretations should be entitled to extra weight upon judicial review. Legal scholars long have assumed that longevity matters a great deal in the judicial calculus of whether to uphold an agency statutory interpretation,[5] and federal courts in some cases have made sweeping

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(longstanding); United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 219 (2001) (contemporaneousness); *Mead*, 533 U.S. at 228 (formality and relative expertness); Steadman v. SEC, 450 U.S. 91, 103 (1981) (longstanding practice).

3. For just a small sampling, see Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611 (2009); Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549 (2009); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Michael P. Healy, *Reconciling* Chevron*,* Mead*, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1 (2011); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Abner J. Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1 (1986); Richard J. Pierce, Jr., Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Connor N. Raso & William N. Eskridge, Jr., Chevron *As a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010); Antonin Scalia, *Judicial Deference to Agency Interpretations of Law*, 1989 DUKE L.J. 511; Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 307–12 (1986); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990).

4. One previous article addresses the Supreme Court's treatment of longstanding agency interpretations indirectly. *See* Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013 (2005). The article argues that *Chevron*'s approval of agency flexibility to change interpretations over time confused judicial deference analysis by creating a clash between the competing values of interpretive consistency and flexibility and that *Mead*'s "force of law" test further complicates things. *Id.* at 1015–16. The article advocates a commitment theory approach to *Mead*'s "force of law" inquiry, whereby courts afford "force of law" status to an interpretation when an agency commits to applying the interpretation consistently across time and parties. *Id.* at 1016–17.

5. Scholars have not examined judicial deference to longstanding agency interpretations in detail; rather, their assumptions rest on empirical studies showing that federal courts often reference the longevity of an agency's interpretation in the course of upholding it. In a seminal *Yale Law Journal* article about *Chevron*, for example, Professor Thomas Merrill noted that "the duration of an executive interpretation is the most frequently encountered factor in the pre-*Chevron* case law (and for that matter in the post-*Chevron* cases as well)." *See* Merrill, *supra* note 3, at 1019; *see also, e.g.*, William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1148–49 (2008) (reporting an agency win rate of 73.2 percent for longstanding and relatively stable interpretations, compared to an average win rate of 68.8 percent for all agency

statements indicating that longevity should factor significantly in the judicial review of an agency interpretation.[6] But no one has explained *why* longstanding agency interpretations should receive heightened deference, or how exactly such heightened deference should work. Moreover, once we look past the surface rhetoric and examine actual judicial practice, federal courts' handling of longstanding agency interpretations proves to be startlingly unstructured. Courts do sometimes note the longevity of an agency's statutory interpretation as a plus factor in their overall deference analysis, but their talk is always loose—and worse—inconsistent from case to case.

Consider the following four scenarios, all of which occur with some regularity in federal court review of longstanding agency interpretations: (1) the court mentions the longevity of an agency's interpretation in passing, assigning no particular weight to it;[7] (2) the court discusses the historical pedigree of a longstanding interpretation in detail and states that longstanding interpretations are worthy of "particular" or "great" deference;[8] (3) the court completely ignores the fact that the agency

interpretations and win rates for recent and evolving agency positions of 66.9 percent and 60.5 percent); Raso & Eskridge, *supra* note 3, at 1781–82 (reporting a statistically significant correlation between a longstanding agency policy and the Supreme Court's willingness to defer to the agency's interpretation).

6. Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487 (2004) (recognizing that the Court "will normally accord particular deference to longstanding agency interpretations" (quoting Barnhart v. Walton, 535 U.S. 212, 220 (2002))); Bragdon v. Abbott, 524 U.S. 624, 644–45 (1998); NLRB v. Hendricks Cnty. Rural Elec. Membership Corp., 454 U.S. 170, 189–90 (1981); Menkes v. U.S. Dep't of Homeland Sec., 637 F.3d 319, 332 (D.C. Cir. 2011) ("It is highly significant here that the agency's 'interpretation is one of long standing.'" (quoting *Walton*, 535 U.S. at 221)); Estate of Landers v. Leavitt, 545 F.3d 98, 107 (2d Cir. 2008) (finding that agency's "longstanding" interpretation was "entitled to a great deal of persuasive weight"); Council Tree Commc'ns, Inc. v. FCC, 503 F.3d 284, 289 (3d Cir. 2007) ("[C]ourts give 'considerable weight' to a 'consistent and longstanding interpretation by the agency' responsible for administering a statute." (quoting Int'l Union of Elec. Radio & Mach. Workers v. Westinghouse Electric Corp., 631 F.2d 1094, 1106 (3d Cir. 1980)). *But see* Judulang v. Holder, 132 S. Ct. 476, 488 (2011) (calling longevity "a slender reed to support a significant government policy" and arguing that "[a]rbitrary agency action becomes no less so by simple dint of repetition").

7. *See, e.g.*, Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2033 (2012); Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1335 (2011); Smith v. City of Jackson, 544 U.S. 228, 239–40 (2005); Morrison-Knudsen Const. Co. v. Dir., Office of Workers' Comp. Programs, 461 U.S. 624, 635 (1983); Ammex, Inc. v. United States, 367 F.3d 530, 535 (6th Cir. 2004); Sec'y of Labor v. Excel Mining, LLC, 334 F.3d 1, 7 (D.C. Cir. 2003). For additional cases, see discussion *infra* Part I.A.

8. *See, e.g.*, *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 487 ("particular deference" (quoting *Barnhart*, 535 U.S. at 220)); United States v. Clark, 454 U.S. 555, 565 (1982) ("great deference"); United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 719 (1975) ("considerable weight" but "not controlling"); Chemehuevi Tribe of Indians v. Fed. Power Comm'n, 420 U.S. 395, 410 (1975) ("great respect"); Ramos-Barrientos v. Bland, 661 F.3d 587, 598 (11th Cir. 2011) ("particular deference" (quoting *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 487)); Sai Kwan Wong v. Doar, 571 F.3d 247, 262 (2d Cir. 2009) ("substantially more deference" than other interpretations); United States v. Occidental Chem. Corp., 200 F.3d 143, 152 (3d Cir. 1999) ("must defer" unless agency's interpretation is unreasonable). For additional cases, see discussion *infra* Part I.A.

interpretation it is reviewing has been in place for years or even decades;[9] and (4) the court acknowledges the longevity of an agency's interpretation but rejects the interpretation as unpersuasive.[10]

Consider also the following scenario from a recent Roberts Court case: the Clean Water Act[11] (CWA) requires landowners to obtain a permit before discharging certain materials into "navigable waters" and defines "navigable waters" as "waters of the United States."[12] The Army Corps of Engineers, the agency that administers the relevant sections of the CWA, had for *thirty years* interpreted "waters of the United States" expansively, to include "tributaries" and wetlands "adjacent" to navigable waters and had specified that "[w]etlands separated from other waters of the United States by man-made dikes" count as "adjacent wetlands."[13] John Rapanos backfilled three wetlands that bore a surface connection to man-made drains (or in one case a river) that emptied into other rivers—without obtaining a permit.[14] When the agency brought an enforcement action against him, Rapanos challenged the validity of the Army Corps' regulation.[15] On judicial review, Justice Scalia's plurality opinion rejected the agency's longstanding interpretation of the statute and ruled in Rapanos's favor.[16] Justice Stevens's dissenting opinion, joined by three other Justices, chastised the plurality for displacing agency regulations that had been in effect for over thirty years.[17] Two concurring opinions failed to mention the longevity of the agency's interpretation at all.[18]

What are regulated parties, members of the public, and agencies themselves to make of this inconsistent, fickle jurisprudence? The upshot of the courts' chaotic approach seems to be that the longevity of an agency's interpretation matters, but not that much. Settled agency practices are relevant, but not controlling. What makes this doctrinal incoherence particularly remarkable is that courts usually care much more about the predictability of statutory interpretations and about upsetting settled institutional practices. As Justice Brandeis once famously declared, "in most matters it is more important that the applicable rule of law be settled

9. *See, e.g.*, Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 870–71 (2011) (Ginsburg, J., concurring) (pointing out that majority opinion ignores longevity). For additional cases, see discussion *infra* Part I.B.

10. *See, e.g.*, Brown v. Gardner, 513 U.S. 115, 122 (1994); Aaron v. SEC, 446 U.S. 680, 694 n.11 (1980); SEC v. Sloan, 436 U.S. 103, 117 (1978); Se. Ala. Med. Ctr. v. Sebelius, 572 F.3d 912 (D.C. Cir. 2009). For additional cases, see discussion *infra* Part I.C and accompanying notes.

11. 33 U.S.C. § 1251 (2012).

12. Rapanos v. United States, 547 U.S. 715, 723–24 (2006) (citing 33 C.F.R. §§ 328.3(a)(1)–(3), (5), (7); 328.3(c)).

13. *.Id.*

14. *Id.* at 719–20.

15. *Id.* at 719.

16. *Id.* at 732–35, 738 (relying on dictionary definitions, the meaning given to similar terms in other statutes, the whole act rule, the constitutional avoidance canon, and a federalism clear statement rule).

17. *Id.* at 797, 799, 806–07 (Stevens, J., dissenting).

18. *Id.* at 759 (Kennedy, J., concurring); *id.* at 811 (Breyer, J., dissenting).

than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation."[19] In other words, where the legislature has the power to correct mistakes—as it does with improper statutory interpretations, which can be overridden by legislative amendment—even incorrect statutory interpretations should be left alone. And, indeed, when it comes to reexamining *judicial* interpretations of statutes, courts tend to be extremely deferential to established prior constructions.

In fact, the general rule is that judicial interpretations of statutes, once rendered, enjoy heightened stare decisis effect, sometimes referred to as a "super-strong" presumption of correctness—particularly, although not only, if they are of longstanding vintage.[20] Established executive branch practices similarly receive significant weight from courts reviewing the scope of executive power under the *U.S. Constitution*, rather than a statute.[21] This heightened precedential effect for judicial constructions of statutes and executive constitutional interpretations is based on several theoretical premises, ranging from presumed legislative acquiescence to reliance interests to legitimacy concerns.[22] The puzzling thing is that these theoretical premises apply at least equally, if not more so, to agency interpretations of statutes. Yet no one seems to have noticed the courts' disparate treatment of longstanding judicial versus agency statutory interpretations, or longstanding executive practice in constitutional versus statutory interpretation—or at least, no one seems to think the disparities are all that troublesome.[23]

One reason for this disparate treatment may be that federal courts tend to view agency interpretations as the work of an inferior institution, rather than as legal precedents established by a coequal branch. Perhaps as a result, courts tend to underplay the extent to which statutory interpretation involves policymaking choices that courts are ill-equipped to second-guess. Further, judicial review of agency statutory interpretations may reflect an underlying judicial bias toward maintaining control and discretion over the final determination of what a statute means. Because of these institutional dynamics, courts reviewing longstanding agency interpretations tend to

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19. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

20. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation."); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (noting that statutory precedents "often enjoy a super-strong presumption of correctness").

21. *See infra* notes 107–11 and accompanying text.

22. *See infra* notes 107–11 and accompanying text.

23. For one notable exception, see Harold M. Greenberg, *Why Agency Interpretations of Ambiguous Statutes Should Be Subject to Stare Decisis*, 79 TENN. L. REV. 573, 574–75 (2012) (criticizing *Chevron* for allowing agencies to change their interpretations of ambiguous statutes over time and arguing instead for stare decisis effect that would bind agencies to stick with their initial interpretations). The author seeks to constrain agencies' interpretive flexibility, not to force greater deference from courts, and argues for stare decisis effect for *all* agency interpretations of ambiguous statutes, not just longstanding ones. *Id.* at 617–18.

focus on linguistic arguments and background interpretive presumptions rather than on the workability of the agency's interpretation, the reliance interests it has created, or the extent to which it has become an established component of the regulatory framework.[24] Longevity accordingly gets folded into—and often lost within—judicial wrangling over competing interpretive canons or other traditional tools of statutory construction. But this seems wrong, or at least insufficient. An agency interpretation that has been in place for years, directing both private and government behavior, and that has withstood executive and congressional oversight as well as the shifting political whims of several presidential administrations, is a precedent in its own right. It has its own, independent claim to authority. As such, it deserves more than loose mention as merely one factor in a laundry list of considerations taken into account upon judicial review.

The purpose of this Article is twofold: First, it seeks to illuminate federal courts' chaotic current treatment of longstanding agency statutory interpretations. Second, it compares the courts' inconclusive approach to reviewing established agency interpretations with their highly deferential approach toward established judicial interpretations of statutes and established executive practice in the constitutional context, and it argues that courts should accord greater systematic deference to longstanding agency interpretations of statutes as well. Instead of the current haphazard approach, courts should adopt a rule providing that, where an agency interpretation has been in place for a significant period of time[25] and has not been disturbed by Congress, the interpretation is entitled to some form of precedential effect.

To be clear, this Article is concerned only with the judicial review of agencies' longstanding legal interpretations of statutes, not with the review of agencies' policy or factfinding decisions. That is, the Article advocates presumptive judicial deference to longstanding agency constructions of statutory language; it does not address federal court review of agency action for "arbitrariness or capriciousness" or for the presence of "substantial evidence" supporting the agency's factual findings.[26]

The Article proceeds in three parts. Part I examines federal courts' muddled current approach to evaluating longstanding agency interpretations and the inconsistency that results. Part II elaborates the theoretical assumptions that underlie the super-strong presumption of correctness for judicial interpretations of statutes and the historical "gloss" deference given to past executive practice in constitutional interpretation and argues that

24. *See, e.g.*, *infra* notes 63, 78 and accompanying text.

25. The exact length of time can and should be open for discussion, perhaps something along the lines of ten years or more.

26. The "arbitrary and capricious" standard of review is a "catch-all" standard that applies to the judicial review of numerous agency activities, including the exercise of discretion and informal factfinding. *See* RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 127–28 (6th ed. 2011). "Substantial evidence" is a standard of review applied to agency factual determinations made in the context of formal hearings. *See id.* at 199. Both standards are set forth in the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A), (E).

most of these assumptions operate at least equally, if not with greater force, in the context of longstanding agency interpretations of statutes. Part III outlines a new approach to the judicial review of longstanding agency interpretations, advocating that such interpretations be entitled to precedential effect, subject to judicial overruling under only those limited circumstances that justify the overruling of ordinary judicial precedents.[27]

I. THE CURRENT DOCTRINAL MUDDLE

Judicial doctrine regarding longstanding agency interpretations is a mess. Trapped somewhere between the recognition that an interpretation's vintage should matter and the Supreme Court's current deference regimes, federal courts have been markedly inconsistent in their evaluations of longstanding agency statutory interpretations. This part uses several cases to illustrate the resulting doctrinal incoherence. It is descriptive and foundational, deferring until Part II.D theoretical discussions about the reasons for the courts' loose jurisprudence in this area.

The methodology employed by this Article is not empirical; it does not examine every Supreme Court or federal court of appeals case decided within a certain time frame that involved a longstanding agency interpretation. However, the Article's analysis is based on review of over sixty-six such cases, including nearly forty Supreme Court cases and nearly thirty federal court of appeals cases.[28] The cases discussed in this part thus offer a representative picture but are not comprehensive.

Longstanding agency interpretations receive varying levels of deference from federal courts. But there are three basic approaches that describe the overarching landscape. First, courts sometimes treat the vintage of an agency interpretation as a loose plus factor that adds force to a construction reached primarily through other interpretive tools. Second, courts sometimes completely ignore the fact that an agency interpretation has been in effect for years, while upholding it for other reasons. Third, courts sometimes reject longstanding agency interpretations—either outright or without acknowledging the interpretation's longevity.

Before examining federal courts' haphazard treatment of longstanding agency interpretations, it is worth briefly summarizing the deference regimes that the Supreme Court has established for the judicial review of agency statutory interpretations. The most famous of the Court's deference regimes is set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*.[29] *Chevron* directs courts to defer to reasonable agency

27. The agency itself should remain entitled to change its own statutory interpretation, even if longstanding, for the reasons discussed *infra* Part III.

28. These cases were identified primarily through language-based searches (for "agency /s interpret! /s long-standing consistent!") supplemented by keynote searches. For a list of the cases reviewed, see Table 1. These findings are also illustrated in a searchable table available online. *See Table 1: Longstanding Interpretation Cases Reviewed*, FORDHAM LAW REVIEW, http://fordhamlawreview.org/articles/table-1-longstanding-interpretation-cases-reviewed.

29. 467 U.S. 837 (1984).

interpretations of statutory gaps and ambiguities.[30] Specifically, *Chevron* articulates a two-part inquiry to be conducted by courts reviewing agency statutory interpretations. First, reviewing courts are to ask "whether Congress has directly spoken to the precise question at issue."[31] This inquiry has come to be known as *Chevron* Step One. If the court determines that Congress *has* spoken to the precise question at issue, then the agency is bound by Congress's directive.[32] But if the court determines that Congress has not directly addressed the question at issue, judicial review proceeds to a second inquiry—known as *Chevron* Step Two—which directs courts to defer to an agency's interpretation so long as it is "reasonable."[33]

Not all agency interpretations, however, qualify for *Chevron*'s two-step inquiry. In *United States v. Mead Corp.*,[34] the Supreme Court limited *Chevron*'s reach to those cases in which "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and [in which] the agency interpretation claiming deference was promulgated in the exercise of that authority."[35] In practice, this appears to mean that formal agency actions such as notice-and-comment rulemaking and formal adjudication will qualify for *Chevron* treatment, while lesser actions such as the issuing of opinion letters or agency manuals will not.[36] Agency interpretations that do not qualify for *Chevron* deference under *Mead*'s "force of law" test are subject to a third deference regime, articulated in *Skidmore v. Swift & Co*.[37] *Skidmore* states that agency views "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" and directs courts to give weight to an agency's interpretation according to "the thoroughness evident in [the agency's] 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."[38]

30. *Id.* at 842–44.

31. *Id.* at 842.

32. *Id.* at 842–43.

33. *Id.* at 843–44. Scholars have debated whether these two steps are really two versions of the same question. *See* Bamberger & Strauss, *supra* note 3 (no); Stephenson & Vermeule, *supra* note 3 (yes).

34. 533 U.S. 218 (2001).

35. *Id.* at 226–27. This limitation, or threshold "force of law inquiry" has come to be called *Chevron* "Step Zero." *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

36. *See Mead*, 533 U.S. at 229–31; Christensen v. Harris County, 529 U.S. 576, 586–87 (2000). Of course, even if an agency interpretation qualifies for *Chevron* analysis, it must pass *Chevron*'s two-step test in order to receive deference. *See Chevron*, 467 U.S. at 842–44.

37. 323 U.S. 134 (1944); *see also Mead*, 533 U.S. at 234 ("*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form").

38. *Skidmore*, 323 U.S. at 140. *Chevron*, *Mead*, and *Skidmore* are the main deference regimes that govern judicial review of agency statutory interpretations, but the Court has established other deference tests and doctrines applicable to specific subject areas as well. *See, e.g.*, Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500–01 (1978) (heightened deference

Notably, the above deference regimes do not require judges to pay any attention to the longevity of an agency's interpretation. The Court's opinions in *Mead* and *Skidmore* note that the "consistency" of an agency interpretation is a factor to be considered when evaluating the interpretation's persuasiveness, but the opinions give no other direction to judges.[39] Further, federal courts lack any clear rules for where the longevity of an agency interpretation fits in the hierarchy of different deference regimes. In some cases, courts mention longevity as part of the *Chevron* Step Two inquiry regarding the "reasonableness" or "permissibility" of the agency's interpretation.[40] In other cases, they discuss longevity as one of the persuasiveness factors considered under *Skidmore*.[41] Occasionally, longevity is considered as part of a court's *Mead* "Step Zero" analysis, to help determine whether an agency has the power to act with the force of law and, therefore, to receive *Chevron* deference in the first place.[42] In still other cases, federal courts cite an agency interpretation's longstanding pedigree without reference to any of the Supreme Court's deference regimes or tests.[43] In short, there is no coherence or order to judicial treatment of an agency interpretation's longevity.

for NLRB decisions); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (heightened deference to executive for international, military, and national security decisions).

39. *Mead*, 533 U.S. at 228 (citing *Skidmore*, 323 U.S. at 140).

40. *See, e.g.*, Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218–24 (2009); Barnhart v. Walton, 535 U.S. 212, 219–20 (2002); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740 (1996); NLRB v. United Food & Commercial Workers Union Local 23, 484 U.S. 112, 124 n.20 (1987); CFTC v. Schor, 478 U.S. 833, 845–46 (1986); Young v. Cmty. Nutrition Inst., 476 U.S. 974, 979–84 (1986); Chem. Mfrs. Ass'n v. Natural Res. Def. Counsel, 470 U.S. 116, 125, 134 (1985); Ariz. Health Care Cost Containment Sys. v. McClellan, 508 F.3d 1243, 1253–54 (9th Cir. 2007); Council Tree Commc'ns, Inc. v. FCC, 503 F.3d 284, 289 (3d Cir. 2007); Pena-Muriel v. Gonzales, 489 F.3d 438, 442–443 (1st Cir. 2007); U.S. v. Baxter Int'l, Inc., 345 F.3d 866, 887 (11th Cir. 2003).

41. *See, e.g.*, Pub. Emps. Ret. Sys. of Ohio v. Betts, 492 U.S. 158, 171 (1989) (citing *Chevron* in passing without applying two-step analysis); FDIC v. Phila. Gear Corp., 476 U.S. 426, 438–39 (1986); U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 612 n.14 (1986) (citing *Chevron* after noting longevity, but not going through full two-step analysis).

42. *See* Pub. Citizen Health Research Grp. v. U.S. Dep't of Labor, 557 F.3d 165, 183 (3d Cir. 2009); Groff v. United States, 493 F.3d 1343, 1352 (Fed. Cir. 2007).

43. *See, e.g.*, Smith v. City of Jackson, 544 U.S. 228, 239–40 (2005); *id.* at 243 (Scalia, J., concurring) (noting the majority's oversight and stating that *Chevron* should apply); INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 189–90 (1991); W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 412 (1985); United States v. Clark, 454 U.S. 555, 561–62 (1982); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 296–97 (1985); Morrison-Knudsen Const. Co. v. Dir., Office of Workers' Comp. Programs, 461 U.S. 624, 634–35 (1983); Les v. Reilly, 968 F.2d 985, 989–90 (9th Cir. 1992); Uselton v. Commercial Lovelace Motor Freight, Inc., 940 F.2d 564, 578–79 (10th Cir. 1991); Burton v. Derwinski, 933 F.2d 988, 989 (Fed. Cir. 1991); Anderson Shipping Co. v. EPA, 852 F.2d 1387, 1391 (D.C. Cir. 1988).

A. Loose Plus Factor

Things do not look much better when we examine the substantive manner in which federal courts treat longstanding agency statutory interpretations. Federal courts often uphold agency statutory interpretations, including those that are longstanding, but their opinions fail to provide any clear rule for how much longevity counts in the deference analysis. In many cases, federal courts mention the fact that an agency interpretation is longstanding only in passing—almost as an afterthought or vague plus factor supporting the court's independent reading of the statute. The courts' opinions in these cases tend to spend considerable space construing the relevant statute from scratch, using traditional tools of interpretation, and then add a sentencing beginning "In addition" or "Finally, we note" in which they observe that the agency in charge has interpreted the statute the same way for years.[44] As a result, it is almost impossible to tell how much weight the court has placed on the fact than an agency interpretation has been in effect for a long time, and the implication is that the longevity of the interpretation did not significantly affect the court's ruling.

Consider, for example, the Supreme Court's opinion in *Smith v. City of Jackson*.[45] *Smith* involved a lawsuit brought by police and public safety officers against the city contending that the city's salary increase plan violated the Age Discrimination in Employment Act[46] (ADEA) because it was less generous to officers over the age of forty than to younger officers.[47] Two federal agencies, the U.S. Department of Labor and the Equal Employment Opportunity Commission (EEOC), had long interpreted the ADEA to authorize disparate impact claims of this kind, but the City of Jackson challenged the agencies' longstanding reading.[48] On review, the Supreme Court examined other parallel statutes, Supreme Court precedent, statutory text, and legislative history, and concluded that all of these traditional tools supported a finding that disparate impact claims were allowed under the ADEA.[49] The Court then observed, "Finally, we note

44. *See* Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1335 (2011) (stating that longevity "add[s] force" to Court's construction of statute); Barnhart v. Walton, 535 U.S. 212, 219–20 (2002) ("In addition, the Agency's regulations reflect the Agency's own longstanding interpretation. . . . [T]his Court will normally accord particular deference to an agency interpretation of 'longstanding' duration."); *Morrison-Knudsen*, 461 U.S. at 634 ("Finally, we note that [the agency] has consistently taken the position that fringe benefits are not includible in wages."); Frankl v. HTH Corp., 650 F.3d 1334, 1352 (9th Cir. 2011) ("One final consideration" is that "Act has long been interpreted" this way); Ammex, Inc. v. United States, 367 F.3d 530, 535 (6th Cir. 2004) ("Additionally, the fact that the IRS has left Revenue Ruling 69-159 virtually unchanged for over three decades demonstrates the soundness of the decision."); *see also United Food & Commercial Workers Union*, 484 U.S. at 124 n.20; *Paralyzed Veterans of Am.*, 477 U.S. at 612 n.14; E.I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46, 54–55 (1977); Pub. Citizen Health Research Grp. v. U.S. Dep't of Labor, 557 F.3d 165, 183 (3d Cir. 2009).

45. 544 U.S. 228 (2005).

46. 29 U.S.C. §§ 621–633, 633a, 634 (2012).

47. *Smith*, 544 U.S. at 231.

48. *Id.* at 232.

49. *Id.* at 233–40.

that both the Department of Labor, which initially drafted the legislation, and the EEOC, which is the agency charged by Congress with responsibility for implementing the statute, . . . have consistently interpreted the ADEA to authorize relief on a disparate-impact theory."[50] The agencies' interpretation had been in place for nearly *twenty-five* years,[51] but the Court's casual, last-minute mention made it sound as though this mattered little in its analysis.

Confusingly, the "afterthought" cases contrast with several cases in which federal courts emphasize the longevity of an agency interpretation, discussing the interpretation's history in detail or pointing to its vintage as "persuasive evidence" of its accuracy or as a reason to afford it "great deference."[52] In such cases, federal courts seem to be giving significant consideration to the longevity of the agency's interpretation—longevity is mentioned as more than just a brief "final" consideration. But these cases, too, ultimately are vague about the role that longevity plays in the judicial review of agency interpretations, expressly noting that longevity is not a "controlling" factor or discussing it along with several other factors.[53]

Federal courts' treatment of longstanding agency interpretations is further complicated by the fact that some of the above cases stress the "contemporaneousness" of the agency's interpretation along with its

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50. *Id.* at 239.

51. *Id.* at 243–44 (Scalia, J., concurring) (citing 46 Fed. Reg. 47,724, 47,727 (Sept. 29, 1981)).

52. *See, e.g.*, Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487 (2004) (recognizing that longstanding agency interpretations are entitled to "particular deference" (quoting Barnhart v. Walton, 535 U.S. 212, 220 (2002)), and upholding an agency construction in part because it was "reflected in interpretive guides the Agency has several times published"); Bragdon v. Abbott, 524 U.S. 624, 644–45 (1998) (detailing longstanding and consistent interpretation by multiple agencies); NLRB v. Hendricks Cnty. Rural Elec. Membership Corp., 454 U.S. 170, 189–90 (1981) (detailing NLRB's forty-year history of interpreting relevant statutory provision); Menkes v. U.S. Dep't of Homeland Sec., 637 F.3d 319, 332 (D.C. Cir. 2011) ("It is highly significant here that the agency's 'interpretation is one of long standing.'" (quoting *Barnhart*, 535 U.S. at 221)); Estate of Landers v. Leavitt, 545 F.3d 98, 107 (2d Cir. 2008) (holding that a longstanding agency interpretation was entitled to "a great deal of persuasive weight"); Council Tree Commc'ns, Inc. v. FCC, 503 F.3d 284, 289 (3d Cir. 2007) ("[C]ourts give 'considerable weight' to a 'consistent and longstanding interpretation by the agency' responsible for administering a statute." (quoting Int'l Union of Elec. Radio & Mach. Workers v. Westinghouse Electric Corp., 631 F.2d 1094, 1106 (3d Cir. 1980))).

53. *See, e.g.*, United States v. Clark, 454 U.S. 555, 565 (1982) ("Although not determinative, the construction of a statute by those charged with its administration is entitled to great deference, particularly when that interpretation has been followed consistently over a long period of time."); United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 717 (1975) (longstanding agency interpretation is "impressive evidence" entitled to "considerable weight" though "not controlling"); Chemehuevi Tribe of Indians v. Fed. Power Comm'n, 420 U.S. 395, 410 (1975) (longstanding interpretation entitled to "great respect"); Saxbe v. Bustos, 419 U.S. 65, 73–74 (1974) ("Our conclusion reflects the administrative practice, dating back at least to 1927 . . . . [L]ongstanding administrative construction is entitled to great weight."); *Menkes*, 637 F.3d at 332 (one of many factors discussed); *Estate of Landers*, 545 F.3d at 107–111 (longevity persuasive, but also examines text and judicial precedents); *Council Tree Commc'ns*, 503 F.3d at 288–90 (one of many factors).

longevity.[54] Contemporaneousness is believed to enhance an interpretation's claim to accuracy because it means that the interpretation was adopted shortly after the statute itself, under the watchful eye of the enacting Congress and ostensibly by administrators familiar with the enacting Congress's views.[55] Other cases emphasize that Congress has revisited and reenacted the statute at issue without disturbing the agency's longstanding interpretation.[56] Legislative reenactment of the statute is taken to enhance an agency interpretation's claim to accuracy because it implies congressional awareness and approval of the agency's statutory construction, rather than mere legislative inattention.[57] But contemporaneousness and congressional reenactment are not present in all of the cases in which federal courts defer to longstanding agency interpretations, nor are they treated as dispositive factors when they are present.[58] Thus it is unclear whether contemporaneousness and congressional reenactment are helpful, necessary, or merely interesting

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54. *See Nat'l Ass'n of Sec. Dealers*, 422 U.S. at 718 (contemporaneous interpretation consistently maintained by SEC); *Chemehuevi Tribe*, 420 U.S. at 409–10 (longstanding construction entitled to "great respect," "particularly when it involves a contemporaneous construction of the Act by the officials charged with the responsibility of setting its machinery in motion"); Balt. & Ohio Ry. Co. v. Jackson, 353 U.S. 325 (1957) ("The contemporaneous and long-standing interpretation of any regulatory Act by the agency that administers it is entitled to great weight."); Davis v. Manry, 266 U.S. 401, 404–05 (1925) (same); *see also* W. Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) (same); Ariz. Health Care Cost Containment Sys. v. McClellan, 508 F.3d 1243, 1253–54 (9th Cir. 2007); Sai Kwan Wong v. Doar, 571 F.3d 247, 262 (2d Cir. 2009); Les v. Reilly, 968 F.2d 985, 989 (9th Cir. 1992).

55. *See, e.g.*, Breyer, *supra* note 3, at 368 (explaining that one rationale for deference to an agency's contemporaneous interpretation is that "[t]he agency that enforces the statute may have had a hand in drafting its provisions" and "may possess an internal history in the form of documents or 'handed-down oral tradition' that casts light on the meaning of a difficult phrase or provision").

56. *See, e.g.*, CFTC v. Schor, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 274–75 (1974))); Young v. Cmty. Nutrition Inst., 476 U.S. 974, 983 (1986) ("[I]n revisiting § 346, Congress did *not* change the procedures . . . . This failure to change the scheme under which the FDA operated is significant."); FDIC v. Phila. Gear Corp., 476 U.S. 426, 437 (1986) ("At no point did Congress criticize the FDIC's longstanding interpretation. . . . In fact, Congress had reenacted the 1935 provisions in 1950 without changing the definition of 'deposit' at all."); *Chemehuevi Tribe*, 420 U.S. at 410 ("The deference due this longstanding administrative construction is enhanced by the fact that Congress gave no indication of its dissatisfaction with the agency's interpretation . . . when it amended the Act in 1930 . . . or when it reenacted the Federal Water Power Act in 1935."); *Saxbe*, 419 U.S. at 74 ("This longstanding administrative construction is entitled to great weight, particularly when, as here, [C]ongress has revisited the Act and left the practice untouched."); Les v. Reilly, 968 F.2d 985, 990 (9th Cir. 1992) ("Congress has repeatedly ratified a strict interpretation of the Delaney clause by reenacting [the relevant provision] . . . without changing the Agency's interpretation."); Lamoille Valley R.R. Co. v. I.C.C., 711 F.2d 295, 324 (D.C. Cir. 1983) ("That consistent interpretation is entitled to deference, especially since Congress implicitly approved that interpretation in revising and reenacting [the statute].").

57. This theoretical assumption is discussed in greater detail *infra* Part II.A.

58. *See* Table 1.

asides in the judicial calculus of whether to defer to a longstanding agency interpretation.

In short, judicial references to the longevity of an agency interpretation are a jumble. Courts engage in a lot of loose talk about the relevance of longevity, but they provide no consistent rules or practices to govern if, when, or how federal courts should factor longevity into their review of agency statutory interpretations.

B. Irrelevant

Further complicating the doctrine in this area is the surprising finding that federal courts (or at least majority opinions) sometimes completely ignore the fact that an agency interpretation is longstanding when reviewing it. What is puzzling about these cases is that the majority appears aware of the interpretation's longevity. Indeed, concurring opinions in these cases often explicitly point out the fact that the agency interpretation is longstanding, as do the parties' briefs.[59] Moreover, these cases are no different, doctrinally or in terms of interpretive techniques, than the cases discussed in Part I.A, which make at least passing mention of an agency interpretation's vintage. The cases in which courts ignore longevity do not, for example, involve statutory text that is exceptionally clear, so as to eliminate the need for consideration of other interpretive factors like longevity. Further, it would cost the majority little to mention an interpretation's longevity in these cases. The majority's failure even to acknowledge the longevity of the agency's interpretation in such cases suggests an unspoken judgment that longevity does not matter much in the deference analysis.

The Supreme Court's opinion in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*[60] is illustrative. *Babbitt* involved a 1975 regulation promulgated by the U.S. Interior Department that interpreted the term "harm" in the Endangered Species Act[61] (ESA) to include "significant habitat modification or degradation where it actually kills or injures wildlife."[62] The majority opinion in *Babbitt* relied on ordinary meaning, the whole act rule, the *noscitur a sociis* language canon, statutory purpose, legislative history, and a 1982 amendment to the ESA, among other

59. *See, e.g.*, Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 870–71 (2011) (Ginsburg, J., concurring) ("I join the Court's opinion, and add a fortifying observation: Today's decision accords with the longstanding views of the Equal Employment Opportunity Commission (EEOC), the federal agency that administers Title VII."); Del. River Stevedores v. DiFidelto, 440 F.3d 615, 624 (3d Cir. 2006) (Fisher, J., concurring) (noting that "[t]he regulation at issue here has been in effect for over 20 years. It has been applied, not 252 times, but 66,000 times in the past year alone"); Brief for Petitioner at 21–26, *Thompson*, 131 S. Ct. 863 (No. 09-291), 2010 WL 3501186, at *21–26.

60. 515 U.S. 687 (1995).

61. 16 U.S.C. §§ 1531–1537, 1537a, 1538–1544 (1973).

62. *See Babbitt*, 515 U.S. at 690–91; 50 C.F.R. § 17.3 (1994). The Secretary originally promulgated the regulation in 1975 and amended it in 1981 to emphasize that actual death or injury of a protected animal is necessary for a violation. *See* 40 Fed. Reg. 44,412, 44,416 (Sept. 26, 1975); 46 Fed. Reg. 54,748, 54,750 (Nov. 4, 1981).

interpretive tools, to determine that the Interior Department's regulation provided a reasonable construction of the statute.[63] Although the regulation was twenty years old by the time of the Court's decision, the Court nowhere acknowledged—let alone relied on—this fact in its analysis.[64] In effect, the majority treated the longevity of the agency's interpretation as irrelevant to its review.

It is difficult to square such "irrelevance" cases with the "afterthought" cases, in which courts go out of their way to mention longevity, or with the "great deference" cases, in which courts emphasize longevity as an important factor favoring judicial deference to an agency interpretation. Indeed, the contrast between the majority's careless attitude toward longevity in the "irrelevance" cases and its rhetoric emphasizing longevity as a grounds for "great deference" in other cases highlights the utter indeterminacy of legal doctrine surrounding longstanding agency interpretations.

Relatedly, federal courts also sometimes *reject* longstanding agency interpretations without mentioning the interpretation's vintage.[65] Dissenting or concurring opinions in such cases tend to point out the interpretation's longevity and to castigate the majority for paying insufficient heed to the agency's established practice.[66] Here, the puzzle is why the majority does not acknowledge and seek to explain away the significance of the interpretation's longevity. As in the cases where courts fail to mention longevity despite the fact that doing so would add legitimacy to their statutory analysis, federal courts' failure to address longevity when rejecting an established agency interpretation underscores the uncertain status of longevity in deference analysis: if longevity carried significant weight in the deference calculus, then we would expect courts to at least attempt to explain their reasons for construing a statute in a way that upsets established agency practice.

To be fair, only a handful of "irrelevance" cases emerged in my review.[67] One reason may be that cases in which a court *ignores* the longevity of an

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63. *See Babbitt*, 515 U.S. at 697–708.

64. The Court did note that the regulation had "been in place since 1975" but did not calculate its vintage or ascribe any weight to that vintage in its analysis. *Id.* at 691 & n.2.

65. *See* Garcia v. Brockway, 526 F.3d 456, 462 n.3, 468 (9th Cir. 2008); Sutton v. United Air Lines, Inc. 527 U.S. 471, 501–02 (1999) (Stevens, J., dissenting), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 347 (1981) (Blackmun, J., dissenting).

66. *See, e.g.*, Abebe v. Mukasey, 554 F.3d 1203, 1210 (9th Cir. 2009) (Clifton, J., concurring in part) ("[T]he majority holds that sixty-eight years of agency practice was contrary to the will of Congress and in violation of the plain language of the statute the agency is charged with interpreting."); Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 490 (5th Cir. 2002) (King, C.J., dissenting).

67. My research revealed seven such cases. In two of these, the majority opinion ignored an interpretation's longevity while upholding the interpretation. *See* Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 870–71 (2011); Del. River Stevedores v. DiFidelto, 440 F.3d 615, 624 (3d Cir. 2006) (Fisher, J., concurring). In the other five cases, the majority rejected a longstanding interpretation without acknowledging its longevity. *See* Sutton v. United Air Lines, Inc. 527 U.S. 471, 501–02 (1999) (Stevens, J., dissenting), *superseded by*

agency interpretation are difficult to identify in any systematic manner. But the fact that even a handful of such cases exist—and that they involve what only can be knowing, rather than inadvertent,[68] judicial disregard of an agency interpretation's longevity—strikingly illustrates federal courts' confused, chaotic approach to the review of longstanding agency interpretations.

C. Rejected

Finally, federal courts sometimes acknowledge that an agency interpretation is longstanding but refuse outright to defer to it. In such cases, courts give varying reasons for why an interpretation's longevity should not weigh heavily in their deference analysis. For example, in cases where Congress has reenacted the relevant statute without disturbing the agency's interpretation, courts insist that the reenactment was not meaningful—either because Congress focused on matters unrelated to the agency interpretation or because Congress never expressly referenced the agency interpretation during the course of reenactment.[69] The Supreme Court's statements in *Aaron v. SEC*[70] are illustrative:

> Congress was expressly informed of the Commission's interpretation on two occasions when significant amendments to the securities laws were enacted . . . and on each occasion Congress left the administrative interpretation undisturbed. *But, since the legislative consideration of those statutes was addressed principally to matters other than that at issue here*, it is our view that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction of § 10(b) so clearly at odds with its plain meaning and legislative history.[71]

Consider how different such cases sound from those in Part I.A in which courts state that a longstanding interpretation that Congress fails to disturb during reenactment should be entitled to "particular deference."[72] Indeed, many of the afterthought cases discussed in Part I.A also involved a congressional reenactment that focused on matters not directly related to the agency interpretation, and almost none of the cases involved express

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statute, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *City of Milwaukee*, 451 U.S. at 347 (Blackmun, J., dissenting); *Abebe*, 554 F.3d at 1210 (Clifton, J., concurring in part); Garcia v. Brockway, 526 F.3d 456, 462 n.3, 468 (9th Cir. 2008); *Rose Mobile Homes LLC*, 298 F.3d at 490 (King, J. dissenting).

68. As discussed *supra* note 59 and the accompanying text, the majority must at least be aware of the vintage of the agency interpretations it is reviewing because concurring or dissenting opinions in these cases explicitly discuss the longevity of the interpretations.

69. Brown v. Gardner, 513 U.S. 115, 121 (1994) (makes no reference); Aaron v. SEC, 446 U.S. 680, 694 n.11 (1980) (unrelated matters); SEC v. Sloan, 436 U.S. 103, 121 (1978) (never expressly referenced); Legal Envtl. Assistance Found., Inc. v. EPA, 118 F.3d 1467, 1477 (11th Cir. 1997) (makes no reference).

70. 446 U.S. 680 (1980).

71. *Id.* at 694 n.11 (emphasis added) (citations omitted). For additional examples of cases in which federal courts have rejected longstanding agency interpretations, see Table 1 (listing nineteen such cases).

72. *See supra* note 44.

congressional mention of the interpretation at issue.[73] Further, courts on occasion have rejected a longstanding agency interpretation even when there were signs that Congress *had* expressly acknowledged and approved of the interpretation. In *SEC v. Sloan*,[74] for example, a committee report written during the reenactment process explicitly affirmed the SEC's interpretation—but the Supreme Court nevertheless refused to defer to that interpretation, stating, "We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents."[75]

The markers seem to keep moving in these cases. Because there is no established doctrine governing the significance of longstanding interpretations or of legislative reenactment that fails to disturb a longstanding interpretation, courts characterize the applicable rule differently from case to case. Illustratively, the case review conducted for this Article found thirty-five (of sixty-six) cases in which a federal court or a litigant noted some form of legislative acquiescence—which almost always involved a congressional reenactment or amendment that failed to undo the agency's interpretation.[76] Of these thirty-five cases involving legislative acquiescence, courts rejected the agency's interpretation in eleven and upheld it in twenty-four.[77]

Federal courts also openly reject longstanding agency interpretations on more general grounds, arguing that the interpretation does not deserve much weight because (1) it is inconsistent with the meaning ascribed to other, similar statutes; (2) it conflicts with substantive canons reflecting background judicial norms; (3) it contradicts the statute's supposedly plain text; or (4) the interpretation simply is unpersuasive.[78] In other words, they treat longevity as an interpretive factor that can be trumped by almost any other interpretive factor. The Second Circuit, for example, concluded in *Mayburg v. Secretary of Health and Human Services*[79] that sister circuits' decisions, dictionary definitions of the term at issue, practical

73. *See supra* note 44. *But see* Chemehuevi Tribe of Indians v. Fed. Power Comm'n, 420 U.S. 395, 410 (1975) (involving express congressional affirmation of agency's interpretation); Saxbe v. Bustos, 419 U.S. 65, 74 (1974) (same).

74. 436 U.S. 103 (1978).

75. *Id.* at 121.

76. *See* Table 1 (reporting twenty-eight cases involving reenactment or amendment, two involving rejected proposals).

77. *See* Table 1.

78. *See, e.g.*, Rapanos v. United States, 547 U.S. 715 (2006) (invoking statutory text, dictionary definitions, other similar statutes, the whole act rule, federalism canons of construction, and constitutional avoidance canon to reject longstanding interpretation); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248–51 (1991) (relying significantly on presumption against extraterritorial application of domestic statutes), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, 1078, 1079 (codified at42 U.S.C. § 2000e-5); Pub. Emps. Ret. Sys. of Ohio v. Betts, 492 U.S. 158, 170–72 (1989) (inconsistent with plain language of the statute), *superseded by statute*, Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990); Mayburg v. Sec'y of Health & Human Servs., 740 F.2d 100, 105–06 (1st Cir. 1984) (not persuasive enough).

79. 740 F.2d 100 (1st Cir. 1984).

considerations, and interpretive canons calling for liberal construction of the Social Security Act were "simply more persuasive" than the agency's longstanding interpretation.[80] The Supreme Court similarly ruled in *EEOC v. Arabian American Oil Co.*[81] that an eleven-year-old agency interpretation was unworthy of deference because its "persuasive value is limited."[82]

Contrast those cases with the Supreme Court's declaration in *Alaska Department of Environmental Conservation v. EPA*[83] that longstanding agency interpretations are entitled to "particular deference,"[84] or with the Third Circuit's statement in *Council Tree Communications, Inc. v. FCC*[85] that "courts 'give considerable weight to a consistent and longstanding interpretation by the agency' responsible for administering a statute."[86] Unless federal courts in the latter set of cases are being disingenuous when they ascribe extra force to longstanding interpretations, the two sets of cases are difficult to reconcile with each other. If longstanding interpretations are to receive "particular deference" or "considerable weight" rather than ordinary deference (or weight), then they must count somewhat more than other interpretive factors and tools that ordinarily are used to construe statutes. At the very least, they should not lightly be dismissed as "unpersuasive"—rather, rejecting them should require serious explanation. But that is not what the cases show; instead, the cases reveal easily overcome-able loose plus factor treatment of longstanding agency interpretations and correspondingly troubling inconsistencies—whether intentional or inadvertent—in the level of deference that courts afford to such interpretations.

A point of clarification may be in order here: this Article does not mean to suggest that federal courts are rejecting longstanding agency statutory interpretations at an alarmingly high rate. In fact, empirical evidence from one prominent study suggests that, at least at the Supreme Court level, agency statutory interpretations generally enjoy good rates of judicial deference (68.8 percent), and that longstanding agency interpretations enjoy slightly higher rates of deference still (73.2 percent).[87] And the evidence from this Article's case review shows similar rates of deference (69.7 percent, or forty-six of sixty-six cases).[88] But rates of deference do not tell the whole story. For one thing, the fact that overall rates of judicial deference to agency interpretations are strong makes it all the more noteworthy—and perhaps especially unprincipled—when federal courts reject a longstanding agency interpretation with little explanation. Further, as this Article's doctrinal analysis reveals, rates of deference can mask a

80. *Id.* at 102–06.
81. 499 U.S. 244 (1991).
82. *Id.* at 258.
83. 540 U.S. 461 (2004).
84. *Id.* at 487 (quoting Barnhart v. Walton, 535 U.S. 212, 220 (2002)).
85. 503 F.3d 284 (3d Cir. 2007).
86. *Id.* at 289 (quoting Int'l Union of Elec. Radio & Mach. Workers v. Westinghouse Electric Corp., 631 F.2d 1094, 1106 (3d Cir. 1980)).
87. *See, e.g.*, Eskridge & Baer, *supra* note 5, at 1148–49.
88. *See* Table 1.

lack of logical coherence or stability regarding the factors that should matter in determining the appropriate level of deference to a longstanding agency interpretation. In other words, because federal courts lack a coherent approach to the judicial review of longstanding agency interpretations, their treatment of such interpretations has been substantively erratic and inconsistent across cases, providing no measures to ensure that the appropriate factors are taken into account—or that any factors consistently are taken into account—in deciding whether to respect longstanding agency judgments. For example, the length of time that an interpretation has been in effect does not provide any consistent guide as to how a federal court will treat the interpretation. As Table 1 shows, in approximately one-fourth of the cases reviewed for this Article (seventeen of sixty-six), federal courts rejected an agency interpretation that had been in place for over ten years, and twelve of those interpretations had been in effect for *over twenty years*.[89] Further, out of seven agency interpretations that had been in place for less than ten years at the time of judicial review, courts rejected three and upheld four; and out of six agency interpretations that were in place for less than fifteen years, federal courts rejected three and upheld three.[90] Other rejected interpretations had been in effect for anywhere from sixteen to sixty-nine years.

Nor does the identity of the agency responsible for the interpretation, the form of the agency's interpretation, or the reasons that motivate a particular challenge to an interpretation seem to play any consistent role in federal courts' deference analysis. Again, as Table 1 shows, in the cases reviewed for this Article, federal courts rejected twenty longstanding agency interpretations and ignored-but-upheld two. Of the rejected interpretations, seven involved agency constructions that took the form of a regulation, five involved agency adjudications, three involved constructions printed in an agency handbook or policy manual, three constructions were formulated as part of an agency's litigation position, and four involved agency constructions that took some other form (such as an interpretive rule).[91] In terms of agency identity, the closest thing to a pattern that emerges is the federal courts' handling of EEOC interpretations—but even then the data demonstrates inconsistency. Of twenty rejected longstanding interpretations, three were made by the EEOC,[92] and both of the two ignored-but-upheld interpretations were supported, if not made in the first instance, by the EEOC.[93] On the other hand, two longstanding interpretations rendered by the EEOC were upheld.[94]

89. Table 1.

90. Table 1.

91. *See* Table 1.

92. *See* Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863 (2011); W. Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) (upholding interpretation made by the Department of Labor and later adopted by the EEOC).

93. *See* Sutton v. United Air Lines, Inc. 527 U.S. 471 (1999); EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991); Pub. Emps. Ret. Sys. of Ohio v. Betts, 492 U.S. 158 (1989).

94. *See* Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011); Smith v. City of Jackson, 544 U.S. 228 (2005).

Nor, as Table 2 indicates, did the reason motivating litigants' challenge to an agency interpretation seem to affect federal courts' deference analysis. The most common reasons behind challenges to an agency's longstanding statutory construction were litigant "attempts to obtain or increase a government benefit" and "employer defenses to claims of a statutory violation."[95] Federal courts were uneven in their review of such challenges, upholding them two-thirds of the time and rejecting them one-third of the time. Even when the reason for a challenge was that factual circumstances (such as technology) or the surrounding law had changed so much as to render the agency interpretation outdated—a seemingly strong reason for overriding a longstanding agency construction—federal courts were inconsistent in their judicial review, rejecting the construction in two cases, ignoring its longevity but upholding it in one, and upholding the construction despite changed circumstances in five cases.[96] In fact, the only somewhat consistently handled categories of agency challenges were (1) those involving challenges to the agency's authority or in which litigants insisted upon judicial review of a particular form of agency decision and (2) challenges to a new agency regulation based on a longstanding agency position; for both categories of challenges, federal courts routinely upheld the agency's interpretation.[97]

Given the above, this Article's primary concern is not so much with increasing the *number* of longstanding agency interpretations that receive judicial deference (although if longstanding agency interpretations deserve to be treated like legal precedents, then federal courts' failure to uphold them in nearly one-third of the cases could be considered problematic), but with remedying the doctrinal disarray and inconsistency that has resulted from the current lack of a coherent theoretical framework for the judicial review of such interpretations. To that end, Part III provides suggestions for simplifying and regularizing the judicial review of longstanding agency interpretations.

Before turning to the proposals in Part III, however, it is worth pausing to consider the mismatch between the chaotic judicial treatment of longstanding agency statutory interpretations and the heightened deference that courts afford to longstanding *judicial* interpretations of statutes[98] and to historical practices of the executive branch when confronting questions of *constitutional* interpretation.[99] As the next part discusses, the theoretical assumptions that underlie heightened deference to established judicial interpretations of statutes and to established practice by the executive in constitutional interpretation also support at least some form of precedential effect or heightened presumption in favor of longstanding *agency* interpretations of *statutes*.

95. *See* Table 2.
96. *See* Table 2.
97. Table 2. For additional examples and reasons, see Table 3.
98. *See supra* note 20 and accompanying text.
99. *See infra* notes 107–11 and accompanying text.

II. STATUTORY STARE DECISIS AND HISTORICAL EXECUTIVE PRACTICE: ASSUMPTIONS AND ANALOGIES

Institutional precedent and past practice are revered metrics in the law. As every first-year law student learns, custom and past practice play a significant role in common law analysis, and prior judicial decisions are treated as binding on future courts under the principle of stare decisis. But beyond the fundamental respect for past practice and precedent that undergirds the legal system, courts accord special effect to two forms of institutional precedent that are close analogues to longstanding agency statutory interpretations: prior judicial interpretations of statutes and historical executive practice in matters that implicate the separation of powers. With respect to the first, the Supreme Court has adopted a tiered hierarchy of stare decisis for different kinds of judicial precedent.[100] Under this hierarchy, common law precedents enjoy a strong presumption of correctness; constitutional precedents receive a weaker presumption of correctness because the difficulty of amending the Constitution makes the Court the only institution that effectively can correct interpretive mistakes; and statutory precedents receive a super-strong presumption of correctness because Congress rather than the Court has the power and obligation to correct mistakes in this area.[101] Indeed, the general rule is that the Supreme Court will not overrule its own statutory precedents even when a majority of its current members believes the original interpretation to be incorrect.[102]

The classic example of strict adherence to statutory precedent is *Flood v. Kuhn*,[103] a 1972 case in which the Court refused to interpret the Sherman Act to apply to professional baseball because of two longstanding Supreme Court precedents that had held that baseball was not interstate commerce under the Act.[104] Despite changes in the way professional baseball was exhibited and marketed and intervening Supreme Court decisions applying the Sherman Act to other professional sports including football and hockey, the Court insisted on adhering to its original interpretation: "We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long . . . ."[105]

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100. *See* Eskridge, *supra* note 20, at 1362.

101. *See id.*

102. For examples of the Supreme Court's refusal to overrule arguably outdated statutory precedents, see *Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986); *Miller v. Fenton*, 474 U.S. 104 (1985); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); Cleveland v. United States, 329 U.S. 14 (1945). This is not to say that the Court never overrules statutory precedents—it does—but such overrulings occur infrequently, usually with an explanation that one of the traditional theoretical reasons justifying stare decisis does not apply. *See* Eskridge, *supra* note 20, at 1368–69 (finding that from 1961 to 1986 the Supreme Court overruled its own statutory precedents twenty-six times, or once per term, and when it did so it often justified the overruling based on lack of public or private reliance or on Congress's decision to leave development of the particular statutory scheme to the courts).

103. 407 U.S. 258 (1972).

104. *Id.* at 283–84.

105. *Id.*

The same could be said for agency interpretations of statutes that Congress has allowed to stand for several years. This is particularly so because, as discussed below, there is evidence that Congress itself is much more attuned to agency statutory interpretation than to judicial statutory interpretation.[106] Accordingly, it could be argued that Congress's failure to overturn a longstanding agency interpretation should be given at least as much weight as its failure to overturn a longstanding judicial construction.

In addition, as Curtis Bradley and Trevor Morrison recently have highlighted, courts and commentators regularly defer to past executive practice when interpreting the scope of executive power under the Constitution.[107] Judicial recognition of a practice-based "gloss" on constitutional interpretation reaches back at least as far as Justice Frankfurter's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,[108] which observed that

> a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.[109]

Again, the same can be said for executive branch interpretations made by administrative agencies. Historical executive practice "gloss" also has roots in Justice Jackson's more famous concurring opinion in *Youngstown*. Jackson's concurrence articulated a three-tiered framework for evaluating the scope of presidential power, providing that the President's power is at its maximum when supported by express or implied congressional authorization, at its lowest when contradicted by Congress's express or implied position, and in an in-between "zone of twilight" when Congress has neither granted nor denied the President's authority to act.[110] Regarding the middle zone, Jackson argued that "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[111]

As these excerpts from *Flood* and *Youngstown* suggest, part of the theoretical justification for statutory stare decisis and deference to past executive practice is presumed legislative acquiescence in the judiciary's and executive's longstanding interpretations. Courts and commentators

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106. *See* discussion *infra* Part II.A.

107. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 418 (2012). One prominent example includes the Supreme Court's reliance on "long practice under the pardoning power and acquiescence in it" to conclude that the President's pardon power extends to a contempt of court conviction. *See Ex parte* Grossman, 267 U.S. 87, 118–19 (1925). For additional examples, see Bradley & Morrison, *supra*, at 419 n.17.

108. 343 U.S. 579 (1952).

109. *Id.* at 610–11 (Frankfurter, J., concurring).

110. *Id.* at 637 (Jackson, J., concurring).

111. *Id.*

also offer other theoretical grounds for deference to these two forms of institutional precedent, including: soundness, institutional competence, and reliance interests. This part examines the theoretical assumptions that underlie federal courts' heightened deference to judicial interpretations of statutes and to executive practice in the separation of powers context and argues that these assumptions support at least some form of precedential effect for longstanding agency statutory interpretations as well.

A. Acquiescence

The acquiescence argument for statutory stare decisis is grounded in Congress's power to override judicial interpretations with which it disagrees. Because Congress is the creator of statutory text, it has the ability to amend that text in response to judicial interpretations that run counter to its intended statutory meaning. Congressional failure to respond to a particular judicial interpretation thus is taken as a sign of legislative acquiescence in, or ratification of, that interpretation.[112] "If Congress does not amend the statute to overrule the statutory precedent, and especially if it reenacts the statute without changing the operative language, it is presumed that Congress 'approves' of the interpretation."[113] William Eskridge has theorized that what is going on in these acquiescence cases is not so much a judicial assumption that Congress affirmatively approves of any judicial interpretation that it fails to override but, rather, a judicial choice to place the burden on Congress to respond to any judicial interpretations with which it disagrees.[114] Viewed in this light, the presumption of acquiescence is a default rule of sorts, not a presumption about *actual* congressional intent.

Reliance on past executive practice in separation of powers analysis rests on a similar presumption of congressional acquiescence in the executive's actions. As Curtis Bradley and Trevor Morrison have shown, claims about acquiescence in this context variously cast Congress's failure to object to executive branch actions as a reflection of interbranch agreement about the legality of the executive's practice, as a waiver of Congress's institutional prerogatives, or as a sign that the executive's actions are unlikely to threaten the basic balance of power between the legislative and executive branches.[115]

These acquiescence arguments apply with at least equal force to longstanding agency interpretations of statutes. As detailed below, Congress oversees agency actions much more closely than it does judicial decisions—and has available several mechanisms for expressing disapproval of agency statutory interpretations that it does not possess vis-

112. *See* Eskridge, *supra* note 20, at 1366–67.
113. *Id.*
114. *See* William N. Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 108 (1988).
115. *See* Bradley & Morrison, *supra* note 107, at 433–36.

à-vis the judiciary or the President acting under his Article II powers.[116] Thus, when Congress fails to counteract an agency statutory interpretation, the above assumptions about interbranch agreement, relinquishment of institutional prerogatives, and the like are at least equally appropriate.

It bears noting that the assumption of legislative acquiescence is somewhat controversial. In the contexts of statutory stare decisis and longstanding executive practices, it has been criticized as reflecting an unrealistic vision of the legislative process. Several scholars have detailed the difficulty of ascertaining a collective legislative intent and the legislative process hurdles that make congressional inaction far more likely than congressional action, rendering it nearly impossible to ascribe legal meaning, even perhaps as a default, to Congress's failure to act.[117] Bradley and Morrison similarly have identified structural and political realities that leave Congress unlikely to raise significant challenges to executive practices that overstep constitutional boundaries—including the President's veto power, free rider problems, congressional obsession with reelection, and members' allegiance to political parties rather than to Congress as an institution.[118]

However, most of the legislative process criticisms leveled against presumed acquiescence in the context of judicial interpretations and historical executive practice gloss are significantly dampened in the context of longstanding agency interpretations. There are two institutional reasons for this: (1) the Congressional Review Act[119] (CRA), and (2) the numerous "soft law" tools that Congress has available to influence agency action. These two features of the administrative process provide Congress with far greater notice, opportunity, and power to respond negatively to improper agency statutory interpretations than it possesses with respect to judicial interpretations or to presidential exercises of power under Article II.[120] First, the CRA gives Congress the ability to reject specific administrative action—including agency statutory interpretations—through expedited procedures.[121] The CRA requires that before any administrative rule can take effect, the promulgating agency must submit a report with the text of the rule and the rule's concise general statement of basis and purpose to

116. *See infra* notes 120–35 and accompanying text.

117. *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994); Eskridge, *supra* note 114, at 98–100; Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Stare Decisis*, 88 MICH. L. REV. 177, 184–196 (1989); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930); Daniel L. Rotenberg, *Congressional Silence in the Supreme Court*, 47 U. MIAMI L. REV. 375, 375 (1992); Cass Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 925 (2003).

118. *See* Bradley & Morrison, *supra* note 107, at 440–44. Bradley and Morrison recognize, however, that Congress possesses several "soft law" tools for pushing back against the executive branch that are not subject to these constraints. *Id.* at 446.

119. 5 U.S.C. §§ 801–808 (2012).

120. *See* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 606–607 (2008).

121. *See* Congressional Review Act, 5 U.S.C. §§ 801–808.

each house of Congress and the Comptroller General.[122] The rule cannot go into effect until at least sixty days after Congress receives the report.[123] During that sixty-day period, the Act provides expedited procedures for resolutions opposing the rule to travel to the floor of each house of Congress for votes.[124] The Act thus ensures that Congress receives notice of each and every agency interpretation that is made through a rule,[125] and gives Congress ample opportunity—including a streamlined legislative process—through which to disapprove interpretations that it does not like. One administrative law scholar has opined that "[b]y enacting this statute, Congress has taken responsibility for supervising agency rulemaking and, in a sense, is lending its authority to those rules that it does not overrule under the procedure."[126] At a minimum, the Act's congressional review procedures decrease the likelihood that inertia or structural hurdles in the legislative process will prevent Congress from expressing disagreement with an agency interpretation contained in a rule. In so doing, the CRA increases the likelihood that agency interpretations left intact for years by Congress reflect congressional acquiescence—or at least lend legitimacy to default rules that make this assumption.[127]

Second, Congress possesses several "soft law" tools for influencing agency behavior. For example, Congress has the power to place restrictions on the appointment and removal of agency personnel, to specify substantive or procedural restrictions on agency authority in an agency's enabling statute, to control an agency's budget through the appropriations process, to conduct oversight hearings scrutinizing agency behavior, and to impose deadlines on agency action. More informally, members of Congress can influence agency behavior through unofficial calls, letters, and other ex parte contacts with agency officials.[128] As Jack Beermann has noted:

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122. *See id.* § 801(a)(1)(A).

123. *See id.* § 801(a)(3).

124. *See id.*

125. The CRA applies not only to rules adopted through the notice-and-comment process, but also to policy statements, interpretative rules, and agency guidance manuals. The CRA defines the term "rule" to have the same meaning as the term "rule" in the Administrative Procedure Act. *See* 5 U.S.C. § 804(3). The APA in turn defines "rule" in a manner that seems to include regulatory actions such as interpretative rules, technical amendments, and policy statements. *See id.* § 551(4); *see also* Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 96–97, 102 (1997).

126. Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 84 (2006).

127. It might be argued that the CRA was not enacted until 1995 and that agency interpretations that pre-date the Act thus are subject to the same legislative process hurdles as judicial interpretations. This argument overlooks two important factors. First, before the CRA, Congress regularly used the legislative veto to express disapproval of agency interpretations. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 496 (1st ed. 1988); LOUIS FISHER, THE POLITICS OF SHARED POWER 92–103 (1981). Second, the "soft law" tools available to Congress (discussed below) have long been in place and have provided ample other avenues for the expression of congressional disapproval.

128. *See generally* CHRISTOPHER H. FOREMAN, JR., SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION (1988); *see also* John Copeland Nagel, *Corrections Day*, 43 UCLA L. REV. 1267, 1286 (1996).

> In addition to formal supervision, Congress, or at least small groups and individual members of Congress, supervise agencies informally. Informal supervision also takes a variety of forms, including cajoling, adverse publicity, audits, investigations, committee hearings, factfinding missions, informal contacts with agency members and staff, and pressure on the President to appoint persons chosen by members of Congress to agency positions.[129]

Congress also, of course, can simply threaten legislative action to overturn an agency's interpretation if the agency does not change the interpretation itself—something that is much more difficult to do vis-à-vis a court that has issued a statutory interpretation that Congress does not like.

Notably, the "soft law" tools described above can be employed both before and after an agency interpretation goes into effect, and so can influence agency statutory interpretations even *before* they are adopted. Moreover, because these tools often operate through threats and signaling,[130] they, like the CRA review mechanism, allow Congress to avoid many of the procedural hurdles that can impede the formal overruling of a judicial interpretation.

And in fact, there are several examples of instances where Congress has used "soft law" tools to influence agency action in a manner that would not be possible with the judiciary or the President. Consider the FTC's proposed changes to the "Made in USA" labeling requirements in the 1990s.[131] In response to an FTC proposal to lower the percentage of a product that must be manufactured in the United States in order to qualify for the label, over 200 members of the House cosponsored a resolution opposing the proposed guidelines and urging the commission to maintain its existing standards;[132] the FTC ultimately abandoned its proposed changes citing congressional opposition as a factor.[133] Another example involves Congress's use of appropriations riders in the 1980s to bar the executive branch from taking any action to change the per se rule prohibiting resale price maintenance agreements in antitrust law.[134] The appropriations rider, like many others of its kind, prohibited the expenditure of any funds for carrying out the disapproved change in antitrust rules.[135]

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129. Beermann, *supra* note 126, at 70.

130. *See id.*

131. *See* 60 Fed. Reg. 53,922 (Oct. 18, 1995).

132. *See* H.R. Con. Res. 80, 105th Cong. (1997); 62 Fed. Reg. 63,756, 63,758 (Dec. 2, 1997); *see also* S. Con. Res. 52, 105th Cong. (1997) (urging retention of the "all or virtually all" standard).

133. *See* 62 Fed. Reg. 63,756, 63,756, 63,758 (Dec. 2, 1997) (discussing H.R. Con. Res. 80, 105th Cong. (1997)).

134. *See* J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2079–80 & n.6 (1989) (citing Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1984, Pub. L. No. 98-166, 97 Stat. 1071, 1102 (1983)). For further examples of Congress's use of "soft law" to influence agency action, see Beermann, *supra* note 126, at 85–90; Gersen & Posner, *supra* note 120, at 606–07; Jamelle Sharpe, *Judging Congressional Oversight*, 65 ADMIN. L. REV. 183 (2013).

135. Pub. L. No. 98-166 § 510, 97 Stat. 1071, 1102 (1983).

The upshot of these congressional soft law tools is that they give Congress many effective avenues outside the ordinary legislative process through which to object to agency statutory interpretations and implementations with which it disagrees—avenues that Congress lacks vis-à-vis the judiciary or the executive in the constitutional interpretation context. These soft law tools thus form a much stronger foundation than exists in the statutory stare decisis or executive practice gloss contexts for a presumption that when Congress has left an agency statutory interpretation in place for years, its failure to object reflects congressional acquiescence in the interpretation.

New empirical evidence based on interviews with congressional staffers supports this idea. In a recent study, Abbe Gluck and Lisa Bressman found that the congressional staffers who draft statutory language view agencies, rather than courts, as the primary interpreters of statutes.[136] Staffers reported paying significant attention to agency statutory interpretations, including to the longevity of an interpretation, and communicating with agencies about their interpretations after enactment.[137] Staffers viewed judicial interpretation of statutes much more warily, calling them a "last resort."[138]

B. Soundness

A second theoretical assumption, related to acquiescence, that underlies statutory stare decisis and the use of historical practice in separation of powers cases is that an interpretation's survival for a long period of time provides some evidence that it is sound, in the sense that it is workable. The Supreme Court has acknowledged this assumption in passing, observing that, "To be sure, agency interpretations that are of long standing come before us with a certain credential of reasonableness, *since it is rare that error would long persist*."[139] The assumption also is philosophically consistent with the Burkean preference for longstanding understandings and traditions that pervades much of the United States' political and legal system. Burkeanism values past practice in part because such practice is

136. Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part II*, 66 STAN. L. REV. 725, 728 (2014).

137. *Id.* at 38; Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 STAN. L. REV. 901, 1000 (2013).

138. Bressman & Gluck, *supra* note 136, at 773.

139. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740 (1996) (emphasis added) (making this observation in passing in the context of an agency interpretation that was neither longstanding nor contemporaneous with the enactment of the relevant statute); *see also* Udall v. Tallman, 380 U.S. 1, 17–18 (1965) ("[O]fficers, lawmakers, and citizens naturally adjust themselves to any longcontinued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice." quoting United States v. Midwest Oil, 236 U.S. 459, 472–73 (1915))).

believed to reflect a collective wisdom generated by the judgments and experiences of numerous actors over time.[140]

As Thomas Merrill has noted, unworkable statutory interpretations

> generate discontent that may result in congressional overruling, or modification or repudiation by the court that initially offered the interpretation. The fact that none of this has occurred is circumstantial evidence that the interpretation does not impose undue costs on regulated entities or frustrate the basic objectives of the proponents of the legislation.[141]

In other words, the fact that multiple actors in multiple branches acting over a period of several years have left a statutory interpretation intact suggests that the interpretation is workable as a practical matter and performs well within—or at least is not inconsistent with—our legal and political system. The interpretation has been tested over time, in a variety of contexts, and has been found to be sound or, at least, good enough to leave in place.[142] This presumption of soundness also has much in common with the theory that the common law tends toward efficiency because inefficient rules will be challenged—and overturned—more often than efficient ones.[143]

The presumption, moreover, applies at least equally to longstanding agency interpretations as it does to established judicial interpretations of statutes or established presidential practices regarding the constitutional separation of powers. The various "soft law" tools that Congress possesses vis-à-vis administrative agencies provide numerous checks on agency interpretations and make it likely that problematic interpretations will be subjected to revision. Even more importantly, agencies themselves have significant expertise and practical experience with the consequences of their statutory interpretations; if something is not working, they have ample opportunity and incentive to change the interpretation themselves. Indeed, the administrative state is designed precisely to put expert regulators in charge both of interpreting and enforcing statutes—which means that if a statutory interpretation or implementation is not working well, agency personnel often will be the first to realize this and seek to fix the problem.

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140. *See generally* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE AND THE RIGHTS OF MAN (Dolphin ed. 1961) (1790). For discussions about the influence that Burkean philosophy has had on constitutional interpretation see, for example, Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509 (1996); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006); Ernst Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

141. Merrill, *supra* note 3, at 1018.

142. *Cf.* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 892 (1996) (advocating "common law constitutionalism," an approach that involves an incremental interpretation of the Constitution in light of both judicial precedent and tradition and that is deferential to the "accumulated wisdom of many generations" and to practices that "have been tested over time, in a variety of circumstances, and have been found to be at least good enough").

143. *See, e.g.*, William M. Landes & Richard A. Posner, *Adjudication As a Private Good*, 8 J. LEGAL STUD. 235, 260–61 (1979); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 73–75 (1977); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 53 (1977).

Conversely, where agency administrators familiar with the practical effects of an interpretation over the years have seen fit to leave that interpretation undisturbed for a decade or more, the administrators' judgment serves as some evidence that the interpretation is a sound and workable one.

C. Institutional Competence

Heightened stare decisis effect for judicial interpretations of statutes is also justified based on the notion that changes in a statutory interpretation are (or appear to be) more policy-based than initial interpretations, and that it is better for policy change to come from Congress than from the judiciary. The reasoning is that a change in a longstanding statutory interpretation is tantamount to a new legal rule or policy, and it is inappropriate for courts rather than the legislature or the executive—i.e., the political branches—to impose new legal rules and policies.[144] The argument, which builds on some of the insights of comparative institutional analysis,[145] rests on an assumption that Congress, as an elected, political institution, is better situated than the courts to understand the costs that a change of policy will entail and to determine whether the benefits are worth the costs. In other words, the judicial interpretation is treated as fixed because once a statutory meaning has been settled, the legislature is considered to be more institutionally competent than the judiciary to decide whether and when that meaning should be altered.

This presumption of institutional competence is even stronger in the context of longstanding agency statutory interpretations. In the case of such interpretations, the statute's meaning has been settled by an agency rather than the courts, not simply because the agency was the first in time to construe the statute, but because the agency's interpretation has been left in place and has controlled for several years. Any judicial opinion that rejects a longstanding agency interpretation necessarily will work a change in statutory policy by undoing years of established agency practice. As in the statutory stare decisis context, it follows that Congress is institutionally better situated than the courts to evaluate the costs associated with such switches in policy and to decide whether and when the costs are worth incurring. Further, if Congress decides that a change in policy is appropriate, it can establish transition rules to mitigate any switching costs in a manner that courts cannot. Thus, if Congress has not seen fit to

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144. *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 531 (1988) (Stevens, J., dissenting); Eskridge, *supra* note 20, at 1366; William J. Fenrich, Note, *Common Law Protection of Individuals' Rights in Personal Information*, 65 FORDHAM L. REV. 951, 975–76 (1996) ("This conception of the judicial role acknowledges the lawmaking function of judges but simultaneously imposes restraints on their ability to craft new legal rules . . . out of respect for 'the tenet of democratic theory that lawmakers should be accountable to the electorate.'" (quoting Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 230 (1981)).

145. *See, e.g.*, NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (Univ. of Chi. Press 1994).

overrule an agency's statutory interpretation, the courts should be reluctant to do so in its stead.

More importantly, administrative agencies are themselves political, policymaking institutions. Their statutory interpretations are to a large extent policy decisions. From the realm of possible statutory constructions, agencies choose one that makes sense as a matter of available empirical data, executive branch political preferences, practical feasibility, and other similar considerations.[146] The Court's opinion in *Chevron* recognized as much, acknowledging throughout that agency administration of a statute involves "the formulation of policy,"[147] "reconciling conflicting policies,"[148] and reflects "the incumbent administration's views of wise policy."[149] As policymaking institutions, agencies possess significant capacity to weigh the benefits against the costs created by a change in a longstanding statutory interpretation. Courts, whose expertise is in legal analysis, are particularly ill-positioned to upset such agency decisions. Agencies also possess technical expertise and on-the-ground experience with the practical consequences of their statutory interpretations. Thus, they are institutionally competent to make changes to their own longstanding statutory interpretations and any necessary changes can and should be expected to come from them. Where, instead, an agency has stuck with an interpretation over several years, through changes in presidential administrations and attendant policy shifts, and after observing how the interpretation works in practice, that is significant and should give courts contemplating an override of the interpretation serious pause. Indeed, a judicial decision to reject an agency's statutory interpretation under such circumstances amounts, as a practical matter, to a policy change imposed by the branch least competent to make such changes—over the heads of the other two branches. This Article advocates affording precedential effect to longstanding agency interpretations in part as a mechanism for forcing courts to think seriously before imposing such policy changes.

A more formal version of the institutional competence argument is the idea that a judicial interpretation becomes part of what the statute means in some fundamental sense—a statutory amendment, in effect—so that any change in the interpretation is legislative in nature and should come from Congress. The Supreme Court articulated this view long ago, observing that a longstanding interpretation of a statute is "part of the warp and woof of the legislation" and should not be disturbed except by Congress.[150] Scholar Frank Horack elaborated upon the "warp and woof" idea, positing that

146. *See* Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 141 (2011).
147. Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984).
148. *Id.* at 865.
149. *Id.*
150. *See* Francis v. S. Pac. Co., 333 U.S. 445, 450 (1948).

> when the decision is made the statute to that extent becomes more determinate, or, if you will, *amended* to the extent of the Court's decision. . . . After the decision, whether the Court correctly or incorrectly interpreted the statute, the law consists of the statute *plus* the decision of the Court. . . . Even assuming that the prior interpretation was incorrect, if the Court now reverses the position it took in the first case it is affirmatively changing an established rule of law under which society has been operating. This is explicitly and unquestionably the exercise of a legislative function.[151]

Horack further criticized judicial changes of interpretation on the ground that they occur "without any of the safeguards normally surrounding legislative action"—citing electoral accountability, bicameralism, presentment, and advance ventilation of interested parties' opinions before Congress and the press as among those safeguards.[152] This "effective amendment" version of the argument treats the initial interpretation as a part of the statute and insists not merely that changes in that interpretation *should* come from Congress (because of its superior institutional capacity for making policy decisions), but that any interpretive change *must* come from Congress in order to be legitimate.

Shades of the "effective amendment" theory also appear in separation of powers cases involving historical executive practice–based "gloss" arguments. In the 1990s, for example, some scholars and the Restatement of Foreign Relations took the position that congressional-executive agreements were interchangeable with Article II treaties because decades' worth of post-World War II practice had treated them as such.[153] Although other scholars disagreed with this interchangeability position substantively, almost all accepted the validity of looking to historical practice to help illuminate the issue. Indeed, most of the scholarly disagreement was over the meaning of the relevant historical practice.[154]

The "effective amendment" argument may not seem, at first blush, to apply neatly to agency statutory interpretations because—at least after *Chevron*—agency interpretations are subject to change by the agency itself, without congressional action.[155] But in the case of *longstanding* agency statutory interpretations, which the agency has chosen not to override

151. Frank E. Horack, Jr., *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEX. L. REV. 247, 250–51 (1947).

152. *See id.* at 251–52.

153. *See* Bradley & Morrison, *supra* note 107, at 471 & n.264 (quoting Letter from Bruce Ackerman, Professor, Yale Law Sch., and David Golove, Professor, Univ. of Ariz. Coll. of Law, to William Clinton, President 3 (Sept. 21, 1994) (on file with the Harvard Law School Library)) ("After a half-century of successful use of the Congressional-Executive Agreement, it is far too late to question Congress' powers under Article [I]."); *id.* at 470 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303, cmt. e (1987)).

154. *See id.* at 469–70.

155. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984) ("An initial agency interpretation is not instantly carved in stone. . . . [T]he agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").

despite its ability to do so, the agency's interpretation, like a judicial interpretation, amounts to an established rule of law under which society operates. It is part of the "warp and woof" of the public's understanding of a statute, as translated into regulations, administrative rulings, or other agency action. It also, of course, represents the executive branch's longstanding practice under the relevant statute. Judicially imposed changes to longstanding agency interpretations—after such interpretations have been in place for a decade or more—thus change the law, as a practical matter, as much as would an override of an initial judicial interpretation or a declaration that the executive branch's historical practice is unconstitutional. Moreover, judicial changes to longstanding agency interpretations, like judicial overrides of a court's own prior statutory interpretations, occur without any of the procedural and accountability safeguards that exist when the legislature (and to some extent an agency itself)[156] decides to alter an existing statutory interpretation. When a court changes a longstanding agency construction, there is no electoral accountability, no interbranch consent akin to bicameralism or presentment, and little opportunity for interested parties to express their views about the change.[157] Accordingly, the consequences of overturning longstanding agency interpretations that have "effectively amended" a statute are as significant as the consequences of overturning judicial interpretations of statutes or executive branch constitutional interpretations. As such, longstanding agency interpretations too should be entitled to precedential effect—and judicial doctrine should impose a high bar before courts can reject such interpretations. Agencies themselves, like Congress, should remain free to change their own longstanding interpretations, however, for the institutional competence reasons discussed above.

D. Reliance Interests

Another significant justification underlying strict adherence to judicial precedent in general, and statutory stare decisis in particular, is that adherence to precedent promotes stability and predictability in the law and protects private and congressional reliance interests. Private parties may, over time, shape their behavior around a judicial precedent such that a sudden or significant change in the applicable legal rule could be costly and unfair to them. Similarly, Congress itself may rely on a judicial interpretation of a statute when formulating related legal rules. That is,

156. In the rulemaking context, an agency change in interpretation requires notice and comment and thus provides for ventilation in a public forum, affording interested parties an opportunity to make their opinions known in advance of an interpretive change. Interpretive changes made through adjudications or other agency policy channels do not necessarily offer such advance opportunities for ventilation, though interested parties may still be able to voice their opinions to agency officials through amicus briefs, petitions, or other communications with agency personnel after the change has been adopted—something that is not possible with a judicially imposed interpretive change since the judiciary does not have direct contact with those affected by its decisions.

157. Amicus briefs provide a limited forum for interested parties to voice their concerns, but they do not provide a public airing.

Congress may build upon the legal rule established by an existing judicial interpretation.[158] Overruling an established judicial interpretation could, therefore, "unsettle a vast cluster of public and private expectations."[159]

Both of these reliance concerns are implicated by longstanding agency interpretations as well. Private parties can and do shape their behavior around administrative regulations and adjudicative orders. They arguably should be aware that agency policies can change, so that a well-ventilated, prospective change in an agency rule—one that occurs after a full notice-and-comment procedure or with the benefit of other warnings, and that does not apply retroactively—might be fair game. But a sudden, unexpected judicial rejection of a longstanding agency interpretation implicates all of the same private reliance concerns as an overruling of one of the Court's own statutory precedents.

Similarly, Congress is aware of existing agency practices and rules and sometimes shapes new statutes or amends existing ones to reflect longstanding agency interpretations. In addition, other administrative agencies, both on the federal and state levels often shape their rules to work alongside the established, longstanding interpretation of an agency with jurisdiction over similar matters.[160] In such cases, a court's refusal to defer to a longstanding agency interpretation of a statute could upset multiple related legal frameworks.

There is, of course, an important flip side to the reliance-based justification for adherence to statutory precedents: the underrepresentation of certain groups in the legislative process and the possibility of agency capture. As public choice scholarship has emphasized, interest groups influence much of the legislative—and administrative—agenda.[161] Moreover, our political system tends to respond best to wealthy, well-organized interests and to ignore or pay little attention to the needs of disadvantaged and diffuse groups who lack political clout.[162] These

158. *See* Eskridge, *supra* note 20, at 1367; Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 523–40 (1948).

159. *See* Eskridge, *supra* note 20, at 1367 (citing Levi, *supra* note 158, at 523–40).

160. *Cf.* Brief of the States of New York, et al. as Amici Curiae Supporting Respondents, Rapanos v. United States, 547 U.S. 715 (2006) (Nos. 04-1034, 04-1384), 2006 WL 139208, at *3 [hereinafter Brief of 33 States] (urging the Court to uphold agency's longstanding interpretation because "over the past three decades, the States have come to rely on the Clean Water Act's core provisions and have structured their own water pollution programs accordingly").

161. *See, e.g.*, Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34–41 (1998).

162. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (Harvard Univ. Press 1971); Croley, *supra* note 161, at 34–41; Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 883–906 (1987) (discussing public choice theory in legislation); Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1050 (1997) (describing the tendency for administrative agencies to become captured by businesses they regulate at the expense of other groups); Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50, 68 (1987); Sidney A. Shapiro, *Keeping the Baby and Throwing Out the Bathwater: Justice Breyer's Critique of Regulation*, 8 ADMIN. L.J. AM. U. 721, 722 (1995); Cass R.

political realities combine to create the possibility that (1) the reliance interests protected by deference to longstanding agency interpretations will be one-sided, and (2) neither the legislature nor the relevant administrative agency will be motivated to change a statutory interpretation that harms a diffuse or politically disadvantaged group. In such cases, the institutional competence and soundness assumptions would be compromised and a judicial or agency statutory interpretation could be left in place for years—becoming longstanding—despite having pernicious consequences. Further, there is a danger that an agency might become beholden to wealthy interests under its regulatory jurisdiction and seek to adopt statutory interpretations that protect those interests at the expense of the interests of politically disadvantaged or unorganized groups. These public choice insights raise important concerns about the appropriate scope of any presumption in favor of longstanding agency statutory interpretations. But such concerns can be addressed, to some extent, by permitting the precedential effect of longstanding agency interpretations to be rebutted by evidence showing that a particular longstanding interpretation has had negative consequences for an underrepresented group.[163]

* * *

Notably, federal courts reviewing longstanding agency interpretations rarely discuss the theoretical assumptions elaborated above. The one exception is legislative acquiescence, which is at least mentioned in over half the cases reviewed for this Article.[164] Reliance, workability, and institutional competence arguments show up in only a handful of the cases.[165] Because courts have failed to develop a coherent theory about how to treat longstanding agency interpretations, they are ignoring important factors in the judicial review of such interpretations. One benefit of a more systemized approach, like the precedential effect proposed below in Part III, is that it should direct reviewing courts to focus on a consistent set of factors in deciding whether to uphold or reject a particular interpretation.[166] Before turning to this Article's proposed approach to the judicial review of longstanding agency interpretations, however, the next section seeks to understand why courts have adopted such strikingly different approaches to the judicial review of their own statutory precedents and longstanding executive practices in the constitutional arena than they have for the review of longstanding agency statutory interpretations.

Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 219 (1992).

163. *See infra* Part III.B.

164. *See* Table 1 (thirty-five of sixty-six cases).

165. *See* Table 1 (reporting discussion of reliance interests in eleven cases, including three in which only parties' briefs raised the issue; one case in which institutional competence was discussed; and three cases raising soundness or practical workability arguments).

166. For a list of factors that should cut against judicial deference to a longstanding agency interpretation, see discussion *infra* Part III and Table 3.

E. Why the Dissonance?

Here is the interpretive puzzle: Why do federal courts, including the Supreme Court, treat judicial interpretations of statutes as super-strong precedents, entitled to heightened stare decisis effect but treat longevity in agency statutory interpretations as only a haphazard plus factor? Likewise, why do courts give significant weight to historical executive practice in the constitutional context but tend to consider longstanding administrative practice only in passing or even to ignore it when reviewing agency statutory interpretations?

This section offers three possible explanations for this interpretive dissonance. Courts may, in part, be motivated by institutional politics, or a desire to preserve power over statutory meaning in the judiciary. Relatedly, courts may view administrative agencies as inferior entities, whose decisions need to be checked and closely scrutinized by reviewing courts. Alternately, courts may be concerned about agency power grabs and view non-deferential review of even longstanding agency interpretations as a way to correct for such overreaching.

First, at least some of the dissonance may be explained by institutional politics. Treating longevity as a mere plus factor in the review of agency statutory interpretations maintains greater power in the judiciary relative to the agency. Specifically, it gives courts the final say as to what the governing legal rule should be and the authority to set aside any agency interpretation with which a court disagrees. When agencies interpret statutes, they do more than merely parse statutory language or congressional intent; they also engage in policy making. That is, agencies choose a particular statutory interpretation after balancing several competing factors, including the political philosophy of the executive branch, current congressional preferences, empirical data about the effects of different policies, practical experiences, interest group dynamics, and so on.[167] Courts are not experts in this kind of policy making and have a limited basis for overturning agency policy decisions. Yet, when engaging in the judicial review of agency statutory interpretations, courts tend to ignore these policy considerations and paint agency statutory interpretation as primarily an exercise in legal, linguistic analysis—i.e., a search for the "correct reading" of a statute or the "intent of Congress"—rather than as the review of policy making by a coequal branch.[168] They use language canons, sophisticated textual analysis, and judicially created substantive canons such as the federalism clear statement rule or the presumption against extraterritorial application of domestic laws to trump agency

167. *See* Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 NOTRE DAME L. REV. 1339, 1351 (2008) ("Justice Stevens' opinion in *Chevron* concludes by noting that determining what the law means (in the administrative law setting) implicates a combination of technical competence and political responsiveness.").

168. *Cf.* Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 676 (2007) (criticizing the "confusing paradigm" whereby "agency implementation is synonymous with statutory construction").

constructions—often without acknowledging the significant policy considerations that may have formed the basis for the agency's selection of one interpretation over another.[169]

As Randy Kozel and Jeffrey Pojanowski have pointed out, courts often fail to distinguish between different forms of reasoning that agencies may employ when exercising their regulatory authority, including their authority to interpret statutes.[170] Specifically, Kozel and Pojanowski differentiate between "prescriptive reasoning," in which an agency weighs evidence, utilizes technical expertise, and makes policy choices about what is best for society and "expository reasoning," in which the agency engages in legal analysis, including evaluating congressional intent or the constraints imposed by prior judicial opinions in choosing among courses of action.[171] Kozel and Pojanowski's focus is on administrative change—i.e., situations in which an agency changes its own rules or interpretations—but the distinction they articulate applies to the judicial review of longstanding agency interpretations as well. In this latter context, I would argue that reviewing courts tend to ignore the extent to which agency interpretations of statutes are based on prescriptive reasoning and to treat such interpretations as though they are, or should be, based on expository reasoning. Hence the judicial focus in many of these cases is on technical linguistic analysis and interpretive canons even when the agency itself has not based its construction on such grounds.[172]

Recall, for example, *Rapanos v. United States*,[173] the wetlands case. In that case, a plurality of the Court was willing to overturn a thirty-year-old agency interpretation based on dictionary definitions, complicated whole act rule–based inferences, and two judicially created background policy norms (the federalism clear statement rule and the avoidance canon).[174] In so doing, it rejected scientific findings and policy choices by the agency, legislative history suggesting congressional acquiescence in the agency's interpretation, and the reliance interests of thirty-three states who filed a joint amicus brief urging the Court to uphold the agency's interpretation because "over the past three decades, the States have come to rely on the Clean Water Act's core provisions *and have structured their own water*

169. *See supra* note 78 and accompanying text.

170. *See* Kozel & Pojanowski, *supra* note 146, at 147–150.

171. *See id.*

172. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), *superseded by statute*, Act of Sept. 25, 2008, Pub. L. No. 110-325, 122 Stat. 3553; Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995).

173. 547 U.S. 715 (2006).

174. Specifically, the Court held that the agency's interpretation was inconsistent with the ordinary meaning of "waters" as reflected in dictionary definitions; was contradicted by the definition given to "point source" elsewhere in the statute; worked an unprecedented federal intrusion into the states' traditional power over land and water use absent a clear and manifest statement from Congress authorizing such intrusion (federalism clear statement rule); and "stretche[d] the outer limits of Congress's commerce power and raise[d] difficult questions about the ultimate scope of that power" that should be avoided if possible (avoidance canon). *Id.* at 732–736, 738.

pollution programs accordingly."[175] In other words, the Court used language and judicially created substantive canons to trump both the agency's policy judgments and practical considerations such as state reliance interests.

Importantly, an erratic approach to the judicial review of longstanding agency interpretations, of the kind described in Part I of this Article, is consistent with—and indeed enhances—judicial efforts to maintain power relative to administrative agencies. There are three possible deference regimes that could govern the judicial review of longstanding agency statutory interpretations: (1) no deference; (2) a presumption of deference or precedential effect; or (3) erratic deference such that courts sometimes give extra weight to longstanding interpretations, but other times do not. The judiciary benefits, as a matter of institutional power, from both the first and third approaches—no deference or erratic deference—perhaps more from erratic deference, because such a rule enables courts to pay lip service to agency expertise and policymaking superiority and to invoke an agency interpretation's longevity when they want to uphold the interpretation, but to ignore or downplay longevity when they want to reject a longstanding agency interpretation. That is, the current judicial approach to longstanding agency interpretations seems to be one that gives the judiciary discretion to reach whatever outcome it prefers.

But even if institutional power dynamics explain the difference between how courts treat longstanding agency statutory interpretations versus prior *judicial* interpretations of statutes, they cannot explain why courts treat executive branch interpretations in the constitutional context differently from longstanding agency statutory interpretations. After all, historical gloss treatment empowers the executive branch at the expense of the judiciary in the same way that precedential effect for longstanding agency interpretations would. So why the disparate treatment of executive branch practices and interpretations? One possibility is that courts view agencies as inferior institutions, rather than as coequal actors, whereas they view the President's direct exercises of power under Article II of the Constitution as the work of a constitutional equal. Such a view could have roots in the historical development of the administrative state. Since its inception, courts have been obsessed with ensuring that the unelected fourth branch does not run roughshod over private citizens' rights or usurp powers beyond those Congress confers on it.[176] As a result, much of administrative law—

175. Brief of 33 States, *supra* note 160, at *3 (emphasis added); *see also* Brief for Respondents, Carabell v. U.S. Army Corps of Eng'rs, 546 U.S. 1162 (2006) (No. 04-1384), 2006 WL 122118, at *25–28 [hereinafter Brief of U.S. Army Corps of Eng'rs et al.] (describing Army Corps's view that pollution of wetlands like those at issue "will typically threaten the quality of those adjacent waters" even when separated "by man-made dikes or barriers, natural river berms, beach dunes and the like").

176. *See, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 874 (2009) ("A central mission of administrative law is to design checks on agency overreaching."). *See generally* RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 79–226 (4th ed. 2004) (providing a general discussion of the statutory and judicial checks on administrative actions).

and judicial review of agency action in particular—focuses on checking the expansion of agency power or the exercise of agency power without adequate procedural safeguards. Courts reviewing agency decision making often address questions such as: *Was the agency required to conduct a notice-and-comment proceeding before adopting the policy at issue?*[177] *Did the agency's final rule adequately explain its basis and give reasons for rejecting proposed alternatives?*[178] *Was the agency correct to deny this individual social security benefits?*[179] *Did the agency provide adequate opportunity to be heard before (or after) terminating an individual's disability benefits?*[180] In the course of answering such questions, reviewing courts tend to treat agencies as inferior institutions, subject to supervision and correction by the judiciary. Presidential exercises of power under the Constitution, by contrast, may seem qualitatively different and more deserving of respect.

One sign that federal courts view agencies as inferior institutional actors is that despite much surface rhetoric about agencies' superior expertise in implementing statutes, reviewing courts tend to treat agency statutory interpretations more like the work of a trial court than like the work of a coequal branch. Judicial review of agency statutory interpretations—whether longstanding or not—essentially starts from scratch, with the same kind of text + canons + legislative history + purpose traditional interpretive analysis that appellate courts apply to the review of lower court statutory interpretations. Indeed, both the *Skidmore* and *Chevron* Step One inquiries direct courts to engage in what is essentially de novo review of agency statutory interpretations.[181] It is only at *Chevron* Step Two that reviewing courts actually defer to an agency's superior expertise—and even then, they do so in a manner that parallels the "abuse of discretion" standard that governs appellate court review of trial court decision-making on matters with respect to which trial courts have particular expertise.[182]

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177. *See, e.g.*, Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 167 (7th Cir. 1996); Nat'l Family Planning and Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 228–29 (D.C. Cir. 1992); Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1102 (4th Cir. 1985).

178. *See, e.g.*, Reytblatt v. U.S. Nuclear Regulatory Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1997); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252–53 (2d Cir. 1977).

179. *See, e.g.*, Tyler v. Dep't of Health & Human Servs., 989 F.2d 505 (8th Cir. 1993).

180. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 323 (1976); Richardson v. Perales, 402 U.S. 389, 400–02 (1971).

181. *See, e.g.*, United States v. Haggar Apparel Co., 526 U.S. 380, 391 (1999) (finding that *Chevron* analysis is consistent with de novo judicial review of agency statutory interpretations); Agro Dutch Indus. Ltd. v. United States, 508 F.3d 1024, 1029–30 (Fed. Cir. 2007) (describing judicial review of agency interpretations as de novo within *Chevron* framework).

182. *See, e.g.*, Wilson v. City of Lafayette, 510 F. App'x 775, 790 (10th Cir. 2013) (finding that abuse of discretion standard requires that plaintiffs "show that the district court's decision 'exceeded the bounds of the rationally available choices given the facts and the applicable law'" (quoting Big Sky Network Can., Ltd. v. Sichuan Provincial Gov't, 533 F.3d 1183, 1186 (10th Cir. 2008))); SunAmerica Corp. v. Sun Life Assurance Co. of Can., 77 F.3d 1325, 1333 (11th Cir. 1996) (holding that when employing an abuse of discretion

At least in the case of *longstanding* agency statutory interpretations, this treatment of agency decision making as equivalent to trial court decisions is inapt. First, because of the structure of the administrative state, political incentives, and soft law tools that enable members of Congress to monitor and exert pressure on agency officials, longstanding agency statutory interpretations are subject to much more after-the-fact executive and congressional oversight than are lower court statutory constructions.[183] Second, the case or controversy requirement[184] and high standards for en banc review in the circuit courts of appeal[185] constrain lower courts' ability to revise or correct their own statutory interpretations, even if the subsequent development of the law or changes in factual circumstances make clear that their original interpretation was wrong. Administrative agencies, by contrast, have the power to revise their statutory interpretations in response to subsequent legal or factual developments.[186] Third, lower courts lack the technical expertise and political accountability that agencies, as part of the executive branch, possess—so they are neither qualified nor free to make interpretive changes based on policy considerations in the way that agencies are. As such, the fact that a lower court interpretation has endured may not signify much, whereas the fact than an agency statutory interpretation long has survived both congressional and executive branch oversight makes it quite likely that the interpretation reflects an underlying soundness and workability.

Another possible explanation for the dissonance between judicial treatment of longstanding agency statutory interpretations versus prior judicial interpretations of statutes and executive branch constitutional practices is that courts may be using the power to reject longstanding agency interpretations to invalidate agency interpretations that expand the agency's power or jurisdiction. In other words, courts may be treating longstanding agency interpretations with less respect than other longstanding legal rules or practices because they want to retain the ability to reject such interpretations as a check on perceived administrative power grabs. In *Rapanos v. United States*, for example, the plurality's reading of the term "navigable waters" not to include wetlands that were adjacent and

standard, courts "must affirm unless we at least determine that the district court has made 'a clear error of judgment,' or has applied an incorrect legal standard").

183. *See* discussion *supra* Part II.A, C; *see also* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH L. REV. 1, 7 & n.16 (1994) (arguing that "at least when lower court decisions are involved, Congress could not possibly modify or reject in text each statutory interpretation decision with which it has serious concerns and still have time to transact any other legislative business" and observing that courts of appeals decide over 20,000 cases each year, of which nearly 7000 are published).

184. *See* U.S. CONST. art. III, § 2, cl. 1; *see also* Massachusetts v. EPA, 549 U.S. 497, 516 (2007); Muskrat v. United States, 219 U.S. 346, 362 (1911) (stressing that Article III limits federal courts to "deciding cases or controversies arising between opposing parties").

185. *See* FED. R. APP. P. 35.

186. Such changes in agency interpretations are of course subject to judicial review for arbitrariness, and so do require some explanation from the agency. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

connected to navigable waters by a drain or river had the effect of limiting the universe of waters that the Army Corps of Engineers possessed jurisdiction to regulate.[187] Similarly, in *EEOC v. Arabian American Oil*, the Court's conclusion that Title VII did not protect a U.S. citizen employed in the foreign offices of a U.S. corporation had the effect of limiting Title VII's—and consequently, the EEOC's and the Justice Department's—regulatory reach.[188] And the Court's decisions in *Aaron v. SEC* and *SEC v. Sloan*, interpreting the securities laws to require that the SEC establish scienter before it can enjoin private companies' trading activities, and to prohibit the SEC from issuing a series of ten-day suspension orders to block improper trading practices, each limited the SEC's regulatory power over private businesses.[189] To the extent that a desire to check agencies' power is part of the motivation behind federal courts' failure to treat longstanding agency statutory interpretations as precedent, this Article submits that courts are acting improperly. If Congress has left in place an agency construction that, among other things, expands the agency's power, then as in the case of historical executive practice, that legislative failure to object should be respected by the judicial branch. Congress, as author of the enabling statute and in its oversight capacity, has ample institutional incentives and tools available for curbing agency excesses. Thus, where it has chosen not to cut back on an agency's statutory reading for many years, and has allowed public and private reliance interests to build around that reading, then for all the reasons elaborated in this part, the courts should not disturb that settled state of affairs.

III. PRECEDENTIAL EFFECT FOR LONGSTANDING AGENCY STATUTORY INTERPRETATIONS

In the abstract, almost everyone seems to agree that longstanding agency interpretations of statutes should receive heightened deference from courts.[190] Numerous judicial opinions declare it to be so and scholars have assumed that judicial practice matches this rhetoric.[191] But as Part I shows, judicial doctrine regarding longstanding agency interpretations is erratic and provides nothing close to precedential effect for such interpretations. Further, as Table 1 illustrates, federal courts often ignore the traditional theoretical assumptions that justify deference to established precedents when they review longstanding agency interpretations.[192] The question thus becomes, how should courts approach the judicial review of longstanding agency interpretations so that legal doctrine can conform to prevailing intuitions, rhetoric, and practice in analogous legal contexts? This Article advocates that federal courts afford precedential effect, or a

187. Rapanos v. United States, 547 U.S. 715, 750–52 (2006).
188. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 277–78 (1991).
189. Aaron v. SEC, 446 U.S. 680, 701–02 (1980); SEC v. Sloan, 436 U.S. 103, 106 (1978).
190. *See supra* note 5.
191. *See supra* notes 31–32.
192. For example, very few cases contain any mention of reliance interests.

presumption of correctness, to longstanding agency interpretations that is similar to the basic presumption of correctness enjoyed by *ordinary* judicial precedents. The Article does not advocate the equivalent of statutory stare decisis—i.e., a "super strong presumption of correctness"—for longstanding agency interpretations, but only a presumption of accuracy similar to the presumption that applies to ordinary, non-statutory judicial precedents.

Importantly, this Article does *not* advocate that reviewing courts impose such a presumption of correctness when an *agency* wishes to revise or reject its own longstanding statutory interpretation. Although it might seem, at first blush, that precedential effect for longstanding agency interpretations should apply equally whether it is the agency or a court that seeks to overturn the interpretation, I believe that constraining agency-driven interpretive changes in this manner would be a mistake. When an agency seeks to change its own longstanding interpretation of a statute, the theoretical assumptions supporting precedential effect for that interpretation largely disappear. Institutional competence concerns, for example, point in favor of allowing expert agencies to revise their prior statutory interpretations in light of their practical experiences implementing the interpretation over the years and in light of modern developments. Similarly, the assumption of soundness is directly contradicted when the agency in charge of administering the interpretation determines that there are good reasons for revising a longstanding interpretation. Legislative acquiescence, too, becomes uncertain when the agency seeks to change its own interpretation because the agency's revised reading may well reflect congressional approval or even pressure to change an interpretation. Reliance interests would remain an important consideration when an agency seeks to change its own longstanding interpretation, but agencies are better positioned than courts to balance competing interests and to make the judgment that the costs of an interpretive change are outweighed by its benefits. Moreover, so long as agencies provide fair warning of an interpretive change, as through a notice-and-comment period or even a transition phase, those who have relied on a longstanding interpretation can be given time to adjust to the new interpretation—in a way not possible when a court rejects a longstanding interpretation without warning.

At bottom, because agency statutory interpretations typically involve policymaking—including expert weighing of costs and benefits, evaluation of changing empirical data, and responsiveness to changes in congressional or presidential political preferences—rather than merely legal analysis, agencies should be allowed to change their own interpretations when they deem such change appropriate. Indeed, the case for according precedential effect to longstanding agency interpretations would be much diminished absent agency freedom to make such interpretive changes. If agencies lacked the power to change interpretations they found unworkable, then the fact that a particular interpretation had endured for years would not necessarily reflect an executive branch judgment of soundness or practical feasibility.

Part III.A outlines the basic manner in which the proposed precedential effect for longstanding agency statutory interpretations should work. Part III.B discusses limited grounds on which such interpretations should be subject to judicial rejection, drawing from the grounds on which ordinary judicial precedents may be overruled. Part III.C explores how courts should proceed when reviewing an agency's attempt to reverse its own longstanding reading of a statute.

A. Basics

This Article advocates that federal courts follow a three-step approach to reviewing longstanding agency interpretations. First, courts should determine how long an agency interpretation has been in effect. If an interpretation has been in effect for more than ten years, it should be entitled to a presumption of correctness. Second, courts should determine whether the interpretation is "clearly erroneous"; if so, then they may reject the interpretation despite its longevity. Third, it may make sense to require that a supermajority of the judges reviewing a longstanding agency interpretation find the interpretation to be "clearly erroneous" before the interpretation may be rejected. This section explores the practical and theoretical justifications for each of these steps in detail.

In the common law, precedent works essentially as follows: rules established in prior decisions are presumed to be sound and courts confronted with such rules consider themselves bound to follow them, suspending the balancing of interests and weighing of policy outcomes that they ordinarily would engage in if starting from a blank slate.[193] Prior rules can be overturned under certain circumstances, but such overrulings are disfavored and courts take special pains to justify them.[194] Precedential effect for longstanding agency statutory interpretations should work in a similar manner. As a threshold matter, federal courts reviewing agency statutory interpretations should pay specific attention to how long an agency's interpretation has been in effect. If the interpretation is longstanding, it should be entitled to a default presumption of correctness and deference. The precise number of years necessary to qualify an interpretation as longstanding can and should be debated; this Article

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193. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 19–20 (Yale Univ. Press 1962) (1921); Hon. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1897 (2009) ("If precedent controls the disposition of a pending case, appellate judges must follow it. It does not matter whether an appellate judge agrees with established precedent; we are bound to apply established precedent in deciding cases before us.").

194. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 443 (2000) ("[W]e have always required a departure from precedent to be supported by some 'special justification.'" (quoting United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 856 (1996))); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992) (precedents may be overruled for "only the most convincing justification"); *cf.* Eskridge, *supra* note 20, at 1363 (noting that when the Supreme Court overrules a statutory precedent, "the Court normally does not completely admit what it is doing, or goes to great length to explain its overruling").

proposes ten years as a starting point for discussion rather than as a magic number. Other possibilities include using fifteen years as a benchmark; making longevity turn on whether the interpretation has been in force during both Republican and Democratic administrations; or measuring longevity in proportion to how long the agency itself has been in existence.[195] As Table 1 shows, the vast majority of the cases reviewed for this Article involved agency interpretations that had been in effect for at least ten years (sixty of sixty-six cases); and fifty-three of the sixty-six reviewed cases involved interpretations that had been in effect for at least fifteen years.[196] All but three of the sixty-six cases reviewed involved interpretations that survived both Democratic and Republican presidential administrations. This data suggests that the precise location of the cut-off point for deeming an agency interpretation "longstanding" is unlikely to significantly affect the number of interpretations deemed to qualify, nor is a requirement that an interpretation have remained in effect through both Democratic and Republican presidential administrations. Wherever the lines are drawn, once an agency interpretation has been identified as longstanding, courts should presume that it is correct and uphold it unless they find the interpretation to be "clearly erroneous."

I suggest a "clearly erroneous" standard of review because it is a "significantly deferential"[197] standard that nevertheless leaves room for judicial correction of clear mistakes. Although most commonly associated with appellate court review of trial court factual findings, the "clearly erroneous" standard also is used as a ground for overruling legal determinations otherwise protected under the law of the case doctrine.[198] In the context of longstanding agency statutory interpretations, the standard should operate to allow the overruling of an agency's interpretation only if the reviewing court determines that the agency's interpretation is demonstrably wrong—i.e., constitutes an implausible reading of the statutory provision at issue.[199] It should not be enough for the court to conclude that another statutory reading would make greater sense or be a better fit with the statute's language.

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195. The latter was one of the bases used in Eskridge and Baer's and Eskridge and Raso's empirical studies in classifying "longstanding and fairly stable" interpretations. *See* Eskridge & Baer, *supra* note 5, at 1206–07; Raso & Eskridge, *supra* note 3, at 1775 & n.192.

196. *See* Table 1.

197. Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 623 (1993).

198. The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case unless one of three "exceptional circumstances" exists; one of these circumstances is when a "decision is clearly erroneous and its enforcement would work a manifest injustice." *In re* Rainbow Magazine, Inc., 77 F.3d 278, 281 (9th Cir. 1996) (quoting Hegler v. Borg, 50 F.3d 1472, 1475 (9th Cir. 1995)).

199. This is consistent with how the standard is applied in other contexts. *See, e.g.*, Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 855 (1982) (stating that appellate courts must accept trial courts' findings unless "left with the 'definite and firm conviction that a mistake has been committed'" (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948))).

Moreover, in determining whether the interpretation is clearly erroneous, courts should not employ the full arsenal of statutory interpretation tools that they would bring to bear if starting from scratch to construe the statute; rather, just as common law courts suspend their traditional policy analysis when confronting a precedent, courts reviewing longstanding agency statutory interpretations should suspend their traditional balancing of interpretive tools. Specifically, courts should look only for clear incompatibility between an agency's interpretation and the statute's text, and should avoid using complex language canons or substantive canons to trump a statutory reading that has been the governing legal rule for a decade or more.

Although eliminating language and substantive canons from the judicial review of longstanding agency interpretations may sound radical, it is a necessary step to providing longstanding agency interpretations with meaningful precedential effect—and one with some support in existing case law. Language and substantive canons are not definitive guides to statutory meaning, and both allow for substantial judicial discretion in application.[200] Language canons, for example, are supposed to be aids to a statute's most likely meaning, not ironclad rules.[201] They provide a background set of inferences based on logic and patterns, not clear-cut evidence of statutory meaning. And they are supposed to come into play "only when there is some uncertainty as to the meaning of a particular clause in a statute."[202] But if there is uncertainty as to the meaning of statutory language, then an administrative agency's longstanding interpretation of that language cannot

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200. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 138 (2001) (Souter, J., dissenting) ("Like many interpretive canons, however, *ejusdem generis* is a fallback, and if there are good reasons not to apply it, it is put aside."); United States v. Amato, 540 F.3d 153, 160 (2d Cir. 2008) ("*Ejusdem generis* has its limits. Like other canons of statutory construction, it is simply a helpful guide to legislative intent, not a dispositive one, and it does not require a court to give it unthinking reliance." (quoting Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 224–27 (2008))); Levy v. Sterling Holding Co., 544 F.3d 493, 508 n.12 (3d Cir. 2008) ("Canons of interpretation are not mandatory rules. They are guides that 'need not be conclusive.'" (quoting Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001))); *In re* Sealed Case No. 97–3112, 181 F.3d 128, 132 (D.C. Cir. 1999) (recognizing that the legal maxim *expressio unius est exclusio alterius* "is not always correct"); Matter of Beltran, 20 I. & N. Dec. 521, 526 n.12 (1992) (reliability of *expressio unius* canon might be questioned to the extent "it stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen" (quoting Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 676 (D.C. Cir. 1973)); Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 349 (2007) (describing substantive canons as a response to the ambiguity inherent in statutory interpretation, "designed to guide judges when the available information about intended meaning has run out").

201. *See, e.g.*, United States v. Turkette, 452 U.S. 576, 581 (1981) ("The rule of *ejusdem generis* is no more than an aid to construction and comes into play only when there is some uncertainty as to the meaning of a particular clause in a statute."); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 854 (4th ed. 2007).

202. *Turkette*, 452 U.S. at 581; Harrison v. PPG Indus., Inc., 446 U.S. 578, 588 (1980); United States v. Powell, 423 U.S. 87, 91 (1975); Gooch v. United States, 297 U.S. 124, 128 (1936).

be "clearly erroneous" and should be especially deserving of judicial deference. That is, where a statute has more than one plausible meaning, the case for deference to an agency's longstanding choice among meanings is particularly strong.

Moreover, at least some language canons—for example, *ejusdem generis* and *noscitur a sociis*—require courts to make a judgment call about what it is that makes the items in a list or series similar.[203] Unsurprisingly, judges regularly disagree as to what the relevant common denominator should be when applying these canons, with both dissenting and majority opinions claiming consistency with the same language canon.[204] Yet despite the discretion inherent in their application, judges sometimes treat language canons as dispositive trump cards when reviewing agency statutory interpretations. In *Babbitt v. Sweet Home*, for example, Justice Scalia's dissenting opinion placed significant weight on the *noscitur a sociis* canon in concluding that the statutory term "take" covered only deliberate, direct harm to endangered species; the majority opinion in the D.C. Circuit, which the Court reversed over Justice Scalia's dissent, likewise relied significantly on this canon.[205] Because language canons do not provide certainty about statutory meaning, they should not be used to demonstrate "clear" error in a longstanding agency interpretation. Indeed, allowing courts to use language canons to trump a longstanding agency statutory interpretation is just another way of empowering judicial preferences about the best statutory

203. *Noscitur a sociis* translates as "it is known by its associates." BLACK'S LAW DICTIONARY 1224 (10th ed. 2014). The canon "hold[s] that the meaning of an unclear word or phrase, esp[ecially] one in a list, should be determined by the words immediately surrounding it." *Id.* *Ejusdem generis* translates as "of the same kind or class." BLACK'S LAW DICTIONARY 631 (10th ed. 2014). It directs that "when a general word or phrase follows a list of specifics, the general word will be interpreted to include only items of the same class as those listed." *Id.*

204. *See, e.g.*, James v. United States, 550 U.S. 192, 199, 218 (2007) (majority and dissent both invoke *ejusdem generis* canon); Dolan v. U.S. Postal Serv., 546 U.S. 481, 486–87, 495 (2006) (majority and dissent both claim consistency with *noscitur a sociis* canon); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 702, 721 (1995) (majority and dissent both rely on *noscitur a sociis* canon); Estate of Braden *ex rel.* Gabaldon v. State, 266 P.3d 349, 352, 356 (Ariz. 2011) (majority and dissent both claim consistency with *ejusdem generis* canon).

205. *Babbitt*, 515 U.S. at 721; Sweet Home Chapter of Cmtys. for a Great Or. v. Babbitt, 17 F.3d 1463, 1465–66 (D.C. Cir. 1994) (majority opinion in lower court relies on *noscitur a sociis* to reject longstanding agency interpretation); *see also, e.g.*, Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1337–38 (2011) (dissent uses three other protected activities in statutory list to attribute characteristics to phrase at issue and to argue for rejection of agency interpretation); Carr v. United States, 560 U.S. 438, 449 & 450 n.6 (2010) (majority relies in part on grammar canons and substantive canon regarding retroactivity to reject agency interpretation); Global Crossing Telecomms. v. Metrophones Telecomms. Inc., 550 U.S. 45, 75–76 (2007) (Thomas, J., dissenting) (dissenting opinion would have rejected agency interpretation based in part on argument that "a word 'is known by the company it keeps'" (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995))); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 120 (2007) (dissent would have upset longstanding agency construction based in part on an *expressio unius* argument about Education Finance Incentive Program in the same statute); Limited, Inc. v. Comm'r of IRS, 286 F.3d 324, 333–37 (6th Cir. 2002) (relying on *noscitur a sociis* and rejecting agency interpretation).

meaning to displace legal rules that have governed, with the implicit sanction of both the legislative and executive branches, for years. Some reviewing courts have recognized as much, observing that certain language canons should have reduced effect in the administrative context, where Congress has delegated to agencies the discretion to give meaning to statutory text.[206] But it is time for this recognition to become the established interpretive rule, at least with respect to the judicial review of *longstanding* agency statutory interpretations.

Substantive canons also introduce substantial judicial discretion into the interpretive analysis.[207] Unlike language canons, which at least purport to constitute objective guides to meaning, substantive canons are policy-based, in effect "loading the dice" in favor of a particular outcome.[208] Moreover, like language canons, they are supposed to be invoked only when a statute's meaning is ambiguous or uncertain.[209] If a statute's meaning is uncertain, however, the court should defer to the agency's longstanding interpretation—not search for interpretive tools that justify rejecting the agency's construction.

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206. *See* Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 97, 102 (2002) (O'Connor, J., dissenting) (arguing that "*expressio unius* ought to have somewhat reduced force in th[e] context" of statute authorizing agency to "'prescribe such regulations as are necessary to carry out' the Act"); *Babbitt*, 17 F.3d at 1475 (Mikva, C.J., dissenting) (questioning whether "it is ever appropriate to measure an agency's construction of a statute against a seldom-used and indeterminate principle of statutory construction" such as *noscitur a sociis*), *overruled by Babbitt*, 515 U.S. 687; Cheney R.R. v. I.C.C., 902 F.2d 66, 69 (D.C. Cir. 1990) ("Whatever its general force, we think [*expressio unius*] is an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.").

207. *See, e.g.*, ESKRIDGE, FRICKEY & GARRETT, *supra* note 201, at 1020 (describing substantive canons as "famously malleable"); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 7 (2005).

208. *See, e.g.*, *The Supreme Court 2007 Term: Leading Cases*, 122 HARV. L REV. 276, 474 n.72 (2008); Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* ANTONIN A. SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 28–29 (Amy Gutman ed., 1997). Examples include the rule of lenity, a due-process based canon dictating that when a criminal statute is ambiguous it should be construed in favor of the defendant; the federalism clear statement rule, which directs that unless Congress clearly expresses its intent to infringe on state rights in the text of a statute, the statute must not be interpreted to interfere with state functions, laws, or processes; and the presumption that federal law is not meant to have extraterritorial effect. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 264–65 (2010) (extraterritorial application of U.S. law); Nixon v. Mo. Mun. League, 541 U.S. 125, 1564 (2004) (federalism clear statement); BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994) (federalism clear statement); Evans v. United States, 504 U.S. 255, 289 (1992) (Thomas, J., dissenting) (rule of lenity); McNally v. United States, 483 U.S. 350, 359 (1987) (rule of lenity).

209. *See, e.g.*, *In re* Estate of Tanner, 295 S.W.3d 610, 628 n.15 (Tenn. 2009) ("Substantive canons provide presumptions for interpreting ambiguous statutes that explicitly consider the substance of the law being interpreted."); Nelson, *supra* note 200, at 349 (noting that substantive canons "are designed to guide judges when the available information about intended meaning has run out—when the judges' primary interpretive tools have succeeded only in identifying a range of possible meanings, none of which seems significantly more likely than the others to reflect what members of the enacting legislature probably had in mind").

There is a further reason why substantive canons should be eliminated from the judicial review of longstanding agency statutory interpretations: they reflect presumptions about congressional drafting that should be displaced by the practical concerns and assumptions discussed in Part II of this Article. Specifically, substantive canons reflect background policy norms that courts *presume* Congress to be aware of and to legislate in conformance with. So when a court uses such canons to reject an agency's statutory construction, it is not saying that Congress has expressed a clear intent contradicting the agency's interpretation but, rather, that the agency's interpretation must be presumed to contradict Congress's intent because it conflicts with a background norm of which Congress must have been aware.[210] In the case of longstanding agency interpretations, however, such judicially created background norms that Congress is presumed to legislate around should be suspended in favor of a different background presumption—i.e., a presumption that interpretations left in effect for several years are sound, workable, have created reliance interests, and reflect the implicit approval of Congress and the executive branch. In other words, in cases where judicially created policy norms might tip the balance if courts were interpreting the statute from scratch, the agency's (i.e., executive branch's) longstanding construction and experience and Congress's implicit approval—or at least failure to object—should trump the judiciary's vision of the best possible statutory interpretation.

This Article's proposal that courts defer to longstanding agency interpretations without employing traditional language and substantive canons also is supported by key findings in Gluck and Bressman's study of congressional staffers, which revealed that the legislative counsel who draft most statutory language (1) are unaware of or reject many of the canons used by courts[211] and (2) consider agencies, rather than courts, to be the primary interpreters of statutes.[212] If language and substantive canons are considered authoritative because they supposedly reflect how Congress uses language and background norms of which Congress supposedly is aware, then Gluck and Bressman's findings significantly undermine the authoritativeness of such canons. Moreover, these findings suggest that courts concerned with fidelity to congressional design should not lightly overturn agency interpretations.

Finally, it might make sense to impose a supermajority voting requirement for judicial determinations that a longstanding agency interpretation is "clearly erroneous." Jacob Gersen and Adrian Vermeule have suggested a rule by which all agency statutory interpretations should be upheld unless a supermajority of the judges on a reviewing court finds the agency's reading to be incorrect (e.g., six-to-three on the Supreme

210. *See, e.g.*, ESKRIDGE, FRICKEY & GARRETT, *supra* note 201, at 883 (describing substantive canons as "presumptions or rules of thumb that cut across different types of statutes and statutory schemes" and that "represent policies that the Court will 'presume' Congress intends to incorporate into statutes").

211. Gluck & Bressman, *supra* note 137, at 931–48.

212. Bressman & Gluck, *supra* note 136, at 728.

Court, three-to-zero on the courts of appeals).[213] Whatever one thinks of the merits of such proposals as applied to all agency statutory interpretations, it could make considerable sense to require that *longstanding* agency interpretations of statutes may be deemed "clearly erroneous" only if a supermajority of the reviewing judges agrees that the interpretation is demonstrably wrong.

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Readers may wonder where the proposed precedential effect for longstanding agency interpretations would fit within the framework of current deference tests for the general review of agency statutory interpretations. This Article advocates that the proposed precedential effect should supersede existing deference tests and constitute its own independent standard for judicial review of longstanding agency interpretations. There are several reasons why such an approach makes sense. First, recent empirical studies provide strong evidence (1) that the Supreme Court often does not adhere to its own deference tests—declining, notably, to invoke *Chevron* in cases where it clearly is applicable;[214] and (2) that federal courts tend to defer to agencies at roughly equal rates irrespective of which deference test or standard they use.[215] The emerging consensus seems to be that courts review agency statutory interpretations for rationality, or reasonableness, not according to strict deference tests or guidelines.[216] If courts do not apply existing deference regimes in any systematic matter, then there is little to gain from situating precedential effect for longstanding interpretations within those existing regimes.

Moreover, even if courts were in the habit of adhering to existing deference regimes and tests, this Article argues that longstanding agency interpretations raise different institutional, political, and reliance concerns than do other agency interpretations—and that they do so in a way that legal doctrine should allow for. Subjecting longstanding agency interpretations to traditional deference regimes would leave too much discretion with courts to use language and substantive canons to reject established agency constructions, and thus would fail to provide meaningful precedential effect for such interpretations. Thus, the proposed precedential effect for

213. *See* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 679, 684–86 (2007).

214. *See* Eskridge & Baer, *supra* note 5, at 1124–25 (finding *Chevron* cited in only 28.5 percent of cases in which it should be applicable); Raso & Eskridge, *supra* note 3, at 1797.

215. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 137 (2010).

216. *See, e.g.*, Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 256 n.10 (1988) (suggesting that the Chevron two-step test can be collapsed into a rule that courts must respect an agency's reasonable interpretation of its organic statute); Erika Jones et al., *Developments in Judicial Review with Emphasis on the Concepts of Standing and Deference to the Agency*, 4 ADMIN. L.J. 113, 123–24, 126 (1990) (remarks of the Hon. Stephen F. Williams suggesting that he applies *Chevron* as a single inquiry); Stephenson & Vermeule, *supra* note 3, at 598; *see also* Global Crossing Telecomms. v. Metrophones Telecomms., 550 U.S. 45, 47–48 (2007) (concluding that the agency's interpretation was "reasonable . . . [and] hence . . . lawful" with little discussion of *Chevron*).

longstanding agency statutory interpretations, which could be referred to as "longevity deference" or an independent "longevity rule," should take the place of the *Mead-Chevron-Skidmore* regime and kick in immediately once an agency interpretation is determined to be longstanding.

B. Some Grounds for Overruling

The presumption of correctness for longstanding agency interpretations advocated in this Article should not, however, be absolute. Ordinary judicial precedents can be overruled under certain circumstances and such circumstances, at a minimum, also should justify the overruling of longstanding agency statutory interpretations. In addition, if the theoretical assumptions on which precedential effect for longstanding interpretations is based—e.g., acquiescence—do not hold in the case of a particular longstanding agency interpretation, the presumption of correctness should be rebutted with respect to that interpretation. This section explores factors that might limit a longstanding interpretation's claim to precedential effect and outlines corresponding grounds on which the interpretation should be subject to overruling.

In *Planned Parenthood v. Casey*,[217] the Supreme Court provided a list of "prudential and pragmatic considerations" designed to "gauge the respective costs of reaffirming [versus] overruling" an ordinary judicial precedent.[218] It noted, for example, that rejection of a precedent may be appropriate where the prior rule "has proven to be intolerable simply in defying practical workability" or has not been "subject to a kind of reliance that would lend a special hardship to the consequences of overruling"; or where "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"; or where "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[219] These grounds for overruling parallel many of the theoretical assumptions discussed in Part II that justify providing precedential effect for longstanding agency interpretations. The workability ground, for example, is a natural corollary to the assumption that longstanding agency interpretations reflect years of executive branch experience and a judgment that an agency's construction is sound.[220] If a party challenging a longstanding agency interpretation can show that this assumption does not hold for that interpretation—perhaps by demonstrating that the interpretation has proved unpredictable, has confused regulated parties or administrators, has led to instability, or that technological advances have rendered the interpretation obsolete—then it

217. 505 U.S. 833 (1992).
218. *Id.* at 854.
219. *Id.* at 854–55 (citing Patterson v. McLean Credit Union, 491 U.S. 164, 173–174 (1989); Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting); United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924)).
220. *See supra* Part II.B.

makes sense that this showing of unworkability should constitute a ground for overruling the interpretation.

Similarly, the *Casey* exception for legal or factual developments that render a precedent outmoded is a natural check, or backstop, to the assumption that Congress and administrative agencies are institutionally more competent than courts to update statutory interpretations in light of new political, technological, and legal or regulatory developments.[221] Where a challenging party can show that an administrative agency (and Congress) has failed to update an interpretation to reflect factual or legal developments, it makes sense for precedential effect to give way and for courts to consider overruling a longstanding agency interpretation. Finally, assumptions about public and private reliance on settled interpretations play a key role in justifying precedential effect for longstanding legal rules,[222] so it makes sense for courts to allow an exception or relaxation of precedential effect where it can be shown that significant reliance interests or hardship are not implicated by a particular longstanding agency interpretation.

There are also two other grounds that arguably should serve as justifications for overruling a longstanding agency interpretation, based on the theoretical assumptions discussed in Part II. First, much of the argument in favor of giving precedential effect to longstanding agency interpretations rests on the fact that such interpretations have survived both executive and congressional oversight over several years. This rationale depends, however, on the interpretation's salience or visibility within the executive branch and to Congress. If an agency interpretation was first rendered thirty years ago, but appeared only in an obscure agency adjudication order that has since been ignored, or in an interpretive letter issued to a private party that has languished unnoticed in the agency's files, then it is not likely to reflect an executive branch judgment of soundness or workability—nor is it likely to have been subjected to congressional review.[223] Thus, lack of visibility also should constitute a ground on which the presumption of correctness can be rebutted. That is, if those challenging a longstanding agency interpretation can present evidence showing that the interpretation is an obscure one or that Congress or agency higher-ups were unaware of the interpretation over the years, then the

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221. *See supra* Part II.C.

222. *See supra* Part II.D.

223. Incidentally, these examples illustrate why *Mead*'s formality inquiry is an inadequate measure of the level of deference to which an interpretation should be entitled; interpretations arrived at through formal adjudication can lack visibility, while those announced in an informal interpretive letter can become highly visible. *See, e.g.*, Air Brake Sys., Inc. v. Mineta, 357 F.3d 632 (6th Cir. 2004) (National Highway Traffic Safety Administration (NHTSA) publishes an interpretive letter stating that manufacturer's product does not meet safety standards on NHTSA website, manufacturer seeks injunction to have letter removed from website); *cf.* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 201–02 (advocating replacing *Mead* Step Zero inquiry with inquiry tying deference to the place in agency hierarchy of the official responsible for the interpretation).

presumption should not apply.[224] The agency interpretation at issue in *United States v. Mead* could have been faulted on precisely this ground: because it was set forth in a Customs Service ruling letter issued to a private party, it is highly unlikely that Congress would have been aware of the interpretation.[225]

Second, in order to counteract the legislative process's inherent tendency toward underrepresentation of diffuse and politically powerless groups and related concerns about agency capture, the presumption of correctness for longstanding agency interpretations could be made rebuttable on a showing that an interpretation harms a politically weak or underrepresented group. The theory behind such an exception would be that longstanding interpretations that reflect incomplete executive or legislative information, or worse, executive or legislative branch indifference to the interests of certain groups, cannot be presumed sound or practically workable. Allowing such a ground for rejecting a longstanding agency interpretation admittedly could complicate the judicial review of longstanding agency interpretations significantly, forcing courts to engage in difficult line-drawing exercises to determine what makes a group "politically weak or underrepresented" and what constitutes "harm" to such groups.[226] But any attempt to address disparities in political access will face such definitional and categorizing difficulties. Moreover, recognizing an "underrepresentation" ground for rejecting longstanding agency interpretations is perhaps the most direct way to ensure that judicial review of longstanding agency statutory interpretations takes into account the interests of politically disadvantaged groups—who are left entirely out of current deference regimes—and to counteract the possibility that giving precedential effect to longstanding agency interpretations might exacerbate existing disparities in political access.

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224. For agency interpretations adopted through informal rulemaking (including policy statements, interpretative rules, and guidance manuals), see *supra* note 80. Of course, the CRA's notice requirements ensure that Congress is made aware of the agency interpretation, so the visibility of such interpretations should be high. But many agency interpretations are adopted through other means, such as opinion letters that apply only to the parties addressed in the letter or internal agency memoranda or informal letters between government actors. In *EEOC v. Arabian American Oil*, for example, the interpretation at issue had been set forth by two different agencies in three different forms: (1) a letter sent by the EEOC's General Counsel to an individual senator, (2) an EEOC Policy Statement, and (3) DOJ testimony before Congress. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 275–76 (1991). Each of these forms of communication is subject to different levels of congressional and executive visibility; neither the full Congress nor the President necessarily would see the General Counsel's letter to one senator, whereas the Justice Department's testimony before Congress would have been accessible to all members of Congress and to the President.

225. Since visibility is not part of the Court's current deference analysis, the factual record regarding the notoriety of the Customs ruling letter was not developed in *Mead*. The Court did, however, emphasize that the ruling was not the product of notice-and-comment rulemaking. *See* United States v. Mead, 533 U.S. 218, 229–231 (2001).

226. For a proposal to fix the problem at its roots, see generally Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Process Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. 1 (2009).

Finally, longstanding agency interpretations, like statutes themselves, would of course remain subject to constitutional review by the courts and could be struck down as unconstitutional.

Notably, the *Casey* traditional grounds for overruling an established legal precedent receive almost no mention in the cases reviewed for this Article. In fact, only three out of sixty-six reviewed cases contained any mention of these grounds: one case involved an argument, raised in the challenging party's brief, that the agency's interpretation was out of step with subsequent legal developments;[227] another case explicitly mentioned changed factual circumstances as a justification for overturning the agency's longstanding interpretation;[228] and in the third case, a dissenting opinion argued that the agency interpretation lacked visibility.[229]

One of this Article's goals is to counter judicial inattention to factors that might justify the overruling of a longstanding agency interpretation; if federal courts come to treat longstanding agency interpretations like other legal precedents, it is hoped that they might begin to focus their deference analysis specifically on the unique concerns raised by *longstanding*, as opposed to ordinary, agency interpretations. To this end, Table 3 below provides a list of factors that favor deference to longstanding agency interpretations in particular, as well as a list of factors that disfavor deference to such interpretations. The list is intended only as a first stab at itemizing the relevant concerns, but this Article encourages courts to pay attention to the kinds of factors listed below when reviewing agency interpretations that have been in place for several years.

Most of the factors in Table 3 reflect either the theoretical justifications for deference to longstanding legal rules discussed in Part II of this Article or the *Casey* factors for overruling a longstanding precedent. The remaining factors, such as "irrational agency rigidity" and "interpretation causes particular hardship," are intended to counterbalance the factors that favor deference. For example, the "irrational agency rigidity" and "harmful effects become apparent over time" factors seek to balance the presumption that longstanding interpretations are practically workable: if there is evidence that an agency has held on to an agency interpretation out of stubbornness or inflexibility, perhaps despite signs that the interpretation is not working, then that should counsel against deference to the agency's interpretation. Similarly, if a longstanding agency interpretation causes particular hardship to certain litigants—especially members of politically disadvantaged groups—or has harmful effects that do not become apparent

227. *See* Brief for Respondent, Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863 (2011) (No. 09-291), 2010 WL 4232638, at *49–52.

228. *See* Price v. Stevedoring Servs. of Am., Inc., 697 F.3d 820, 841–43 & n.15 (9th Cir. 2012).

229. *See* Menkes v. U.S. Dep't of Homeland Sec., 637 F.3d 319, 347 (D.C. Cir. 2011) (Brown, J., dissenting in part) ("The *Agency Decision on Remand* is not published or readily available to the public. . . . As a result, the *Agency Decision on Remand* does not provide traditional rule-of-law values: it is not publically knowable; it lacks any assurances of stability; and litigants cannot rely upon it when challenging contrary agency action in the future.").

for several years, this too should counsel against deference to the interpretation.

With these factors in mind, let us reconsider *Rapanos v. United States*, discussed in the Introduction and Part III.A. The Army Corps of Engineers had for thirty years interpreted the CWA in a manner that counted John Rapanos's wetlands as "navigable waters" subject to the agency's jurisdiction.[230] That interpretation had generated significant reliance by thirty-three states who had structured their own water pollution programs based on the understanding that wetlands like John Rapanos's were protected waterways.[231] The interpretation also seemed to have earned Congress's affirmative approval, in that Congress had considered and rejected a proposal to limit the Army Corps's regulatory jurisdiction after the agency adopted the regulation at issue.[232] Further, the interpretation reflected the agency's scientific policy judgment that the pollution of wetlands like those at issue would threaten the quality of adjacent navigable waters, even when separated by man-made dikes.[233]

On the other hand, the Army Corps's construction of the CWA also implicated some of the factors disfavoring deference to a longstanding interpretation. As the plurality opinion noted, one study showed that the typical landowner had to spend tens of thousands of dollars to obtain a permit from the Army Corps if he wished to backfill a waterway that fell under the Corps's jurisdiction.[234] This could create particular hardship for some litigants, like John Rapanos. Moreover, because the study identifying these costs was published in 2002, there may have been an argument that the harmful effects of the Army Corps's interpretation did not become apparent until the interpretation had been in effect for twenty-plus years—countering the workability presumption.

Absent a coherent framework for evaluating longstanding agency interpretations, the plurality opinion in *Rapanos* focused on dictionary definitions, language canons, and substantive norms rather than on the above factors. The opinion did mention the high costs of obtaining a permit, but it did so in the context of making a federalism argument against government regulations, rather than evaluating the workability of the agency's longstanding interpretation.[235] The dissenting opinion relied heavily on the longevity of the agency's interpretation and on congressional acquiescence, but nowhere mentioned that thirty-three states had relied on

230. Rapanos v. United States, 547 U.S. 715, 723–24, 727–28 (2006) (citing 33 C.F.R. § 328.3(a)(1)–(3), (5), (7); (c)).

231. *See* Brief of 33 States, *supra* note 160, at 3.

232. *Rapanos*, 547 U.S. at 797 (Stevens, J., dissenting).

233. *See* Brief of U.S. Army Corps of Eng'rs et al., *supra* note 175, at *25–28 (stating that pollution of wetlands like those at issue "will typically threaten the quality of those adjacent waters" even when separated "by man-made dikes or barriers, natural river berms, beach dunes and the like").

234. *Rapanos*, 547 U.S. at 721 (citing David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NATURAL RES. J. 59, 74–76 (2002)).

235. *Id.*

the agency's interpretation in crafting their own water pollution policies.[236] Moreover, the two opinions often seemed to be talking past each other, dismissing as unimportant the factors on which the opposing opinion relied. If federal courts were to adopt a presumption of correctness for longstanding agency interpretations, as this Article suggests, the deference analysis in *Rapanos* would have boiled down to evaluating whether the costs to individual landowners should trump the reliance interests of several states, the acquiescence of Congress, and the scientific judgment of the Army Corps of Engineers. That is, the Court's discussion would have focused on the practical consequences of upsetting the Army Corps's established legal rule—weighing the costs of such a change against the benefits—rather than embarking on a dictionary-language-canon-substantive-norm fest.

Consider as another example the 2011 case, *Astrue v. Capato*,[237] which raised the question whether posthumously conceived children are entitled to receive benefits under the Social Security Act (SSA).[238] For seventy-one years, the Social Security Administration had interpreted the SSA to allow children to qualify for survivor benefits only if they were entitled to inherit from the deceased wage earner under state intestacy law.[239] Most states' intestacy laws, like the SSA, were written long before posthumous conception was possible, and thus did not allow for inheritance by children conceived after their parent's death. The Capatos, twin girls conceived through in vitro fertilization after their father died of cancer, challenged the agency's longstanding construction.[240] The Court rejected their challenge, upholding the agency's reading. In so doing, the Court took a very textualist approach, focusing on the technical interplay of various sections of the SSA.[241] Nowhere did it mention that new technological developments unanticipated at the time the interpretation at issue was adopted (in a 1940 regulation)—that is, changed factual circumstances—may have created reasons to question the agency's approach in this particular application. Indeed, the Court barely mentioned the longevity of the agency's statutory interpretation at all.[242]

Under this Article's proposed presumption of correctness, the fact that the agency's reading had been in effect for seventy-one years would have been the starting point for the Court's deference analysis. Moreover, the change in factual circumstances—that is, the technological developments that made posthumous conception possible decades after the agency

236. *Id.* at 797 (Stevens, J., dissenting).
237. 132 S. Ct. 2021 (2012).
238. *Id.* at 2025–26.
239. *See* 5 Fed. Reg. 1849, 1880 (May 23, 1940) ("A son or daughter (by blood) of a wage earner, who is the child of such wage earner or has the same status as a child, under applicable State law, is the child of such wage earner." (citation omitted)); *see also* Brief for Petitioner, Astrue v. Capato, 132 S. Ct. 2021 (2012) (No. 11-159), 2011 WL 6937369, at *24 (quoting 5 Fed. Reg. at 1880).
240. *Astrue*, 132 S. Ct. at 2026.
241. *Id.* at 2029.
242. *Id.* at 2034.

interpretation was adopted—would have been discussed at length. The Court likely would—and should—still have upheld the agency's interpretation, perhaps based on an institutional competence argument that Congress or the Social Security Administration, rather than the courts, should be the one to decide whether children born through previously nonexistent technologies are entitled to federal benefits. But the Court also might have considered whether the agency's failure to update its interpretation to reflect new technological developments demonstrated an inattentiveness that justified judicial intervention. Either way, judicial review of the agency's longstanding interpretation would have looked significantly different, and would have focused more on the practical considerations—relative institutional competence, soundness, perhaps reliance interests—raised by changing a longstanding agency rule, rather than on traditional text-based statutory analysis.

C. When Agencies Change Longstanding Interpretations

Finally, it is worth considering how federal courts should proceed when an agency seeks to abandon its own longstanding statutory interpretation. I have already noted my general belief that courts should not apply a presumption of correctness to reject an agency-driven change to a longstanding interpretation. But how, then, should courts proceed in their judicial review? Should they uphold all agency-driven interpretive changes, or should they seek to scrutinize the agency's reasons for making the change and decide whether to defer on a case-by-case basis?

My view is that the latter is the better approach. Specifically, I believe that courts confronting an agency-driven interpretive change should seek to determine whether the motivation for the change is purely political, or is based on an exercise of the agency's policy expertise and judgment. That is, courts should look for the presence of traditional factors that support changes in longstanding legal rules and seek to ascertain whether the agency's interpretive switch is based on such factors. For example, courts should consider (1) whether there have been any changes in legal or factual circumstances since the interpretation was rendered that justify an interpretive change;[243] (2) whether the interpretation produces harmful effects that have only recently become apparent;[244] (3) whether the interpretation has proved unsound or unworkable over time;[245] and (4) whether the President is trumping congressional intent in changing the interpretation.[246] They should then weigh such factors against the

243. *See, e.g.*, *Astrue*, 132 S. Ct. 2021 (new technology makes posthumous conception possible raising new questions about Social Security survivor benefits); OfficeMax, Inc. v. United States, 428 F.3d 583, 598 (6th Cir. 2005) (new cellular service technology makes distance-based pricing irrelevant).

244. *See* Balt. & Ohio Ry. Co. v. Jackson, 353 U.S. 325 (1957) (problems with employer's safety equipment apparent after employee injured).

245. *See* Price v. Stevedoring Servs. of Am., Inc., 697 F.3d 820, 841–42 (2012) (noting reasons why rule forbidding compounding interest is unsound).

246. *Cf.* Les v. Reilly, 968 F.2d 985 (9th Cir. 1992).

theoretical assumptions that traditionally justify deference to longstanding precedents—i.e., the presence of (1) public or private reliance on the longstanding interpretation or (2) signs that Congress approves of the agency's longstanding reading and that the agency is acting based on purely political grounds, in opposition to Congress.

If an agency's interpretive shift seems motivated purely by political concerns, then courts should apply the proposed presumption in favor of the longstanding construction. But if there are experience, expertise, or cost-benefit reasons supporting the agency's interpretive shift, then federal courts should defer to the agency's judgment.

For an illustration of how these factors should work in practice, consider two examples, one hypothetical and one based on the facts of an actual case: a recently elected conservative President pushes the EPA to change a thirty-year-old interpretation of the Clean Air Act (hypothetical). Conversely, a liberal President changes a thirty-year-old FDA interpretation of the Food, Drug, and Cosmetic Act (FDCA). (Real case: Under the Clinton Administration, the FDA attempted to reverse a sixty-year-old FDA reading that the FDCA did not give FDA authority to regulate tobacco products.[247]) How should courts treat the longevity of the agency interpretation in each case?

In the actual FDA case, many of the traditional factors supporting a shift in interpretation were present. There were, for example, changed factual circumstances in that data that recently had become available demonstrating the addictive properties of nicotine (which affected the definition of "drug"), as had evidence showing that tobacco companies knew about these addictive effects but hid such data from the public.[248] In addition, certain harmful effects of tobacco only recently had become apparent—including scientific data about the addictive properties of nicotine.[249] Accordingly, there were factors beyond pure politics motivating the FDA's reversal of its longstanding interpretation (though politics certainly played a role in the agency's switch). Conversely, there also was private reliance, by tobacco companies, on the FDA's longstanding interpretation, as well as signs of congressional acquiescence in the FDA's decades-long position that it lacked jurisdiction to regulate tobacco products.[250] Moreover, Congress itself had regulated tobacco labeling and advertising in a series of separate statutes (public reliance).[251] Given that there were good reasons beyond politics for the agency's interpretive change, this Article's proposed approach would have directed federal courts to defer to the agency and allow the change in statutory construction. (This is not, ultimately, how the Supreme Court ruled; rather the Court, relying heavily on congressional

247. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000).
248. *See id.* at 188 (Breyer, J., dissenting).
249. *Id.*
250. *Id.* at 144 (majority opinion).
251. *Id.* at 143–44.

acquiescence and public reliance arguments, rejected the agency's changed construction at *Chevron* Step One.[252])

In the hypothetical situation where a conservative President seeks to change a longstanding environmental interpretation, courts likewise should consider whether new data has emerged that calls into doubt the original interpretation: Has new evidence surfaced regarding whether X pollutant is dangerous to the public health? Have the harmful effects of X pollutant only recently became apparent as, arguably, was the case with greenhouse gases? Courts also should consider whether the agency's original interpretation has proved unworkable to administer. If there are experience- or expertise-based reasons supporting the agency's new construction, then again, courts should defer to the agency's judgment, even if political concerns also played a role in the decision to change interpretations and even if regulated parties have relied on the agency's previous interpretation, or Congress has acquiesced in it. In short, this Article encourages federal courts to develop a consistent set of factors that both support and weigh against deference to an agency-driven change in a longstanding interpretation (like the factors listed in Table 3 favoring and disfavoring deference to a longstanding agency interpretation challenged by a litigant). Ultimately, where an agency seeks to change its own longstanding interpretation, courts should seek to determine whether the agency's motivation is purely political or whether one or more factors justifying interpretive change is present. Unless a court concludes that the agency was driven by purely political concerns—that is, unless none of the factors justifying change is present—the court should defer to the agency's new interpretation.

CONCLUSION

Despite the prevailing wisdom that longstanding agency statutory interpretations should receive heightened judicial deference, courts and scholars lack a coherent framework for how that deference should work. As a result, federal courts' approach to the judicial review of longstanding agency interpretations is surprisingly inconsistent and theoretically chaotic. This Article has aimed to fill the doctrinal and theoretical void by (1) shedding light on federal courts' incoherent approach to the judicial review of longstanding agency interpretations and (2) arguing that longstanding agency interpretations of statutes should be entitled to some precedential effect, or presumption of correctness, upon judicial review. At a minimum, I hope to have convinced the reader that it is curious that the federal courts have treated longstanding agency interpretations so differently from longstanding *judicial* interpretations of statutes and longstanding executive branch practices in the *constitutional* context—and that courts should give greater weight than they currently do to an agency

252. *Id.*

interpretation's longevity (and the reliance interests and executive and legislative branch judgment reflected therein) on judicial review.

Table 1: Longstanding Interpretation Cases Reviewed	
U.S. Supreme Court	
***Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817 (2013)**	
Statute	Medicare Act (HHS)
Form	Regulation
Longevity in Years	39 years (1974–2013)
No. of Presidential Administrations	7
Change in Party?	Yes
Reason for Challenge	Systematic problem with government calculations
Reliance Interests?	Yes (reenacted six times)
Mention of Legislative Acquiescence	No
Outcome	Upheld
***Astrue v. Capato*, 132 S. Ct. 2021 (2012)**	
Statute	Social Security Act (Social Security Administration)
Form	Regulation
Longevity in Years	71 years (1940–2011)
No. of Presidential Administrations	13
Change in Party?	Yes
Reason for Challenge	Tech'l advances (posthumous conception) give rise to new benefits claims
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (amendment noted in brief)
Outcome	Upheld
***Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011)**	
Statute	Fair Labor Standard Act (Dep't of Labor and EEOC)
Form	Compliance Manual (EEOC); Enforcement Action (Dep't of Labor)
Longevity in Years	40 years (1961–2011)

No. of Presidential Administrations	10
Change in Party?	Yes
Reason for Challenge	Employer defense
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Upheld
***Thompson v. N. Am. Stainless*, 131 S. Ct. 863 (2011)**	
Statute	Title VII (EEOC)
Form	Compliance Manual
Longevity in Years	23 years (1998–2011)
No. of Presidential Administrations	3
Change in Party?	Yes
Reason for Challenge	Employer defense; Harmful effects become apparent
Reliance Interests?	No (employer brief argues agency interpretation is out of step with case law)
Mention of Legislative Acquiescence	No
Outcome	Ignored (by majority); Concurring opinion mentions
***Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009)**	
Statute	Clean Water Act (EPA)
Form	Regulation
Longevity in Years	32 years (1977–2009)
No. of Presidential Administrations	6
Change in Party?	Yes
Reason for Challenge	New EPA regulation relies on long-standing agency position
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (reenacted, acquiescence cited in Entergy Brief)
Outcome	Upheld
***Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81 (2007)**	
Statute	Improving America's Schools Act (Dep't of Educ.)

Form	Regulation
Longevity in Years	31 years (1976–2007)
No. of Presidential Administrations	6
Change in Party?	Yes
Reason for Challenge	Benefit reduced; Harmful effects become apparent
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (at time of 1994 amendment, Congress did not mention reversing then-18 year old regulation)
Outcome	Upheld
***Rapanos v. United States*, 547 U.S. 715 (2006)**	
Statute	Clean Water Act (Army Corps of Engineers)
Form	Regulation
Longevity in Years	29 years (1977–2006)
No. of Presidential Administrations	5
Change in Party?	Yes
Reason for Challenge	Government enforcement- hardship to particular litigant; Private property protection; Invades local power over land use planning
Reliance Interests?	Yes, by states
Mention of Legislative Acquiescence	Yes
Outcome	Rejected
***Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005)**	
Statute	Age Discrimination Employment Act (ADEA) (EEOC)
Form	Regulation
Longevity in Years	24 years (1981–2005)
No. of Presidential Administrations	4
Change in Party?	Yes
Reason for Challenge	Employer defense
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (Congress amended statute without disturbing agency's construction)
Outcome	Upheld

***Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461 (2004)**	
Statute	Clean Air Act (EPA)
Form	Adjudication Order
Longevity in Years	21 years (1983–2004)
No. of Presidential Administrations	4
Change in Party?	Yes
Reason for Challenge	Federalism concerns (state issued a permit which EPA)
Reliance Interests?	Arguably yes, cutting against agency interpretation (reliance that state agencies could make binding decision)
Mention of Legislative Acquiescence	No
Outcome	Upheld
***Barnhart v. Walton*, 535 U.S. 212 (2002)**	
Statute	Social Security Act (HHS)
Form	Regulation
Longevity in Years	45 years (1957–2002); or at least 20 (1982–2002)
No. of Presidential Administrations	10; or at least 4
Change in Party?	Yes
Reason for Challenge	Benefit withheld (denial of individual benefits)
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (reenacted)
Outcome	Upheld
***Sutton v. United Air Lines*, 527 U.S. 471 (1999)** ***Superseded by statute**	
Statute	Americans with Disabilities Act (ADA) (EEOC)
Form	Interpretive Rule
Longevity in Years	8 years (1991–1999)
No. of Presidential Administrations	2
Change in Party?	Yes
Reason for Challenge	Employer defense (calls agency reading an "expansion")
Reliance Interests?	No

Mention of Legislative Acquiescence	No
Outcome	Rejected
***Bragdon v. Abbott*, 524 U.S. 624 (1998)**	
Statute	Americans with Disabilities Act (ADA) / Rehabilitation Act (HEW)
Form	OLC opinion
Longevity in Years	21 years (1977–1998)
No. of Presidential Administrations	4
Change in Party?	Yes
Reason for Challenge	Employer defense
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes
Outcome	Upheld
***Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995)**	
Statute	Endangered Species Act (Dep't of Interior)
Form	n/a
Longevity in Years	20 years (1975–1995)
No. of Presidential Administrations	5
Change in Party?	Yes
Reason for Challenge	Government enforcement (hardship to particular litigant); Protection of private property rights
Reliance Interests?	No (although implicit argument about reliance on ability to use private land)
Mention of Legislative Acquiescence	Yes
Outcome	Upheld
***Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994)**	
Statute	Securities Exchange Act (SEC)
Form	Agency Enforcement Actions
Longevity in Years	At least 40 years (1946–1994)
No. of Presidential Administrations	10
Change in Party?	Yes
Reason for Challenge	Unclear

Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (on judicial interpretations as well as agency interpretation)
Outcome	Rejected
***Brown v. Gardner*, 513 U.S. 115 (1994)**	
Statute	Veteran's Benefits Statute (VA)
Form	Regulation
Longevity in Years	64 years (1930–1994)
No. of Presidential Administrations	13
Change in Party?	Yes
Reason for Challenge	Gov't denial of benefits
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Rejected
***EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991)** (superseded by statute)	
Statute	Title VII (EEOC & DOJ)
Form	Letter and hearing testimony
Longevity in Years	16 years (1975–1991)
No. of Presidential Administrations	4
Change in Party?	Yes
Reason for Challenge	Employer defense
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Rejected
***Pub. Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989)** (superseded by statute)	
Statute	Age Discrimination in Employment Act (ADEA) (EEOC)
Form	Interpretive guidelines, later codified as regulations
Longevity in Years	20 years (1969–1989)
No. of Presidential Administrations	4–5
Change in Party?	No
Reason for Challenge	Employer defense

Reliance Interests?	Yes (Betts argues employers have relied on regulations)
Mention of Legislative Acquiescence	Yes (Congress amended other regulations but not disability regulations)
Outcome	Rejected
***K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988)**	
Statute	Tariff Act (Customs Service)
Form	Regulation
Longevity in Years	52 years (1936–1988) common control regulation; 37 years (1951–1988) authorized use regulation
No. of Presidential Administrations	8
Change in Party?	Yes
Reason for Challenge	Trademark holders seek injunction against agency regulation
Reliance Interests?	Yes (Kmart brief argues that "substantial domestic industry has relied")
Mention of Legislative Acquiescence	Yes (ratification argued extensively in Kmart brief)
Outcome	Upheld (common control interpretation); rejected (authorized-use exception)
***NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987)**	
Statute	NLRA (Dep't of Labor)
Form	Regulation
Longevity in Years	39 years (1948–1987)
No. of Presidential Administrations	8
Change in Party?	Yes
Reason for Challenge	Litigant seeks day in court
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Upheld
***CFTC v. Schor*, 478 U.S. 833 (1986)**	
Statute	Commodities Exchange Act (CFTC)
Form	Regulation
Longevity in Years	10 years (1976–1986)
No. of Presidential Administrations	3

Change in Party?	Yes
Reason for Challenge	Litigant seeks day in court
Reliance Interests?	Maybe (briefs claim that counter-claims are filed in many cases)
Mention of Legislative Acquiescence	Yes (Congress twice amended without overruling and once explicitly affirmed interpretation)
Outcome	Upheld
***Young v. Cmty. Nutrition Inst.*, 476 U.S. 974 (1986)**	
Statute	Food Drug and Cosmetic Act (FDA)
Form	Trade correspondence (1938); Fed. Reg. statement (1974); regulation (1977)
Longevity in Years	48 years (1938–1986)
No. of Presidential Administrations	9
Change in Party?	Yes
Reason for Challenge	Unclear
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (revisited exact provision and made other changes)
Outcome	Upheld
***W. Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985)**	
Statute	Age Discrimination Employment Act (ADEA) (DoL, later EEOC)
Longevity in Years	17 years (1968–1985)
No. of Presidential Administrations	5
Change in Party?	Yes
Reason for Challenge	Employer defense
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Ignored (Upheld)
***FDIC v. Phila. Gear Corp.*, 476 U.S. 426 (1986)**	
Statute	FDIC Act (FDIC)
Form	Statement by agency officials at meeting with bank officials
Longevity in Years	53 years (1933–1986); statement by agency officials at meeting with bank officials

No. of Presidential Administrations	9
Change in Party?	Yes
Reason for Challenge	Private party wants government benefit
Reliance Interests?	Yes (Congress sand banking industry, referenced in FDIC brief)
Mention of Legislative Acquiescence	Yes (including reenactment)
Outcome	Upheld
***Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985)**	
Statute	Fair Labor Standard Act (FLSA)
Form	Regulation
Longevity in Years	15 years (1970–1985)
No. of Presidential Administrations	4
Change in Party?	Yes
Reason for Challenge	Employer defense
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Upheld
***Morrison-Knudsen Constr. Co. v. Dir., Office of Workers' Compensation Programs, U.S. Dep't of Labor*, 461 U.S. 624 (1983)**	
Statute	Compensation Act (Dep't of Labor)
Form	Litigation brief and letters filed in legal cases; program memorandum
Longevity in Years	15 years (1968–1983)
No. of Presidential Administrations	5
Change in Party?	Yes
Reason for Challenge	Family of deceased employee seeks to maximize government benefits
Reliance Interests?	Yes
Mention of Legislative Acquiescence	Yes (amended)
Outcome	Upheld
***N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982)**	
Statute	Title IX (Dep't Health, Educ., and Welfare)
Form	Regulation
Longevity in Years	8 year (1974–1982)

No. of Presidential Administrations	3–4 (Nixon resigned in August)
Change in Party?	Yes
Reason for Challenge	Employer defense (argue that HEW has no jurisdiction to regulate employment practices)
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (disapproval resolution attempted but failed, also no changes made when statute amended the next year)
Outcome	Upheld
***United States v. Clark*, 454 U.S. 555 (1982)**	
Statute	Federal Pay Statute (Civil Service Comm'n)
Form	Regulation
Longevity in Years	13 years (1969–1982)
No. of Presidential Administrations	4
Change in Party?	Yes
Reason for Challenge	Federal employees seek to maximize statutory wage increase with promotion
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (amended in 1972, no change)
Outcome	Upheld
***FEC v. Democratic Senate Campaign Comm'n*, 454 U.S. 27 (1981)**	
Statute	Federal Election Campaign Act (FEC)
Form	Advisory opinion; regulation (1977)
Longevity in Years	5 years (1976–1981)
No. of Presidential Administrations	3
Change in Party?	Yes
Reason for Challenge	Harmful consequences of construction become apparent
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (amended with knowledge of agency's construction, no changes made)
Outcome	Upheld (agency consistency noted, not longevity)
***City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304 (1981)**	
Statute	Federal Water Pollution Control Act (EPA (and later DOJ))

Form	Position taken in brief
Longevity in Years	9 years (1972–1981)
No. of Presidential Administrations	4
Change in Party?	Yes
Reason for Challenge	One state suing another—cast as federalism issue—federal law ousting state statutory and common law
Reliance Interests?	Reliance argued in opposite direction by majority
Mention of Legislative Acquiescence	Yes (Congress amended statute in 1977, considered issue and expressed support for position taken by agency, that federal common law survives)
Outcome	Rejected
***NLRB v. Hendricks Cnty. Rural Elec. Membership Corp*., 454 U.S. 170 (1981)**	
Statute	National Labor Relations Act (NLRA) (Dep't of Labor and NLRB)
Form	Adjudication orders
Longevity in Years	41 years (1940–1981)
No. of Presidential Administrations	9
Change in Party?	Yes
Reason for Challenge	Employer defense
Reliance Interests?	No (but discussion about practical workability and that interpretation has stood test of 37 years' experience)
Mention of Legislative Acquiescence	Yes (even talks about NLRB reports bringing practice to Congress's attention)
Outcome	Upheld (a lot of discussion in both sides' briefs about consistency of agency construction)
***Aaron v. SEC*, 446 U.S. 680 (1980)**	
Statute	Securities Exchange Act; Securities Act (SEC)
Form	Litigation position
Longevity in Years	5 years (1975–1980)
No. of Presidential Administrations	2
Change in Party?	Yes
Reason for Challenge	Defense by company in enforcement action
Reliance Interests?	No

Mention of Legislative Acquiescence	Yes (amended in 1975 and 1977 did not upset Commission interpretation)
Outcome	Rejected
***SEC v. Sloan*, 436 U.S. 103 (1978)**	
Statute	Securities Exchange Act (SEC)
Form	Summary Orders
Longevity in Years	34 years (1944–1978)
No. of Presidential Administrations	8
Change in Party?	Yes
Reason for Challenge	Egregious enforcement
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (during reenactment congressional committee expressly accepted interpretation but Court said not good enough)
Outcome	Rejected
***E.I. du Pont de Nemours & Co. v. Collins,* 432 U.S. 46 (1977)**	
Statute	Securities Exchange Act (SEC)
Form	Adjudication orders
Longevity in Years	28 years (1949–1977)
No. of Presidential Administrations	7
Change in Party?	Yes
Reason for Challenge	Investors challenge agency approval of transaction that favors closed-end affiliate of public company (bias/ capture)
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Upheld
***United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975)**	
Statute	Investment Company Act (SEC's GC)
Form	Response to inquiry, printed in Fed. Reg; SEC adjudication order (1946)
Longevity in Years	34 years (1941–1975); 29 years (1946–1979)
No. of Presidential Administrations	7
Change in Party?	Yes

Reason for Challenge	Investors and United States seek expansive application of antitrust laws
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Upheld
***Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 420 U.S. 395 (1975)**	
Statute	Federal Power Act (Fed. Power Comm'n)
Form	Agency's first annual report to Congress
Longevity in Years	54 years (1921–1975)
No. of Presidential Administrations	10
Change in Party?	Yes
Reason for Challenge	Tribe argues that new technological development unforeseen when statute enacted fits within statute's regulatory scheme
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (no change when Act amended or later reenacted as part of new statute)
Outcome	Upheld
***Saxbe v. Bustos*, 419 U.S. 65 (1974)**	
Statute	Immigration and Nationality Act (DOJ)
Form	DOJ general order
Longevity in Years	47 years (1927–1974)
No. of Presidential Administrations	9
Change in Party?	Yes
Reason for Challenge	Farm workers and collective bargaining agents seek reading favoring domestic workers
Reliance Interests?	Yes (dislocation and hardship for daily workers on either side of the border)
Mention of Legislative Acquiescence	Yes (no change, and S. Rep. acceptance when Act revisited); Separation of powers—Congress must be the one to change this practice
Outcome	Upheld
***Balt. & Ohio Ry. Co. v. Jackson*, 353 U.S. 325 (1957)**	
Statute	Safety Appliance Act (ICC)
Form	ICC order

Longevity in Years	46 years (1911–1957)
No. of Presidential Administrations	8
Change in Party?	Yes
Reason for Challenge	Harmful effects become apparent; Alleges that employer equipment does not meet statute's safety requirements
Reliance Interests?	No (but dissent cites practical concerns about safety raised in ICC brief)
Mention of Legislative Acquiescence	No
Outcome	Rejected (Court says no clearly expressed agency position)
***Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132 (1976)**	
Statute	NLRA and Labor Management Act (NLRB)
Form	NLRB adjudication order
Longevity in Years	11 years (1938–1949)
No. of Presidential Administrations	2
Change in Party?	No
Reason for Challenge	Union engages in new tactics, WI state board seeks to enjoin them, Union claims protection under NLRA and LMA
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Rejected (and later overturned by Court)
Federal Courts of Appeals	
***Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820 (2012)**	
Statute	Longshore and Harbor Workers' Compensation Act
Form	Litigation position
Longevity in Years	23 years (1989–2012)
No. of Presidential Administrations	4
Change in Party?	Yes
Reason for Challenge	Injured employee seeks compound interest rather than simple interest
Reliance Interests?	No (references changed circum-stances)
Mention of Legislative Acquiescence	No
Outcome	Rejected

***Bhd. of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807 (D.C. Cir. 2011)**	
Statute	Interstate Commerce Commission Termination Act (ICC)
Form	ICC adjudication order
Longevity in Years	19 (1991–2010)
No. of Presidential Administrations	4
Change in Party?	Yes
Reason for Challenge	New development (Unions want Mass. DOT purchase of RR lines to be subject to STB approval)
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Upheld
***Ramos-Barrientos v. Bland*, 661 F.3d 587 (11th Cir. 2011)**	
Statute	National Labor Relations Act (NLRB)
Form	Regulation
Longevity in Years	64 (1947–2011)
No. of Presidential Administrations	12
Change in Party?	Yes
Reason for Challenge	New situation (NLRB usually handles petitions for injunctions against employers, but delegated authority to its general counsel)
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes
Outcome	Upheld
***Frankl v. HTH Corp.*, 650 F.3d 1334 (9th Cir. 2011)**	
Statute	National Labor Relations Act (NLRB)
Form	Memorandum published in Fed. Reg.
Longevity in Years	64 years (1947–2011)
No. of Presidential Administrations	12
Change in Party?	Yes
Reason for Challenge	New situarion
Reliance Interest?	No

Mention of Legislative Acquiescence	Yes
Outcome	Upheld
***Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319 (D.C. Cir. 2011)**	
Statute	Great Lakes Pilotage Act (Coast Guard)
Form	Agency adjudication order on remand
Longevity in Years	36 years (1975-2011)
No. of Presidential Administrations	7
Change in Party?	Yes
Reason for Challenge	Pilot wants agency authority construed narrowly, so no power to terminate his position for the season
Reliance Interests?	No (but some mention that interpretation reflects agency advice to states for years and dissent argues no visibility)
Mention of Legislative Acquiescence	No
Outcome	Upheld
***Sai Kwan Wong v. Doar,* 571 F.3d 247 (2d Cir. 2009)**	
Statute	Medicaid Act (HHS)
Form	Informal rule
Longevity in Years	15 years (1994–2009)
No. of Presidential Administrations	3
Change in Party?	Yes
Reason for Challenge	Claimant seeking to maximize benefits
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Upheld
***Se. Ala. Med. Ctr. v. Sebelius*, 572 F.3d 912 (D.C. Cir. 2009)**	
Statute	Medicare Statute (HHS)
Form	Interim/final rule; regulation
Longevity in Years	26 years (1983–2009)
No. of Presidential Administrations	5
Change in Party?	Yes
Reason for Challenge	Hospitals in three southern states challenge HHS formula for calculating

	"hospital costs"
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Rejected (remand for better explanation, long-standing rule including postage in costs rejected)
***Pub. Citizen Health Research Grp. v. U.S. Dep't of Labor*, 557 F.3d 165 (3d Cir. 2009)**	
Statute	OSH Act (OSHA)
Form	Regulation
Longevity in Years	35 years (1974-2009)
No. of Presidential Administrations	7
Change in Party?	Yes
Reason for Challenge	Challenge to new OSHA reg that follows long-standing practice re permissive exposure levels for airborne toxins
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Upheld
***Estate of Landers v. Leavitt*, 545 F.3d 98 (2d Cir. 2008)**	
Statute	Medicare statute (HHS)
Form	Regulation
Longevity in Years	42 years (1966–2008)
No. of Presidential Administrations	9
Change in Party?	Yes
Reason for Challenge	Changed factual circum-stances / plaintiffs seek more generous benefits
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (not in opinion, but in agency's brief and in district court opinion)
Outcome	Upheld
***Abebe v. Mukasey*, 554 F.3d 1203, (9th Cir. 2009)**	
Statute	Immigration and Nationality Act
Form	BIA decision
Longevity in Years	69 years (1940–2009)

No. of Presidential Administrations	13
Change in Party?	Yes
Reason for Challenge	Alien seeking favorable reading of INA to allow discretionary waiver of deportation
Reliance Interests?	Yes (public reliance, noted in dissent)
Mention of Legislative Acquiescence	Yes (Congress amended in 1952 without changing)
Outcome	Rejected (majority ignores, concurrence and dissent point out)
***Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008)**	
Statute	Fair Housing Act (HUD)
Form	Handbook/manual
Longevity in Years	10–13 years (1995/98– 2008)
No. of Presidential Administrations	2
Change in Party?	Yes
Reason for Challenge	Plaintiffs seek equitable tolling of FHA statute of limitations
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Rejected (majority ignores longevity, dissent points it out)
***Groff v. United States,* 493 F.3d 1343 (7th Cir. 2007)**	
Statute	Public Safety Officers' Benefits Act
Form	BIA adjudication order codified in a BIA document
Longevity in Years	27 years (1980–2007)
No. of Presidential Administrations	5
Change in Party?	Yes
Reason for Challenge	Plaintiffs seeks to qualify for government benefits
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Upheld
***Health Care Cost Containment Sys. v. McClellan*, 508 F.3d 1243 (9th Cir. 2007)**	
Statute	Indian Health Care Improvement Act (HCFA)

Form	Memorandum
Longevity in Years	31 years (1976–2007)
No. of Presidential Administrations	6
Change in Party?	Yes
Reason for Challenge	States seek greater reimbursement from federal government under Medicaid reimbursement system
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Upheld
***Council Tree Comnc'ns v. F.C.C.*, 503 F.3d 284 (3d Cir. 2007)**	
Statute	Communications Act (FCC)
Form	Regulation
Longevity in Years	26 years (1981–2007)
No. of Presidential Administrations	4
Change in Party?	Yes
Reason for Challenge	Plaintiff seeks to change competitive bidding regulations
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (express approval of regulations during amendment)
Outcome	Upheld
***Pena-Muriel v. Gonzales*, 489 F.3d 438 (1st Cir. 2007)**	
Statute	Real ID Act
Form	Regulation
Longevity in Years	55 years (1952–2007)
No. of Presidential Administrations	11
Change in Party?	Yes
Reason for Challenge	New statute/ legal development, alien seeks to take advantage and reopen removal proceedings
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (revisited)
Outcome	Upheld

***Del. River Stevedores v. DiFidelto*, 440 F.3d 615 (3d Cir. 2006)**	
Statute	Longshore and Harbor Workers' Compensation Act
Form	Regulation
Longevity in Years	Over 20 years (opinion does not give exact dates)
No. of Presidential Administrations	4
Change in Party?	Yes
Reason for Challenge	Employer seeks to pay fewer benefits than ordered by Benefits Review Board
Reliance Interests?	No (notes only two challenges in 20 years as sign of consensus and practical workability)
Mention of Legislative Acquiescence	Yes (amended statute in past, but no change to relevant part)
Outcome	Upheld
***OfficeMax, Inc. v. United States*, 428 F.3d 583 (6th Cir. 2005)**	
Statute	Tax code (IRS)
Form	Revenue ruling
Longevity in Years	26 years (1979–2005)
No. of Presidential Administrations	5
Change in Party?	Yes
Reason for Challenge	New technological developments (e.g., cell service make long-distance less relevant)
Reliance Interests?	Yes (dissent says excise tax already collected, and Congress took tax into account when making revenue and budget decisions)
Mention of Legislative Acquiescence	Yes (Reenacted)
Outcome	Rejected (citing new technological developments and facts that revenue ruling is unusual)
***Ammex, Inc. v. United States*, 367 F.3d 530 (6th Cir. 2004)**	
Statute	Tax code (IRS)
Form	Revenue ruling
Longevity in Years	35 years (1969–2004)
No. of Presidential Administrations	7
Change in Party?	Yes
Reason for Challenge	Export/duty-free shop seeks refund of

	excise taxes paid
Reliance Interests?	No (notes IRS's failure to change ruling as sign of its soundness)
Mention of Legislative Acquiescence	No
Outcome	Upheld
***Sec'y of Labor v. Excel Mining,* 334 F.3d 1 (D.C. Cir. 2003)**	
Statute	Federal Mine Safety and Health Act
Form	Regulation
Longevity in Years	28 years (1975-2003)
No. of Presidential Administrations	5
Change in Party?	Yes
Reason for Challenge	Company defense to Secretary of Labor's issuance of citations
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (brief notes provision reenacted after the practice was in place for two years)
Outcome	Upheld
***United States v. Baxter Int'l, Inc.,* 345 F.3d 866 (11th Cir. 2003)**	
Statute	Medical Care Recovery Act
Form	Regulation
Longevity in Years	14–19 years (1984/89–2003)
No. of Presidential Administrations	3–4
Change in Party?	Yes
Reason for Challenge	Defense to government action
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Upheld
***Walton v. Rose Mobile Homes LLC,* 298 F.3d 470 (5th Cir. 2002)**	
Statute	Magnuson-Moss Warranty Act (FTC)
Form	Regulation
Longevity in Years	27 years (1975– 2002)
No. of Presidential Administrations	6
Change in Party?	Yes

Reason for Challenge	Defendants seek to compel arbitration, reject FTC interpretation that statute precludes
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Rejected
***United States v. Occidental Chemical Corp.*, 200 F.3d 143 (3d Cir. 1999)**	
Statute	CERCLA
Form	Guidance document in EPA memorandum
Longevity in Years	9 years (1990–1999)
No. of Presidential Administrations	2
Change in Party?	Yes
Reason for Challenge	Government enforcement of cleanup and payment of cleanup costs, company resists
Reliance Interests?	No
Mention of Legislative Acquiescence	No
Outcome	Upheld
***Legal Envtl. Assistance Found., v. EPA*, 118 F.3d 1467 (11th Cir. 1997)**	
Statute	Safe Drinking Water Act (EPA)
Form	Order denying petition for review
Longevity in Years	17 years (1980–1997)
No. of Presidential Administrations	4
Change in Party?	Yes
Reason for Challenge	Foundation tries to get EPA to regulate/prohibit hydraulic fracturing activities
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (reenacted without change)
Outcome	Rejected
***Les v. Reilly*, 968 F.2d 985 (9th Cir. 1992)**	
Statute	Food Drug and Cosmetics Act
Form	HEW interpretation printed in Congressional Record

Longevity in Years	34 years (1958–1992)
No. of Presidential Administrations	8
Change in Party?	Yes
Reason for Challenge	EPA attempt to change long-standing interpretation for more practical, workable one
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (repeated reenactment without change)
Outcome	Upheld
***Uselton v. Commercial Lovelace Motor Freight*, 940 F.2d 564 (10th Cir. 1991)**	
Statute	Securities Act
Form	General counsel's testimony at congressional hearings
Longevity in Years	50 years (1941–1991)
No. of Presidential Administrations	10
Change in Party?	Yes
Reason for Challenge	Employees seek to have employer benefits plan invalidated under Securities Acts
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (consideration and rejection of legislation, SEC testimony reiterated three additional times)
Outcome	Upheld
***Burton v. Derwinski*, 933 F.2d 988 (Fed. Cir. 1991)**	
Statute	Veterans' Benefits Statute (VA)
Form	Regulation
Longevity in Years	8 years (1983–1991)
No. of Presidential Administrations	2
Change in Party?	No
Reason for Challenge	Claimant seeking jurisdiction before Court of Veterans Appeals
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (reenacted)
Outcome	Upheld

***Anderson Shipping Co. v. EPA*, 852 F.2d 1387 (D.C. Cir. 1988)**	
Statute	Clean Air Act (EPA)
Form	Regulation
Longevity in Years	18 years (1970–1988)
No. of Presidential Administrations	4
Change in Party?	Yes
Reason for Challenge	New regulations that follow longstanding EPA interpretation
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes
Outcome	Upheld
***Int'l Union, UAW v. Brock*, 816 F.2d 761 (D.C. Cir. 1987)**	
Statute	Veterans' Act
Form	Policy handbook
Longevity in Years	12 years (1975–1987)
No. of Presidential Administrations	3
Change in Party?	Yes
Reason for Challenge	Claimants seeking government benefits
Reliance Interests?	No
Mention of Legislative Acquiescence	Yes (secretary argues that Congress didn't try to change policy until 1981)
Outcome	Rejected

Table 2: Reasons Motivating Litigant Challenge To Longstanding Agency Interpretation		
Changed Factual/Legal Developments		
1	Astrue v. Caputo (technology)	Unclear
2	Thompson v. N. Am. Stainless (law)	Ignored/Upheld
3	Chemehuevi Tribe v. FPC (technology)	Upheld
4	Int'l Union UAW v. Wis. Emp't Relations Bd. (facts)	Rejected
5	Sebelius v. Auburn Reg'l Med. Ctr. (facts)	Upheld
6	Estate of Landers v. Leavitt (facts)	Upheld
7	Pena-Muriel v. Gonzales (law)	Upheld
8	OfficeMax v. United States (technology)	Rejected
Employer Defense to Claim of Statutory Violation		
1	Thompson v. N. Am. Stainless	Ignored/Upheld
2	Smith v. City of Jackson, Miss.	Upheld
3	Sutton v. United Air Lines	Rejected
4	Bragdon v. Abbott	Upheld
5	EEOC v. Arabian Am. Oil Co.	Rejected
6	Pub. Emps. Ret. Sys. of Ohio v. Betts	Rejected
7	W. Air Lines, Inc. v. Criswell	Ignored/Upheld
8	Tony and Susan Alamo Found. v. Sec'y of Labor	Upheld
9	N. Haven Bd. of Educ. v. Bell	Upheld
10	NLRB v. Hendricks Cnty. Rural Elec. Membership	Upheld
11	Del. River Stevedores v. DiFidelto	Upheld
12	Sec'y of Labor v. Excel Mining	Rejected
Resistance to Agency Enforcement		
1	Rapanos v. United States	Rejected
2	Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.	Upheld
3	Aaron v. SEC	Rejected
4	SEC v. Sloan	Rejected
5	United States v. Baxter Int'l, Inc.	Upheld
6	United States v. Occidental Chemical Corp.	Upheld

Attempt to Obtain/Increase Government Benefit		
1	Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.	Upheld
2	Barnhart v. Walton	Upheld
3	Brown v. Gardner	Rejected
4	FDIC v. Phila. Gear Corp.	Upheld
5	Morrison-Knudsen Constr. Co. v. Dir., Office of Workers' Compensation Programs	Upheld
6	United States v. Clark	Upheld
7	Price v. Stevedoring Servs. of Am., Inc.	Rejected
8	Sai Kwan Wong v. Doar	Upheld
9	Estate of Landers v. Leavitt	Upheld
10	Abebe v. Mukasey	Ignored/Reject
11	Groff v. United States	Upheld
12	Int'l Union, UAW v. Wis. Emp't Relations Bd.	Rejected
Challenge to Agency Authority/Claim for Availability of Judicial Review		
1	NLRB v. United Food & Commercial Workers Union Local 23	Upheld
2	CFTC v. Schor	Upheld
3	Frankl v. HTH Corp.	Upheld
4	Menkes v. U.S. Dep't of Homeland Sec.	Upheld
5	Walton v. Rose Mobile Homes	Rejected
6	Les v. Reilly	Upheld
7	Burton v. Derwinski	Upheld
New Regulation Relying on Longstanding Agency Position		
1	Entergy Corp. v. Riverkeeper, Inc.	Upheld
2	Pub. Citizen Health Research Grp. v. Dep't of Labor	Upheld
3	Anderson Shipping Co. v. EPA	Upheld
Particular Hardship to Litigant		
1	Rapanos v. United States	Rejected
2	Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.	Upheld
3	Ramos-Barrientos v. Bland	Partial/Upheld

Private Property Protection		
1	Rapanos v. United States	Rejected
2	Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.	Upheld
3	Aaron v. SEC	Rejected
4	SEC v. Sloan	Rejected
5	United States v. Baxter Int'l, Inc.	Upheld
6	United States v. Occidental Chemical Corp.	Upheld
Federalism Concerns		
1	Rapanos v. United States	Rejected
2	Alaska Dep't of Envtl. Conservation v. EPA	Upheld
3	City of Milwau-kee v. Ill. & Mich.	Rejected
Medicare Reimbursement		
1	Sebelius v. Auburn Reg'l Med. Ctr.	Upheld
2	Se. Ala. Med. Ctr. v. Sebelius	Rejected
3	Health Care Cost Containment Sys. v. McClellan	Upheld
Miscellaneous		
1	Balt. & Ohio Ry. Co. v. Jackson	Rejected
2	FEC v. Democratic Senate Campaign Comm'n	Upheld
3	E.I. du Pont de Nemours & Co. v. Collins	Upheld
4	United States v. Nat'l Ass'n of Sec. Dealers, Inc.	Upheld
5	Saxbe v. Bustos	Upheld
6	Council Tree Commc'ns v. FCC	Upheld
7	Bhd. of R.R. Signalmen v. Surface Transp. Bd.	Upheld
8	Ammex, Inc. v. United States	Upheld
9	Legal Envtl. Assistance Found., v. EPA	Rejected
10	Uselton v. Commercial Lovelace Motor Freight	Upheld
11	Garcia v. Brockway	Ignored/Reject
Unclear		
1	Young v. Cmty. Nutrition Inst.	Upheld
2	Chemical Mfrs. Ass'n v. Natural Res. Def. Council	Upheld

Table 3: Factors Favoring and Disfavoring Deference	
Factors Favoring Deference	**Factors Disfavoring Deference**
Reliance Interests[1]	Changed Factual Circumstances[2]
Legislative Acquiescence[3]	Changes in the Surrounding Law[4]
Presumed Soundness/ Practical Workability[5]	Harmful or Adverse Effects of Interpretation Become Apparent[6]
Separation of Powers/ Institutional Competence of Agency and Congress vs. Courts[7]	Irrational Agency Rigidity[8]
	Lack of Visibility for Interpretation[9]
	Interpretation Causes Particular Hardship in Certain Applications[10]

1. *See, e.g.*, Saxbe v. Bustos, 419 U.S. 65, 76 & n.29 (1974); Brief for Petitioner, FDIC v. Philadelphia Gear Corp, 476 U.S. 426 (1986) (No. 84-1972), 1985 WL 670115, at *27–30.

2. *See* OfficeMax, Inc. v. United States, 428 F.3d 583, 598 (6th Cir. 2005) (court rejects longstanding interpretation where new cellular service technology makes distance-based pricing irrelevant).

3. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 700–01 (1995) (subsequent amendment shows congressional approval of agency's reading); CFTC v. Schor, 478 U.S. 833, 845–46 (1986).

4. *See* Price v. Stevedoring Servs. of Am., Inc., 697 F.3d 820, 841–42 (2012) (noting that case law has moved away from a rule forbidding compounding interest).

5. *See* Ammex, Inc. v. United States, 367 F.3d 530, 535 (6th Cir. 2004) (IRS's adherence to interpretation for thirty years shows interpretation's soundness).

6. *See* Baltimore & Ohio Ry. Co. v. Jackson, 353 U.S. 325 (1957) (injury to employee highlights problems with employer safety equipment).

7. *See* Saxbe v. Bustos, 419 U.S. 65, 79 (1974) (Congress should be the one to change interpretation).

8. *See* Astrue v. Capato, 132 S. Ct. 2021 (2012) (agency applies old regulations to children born through new technologies enabling posthumous conception).

9. *See* Menkes v. U.S. Dep't of Homeland Sec., 637 F.3d 319, 347 (D.C. Cir. 2011) (Brown, J., dissenting) (noting that agency decision was not published or available to the public).

10. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 714 (1995) (Scalia, J., dissenting) ("unfairness to the point of financial ruin").