Deference for Interesting Times

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"May you live in interesting times."[1]

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INTRODUCTION

For the first time in the history of modern environmental regulation the U.S. Supreme Court in 2016 stayed a major rule, while the rule was pending in the D.C. Circuit and after that court had denied similar motions three times.[2] The major rule, of course, is the Clean Power Plan ("CPP"), which is both the Environmental Protection Agency's ("EPA") signature climate change initiative and one of the most contentious rules any federal agency has ever issued.[3] The Court provided no glimpse into its reasoning for granting the stay, leading many to speculate that the Court was largely motivated by political considerations. It is nothing new to suggest this possibility; scholars have demonstrated statistically significant links between judges' presidential appointing parties and

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1. This saying is often described as an ancient Chinese curse; but the dubious source is the 1939 speech of Frederic R. Coudert at the *Proceedings of the Academy of Political Science*. *See* Alexis Carrel, et al., *Proceedings of the American Society International Law at Its Annual Meeting*, 33 AM. SOC'Y OF INT'L L. 163, 166 (1939). Robert F. Kennedy also referenced the "curse" in a speech in 1966. Senator Robert F. Kennedy, Day of Affirmation Address at the University of Capetown (June 6, 1966), http://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/RFK-Speeches/Day-of-Affirmation-Address-as-delivered.aspx. It seems that every generation thinks its own times qualify as "interesting."

2. For a full procedural history, see Emily Hammond & Richard J. Pierce, Jr., *The Clean Power Plan: Testing the Limits of Administrative Law and the Electric Grid*, 7 GEO. WASH. J. ENERGY & ENV'T. 1, 8–9 (2016). Furthermore, it is very unusual that Clean Air Act rules are stayed during the pendency of litigation. In her thoughtful contribution to this Symposium, Professor Lisa Heinzerling shows just how unprecedented the Court's stay was. Lisa Heinzerling, *The Court's Clean-Power Power Grab*, 28 GEO. ENVTL. L. REV. 425 (forthcoming May 2016).

3. Hammond & Pierce, *supra* note 2, at 1 n.1.

outcomes in at least some kinds of cases.[4] Still, that prospect is somewhat embarrassing. Moreover, it is hard to know what to do about it.

Many scholars view the deference doctrines as providing a check on politically motivated judicial behavior.[5] That is, when a court is mindful not to substitute its own judgment for that of an agency, it both respects the executive branch's comparative institutional expertise and democratic accountability, and alleviates the judiciary's countermajoritarian difficulty.[6] Thus, the Supreme Court's CPP "power grab," as described by Professor Lisa Heinzerling, seems an affront not just to the rule of law, but to the bedrock constitutional premises on which administrative law relies. Indeed, the Court's stay cannot be viewed in a vacuum. Commentators have taken note of other departures from deference case law in the Court's jurisprudence, and have speculated that the era of deference may be waning.[7] And—presumably motivated by alarm at EPA's interpretive analysis supporting the CPP—a new bill circulating in the House of Representatives purports to do away with some kinds of deference altogether.[8]

If deference declines, we can expect that it will become even harder for courts to exercise self-restraint, making the outcomes of judicial review more difficult to predict and undermining the legitimacy of the role of the judiciary. This possibility justifies a close look at the Court's recent approaches to deference, which is the task I take up in this article. I focus on two standards of review arising under the Administrative Procedure Act ("APA"). First, I examine the Court's review of agency interpretations of their statutory mandates under the test announced in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*[9] Second, I consider the Court's most recent application of the arbitrary and capricious standard, often described as "hard-look review."[10] The results are mixed. With respect to the *Chevron* standard, there appears to be a slight shift in the Court's

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4. For more on this "attitudinal model," see, for example Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 832–33 (2008).

5. *See e.g.*, Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. Rev. 273 (2011) (grounding *Chevron* in Article III norms).

6. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) (arguing for judicial minimalism to alleviate discomfort with the courts' countermajoritarian role). The "countermajoritarian difficulty" is "shorthand for the problem of reconciling judicial review with popular governance in a democratic society. The problem is . . . , to the extent that democracy entails responsiveness to popular will, how to explain a branch of government whose members are unaccountable to the people, yet have the power to overturn popular decisions?" Barry Freidman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 83 N.Y.U. L. REV. 333, 335 (1998).

7. *E.g.*, Richard J. Pierce, Jr., *The Future of Deference*, 84 GEO. WASH. L. REV. (forthcoming 2016).

8. Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. (2016) (amending Administrative Procedure Act to provide for *de novo* review of questions of law).

9. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). This test considers whether the agency has acted within the scope of its statutory authority. 5 U.S.C. § 706(2)(A) (1966).

10. This standard arises under 5 U.S.C. § 706(2)(C) (arbitrary and capricious) as well as 5 U.S.C. § 706(2)(E) (substantial evidence). *See* Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors, 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.) (stating that the standards are essentially the same).

application of the doctrine that has implications for political control of the administrative state, regulatory certainty, and judicial overstepping. With respect to hard-look review, however, the Court's most recent analytical example shows the doctrine functioning just as I argue that it should.

Part I below suggests the reasons for thinking we live in interesting times. It provides additional context for considering whether the Court is eroding the deference doctrines, and notes particularly what is at stake for the CPP. Next, Part II describes what my co-author and I have called "*Brand X* avoidance"[11] as a distinct sub-species of the *Chevron* literature, and suggests that it represents only a small jurisprudential shift away from courts' traditional concerns with agency interpretations of their statutory mandates. Nevertheless, if the trend continues, *Brand X* avoidance stands to provide an important counter-balance to presidential control theory, at the cost of aggrandizing power to the Court itself. Part III provides a contrast; recent jurisprudence suggests that hard-look review is alive and well, offering the best of judicial care tempered with deference to a co-equal branch. I conclude that, although there may be a detectable shift in the Court's *Chevron* jurisprudence, this development is not necessarily bad; it has the benefit of promoting regulatory certainty. Moreover, the Court's hard-look example offers reasons to be optimistic, even in these interesting times.

I. INTERESTING TIMES

When the Supreme Court issued its decision in the Affordable Care Act case, *King v. Burwell*,[12] it took a surprising analytical approach. It declined to apply *Chevron* to the Internal Revenue Service's ("IRS") interpretation of the relevant statutory provision because it thought Congress did not intend to delegate interpretive authority to the IRS for such an "important" issue.[13] It is unusual for the Court to expressly decline to apply *Chevron* in this manner, and such departure creates consternation among lawyers and scholars alike.[14] In addition, the Court has signaled that *Auer* deference may not belong in the doctrinal world, prompting further speculation about the decline of deference.[15]

The CPP also presents thorny interpretive issues, and the validity of EPA's interpretation of the relevant statutory provisions will certainly play a major role

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11. Hammond & Pierce, *supra* note 2, at 7.

12. King v. Burwell, 135 S. Ct. 2480 (2015).

13. *Id.* at 2488–89.

14. Another rare example is *U.S. Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (declining to apply *Chevron* deference to FDA's interpretation that would have resulted in banning tobacco products).

15. *E.g.*, Sanne Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 67 (2015); Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 OHIO ST. L.J. 813 (2015). The *Auer* doctrine provides that courts should give great deference to agencies' interpretations of their own regulations. *See* Auer v. Robbins, 519 U.S. 452, 462–63 (1997).

in the coming litigation.[16] But the fate of the CPP involves more than a curious puzzle of deference. Issued in final form in the year preceding the 2016 presidential election, the CPP envisions massive changes in our electricity fuel mix, with a major shift first away from coal toward natural gas, and later away from natural gas toward more renewables.[17] Prior to the stay, the first compliance deadline was only months before the election. EPA argued that this deadline was really only a progress update, but states saddled with major compliance challenges and coal companies facing shutdowns argued that they would face irreversible hardships even before the first deadline.[18]

Had the Supreme Court not granted the stay, investors and states would have taken important steps toward compliance leading up to the first deadline.[19] Even if the next president was a Republican, and the Court ultimately found some flaw in the CPP, inertia would have at least prompted some of the changes contemplated by the rule.[20] With the stay in place, the burden of inertia is on EPA. Even if the Court were to ultimately uphold the rule, and the next President disagrees with the CPP, there will be no momentum and we can expect it to be only weakly enforced.[21]

Can we call this "interesting times"—or is it more apt to call it administrative law as usual? That agencies can change their minds is a bedrock principle of administrative law. The deference doctrines give agencies wide latitude to change—even if changes are purely a result of changes in the governing administration[22] and even if there has been significant reliance on a prior

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16. For a description of the largest interpretive issues, see Hammond & Pierce, *supra* note 2, at 7.

17. This description considerably glosses over the details, which are laid out in the Final Rule and supporting documents that span thousands of pages. *See* Hammond & Pierce, *supra* note 2, at 1–2 (describing the voluminous record).

18. For a summary of the arguments, see *id.* at 9.

19. About twenty states and local governments say they will continue to do so. *See* Press Release, New York State Office of the Attorney General, Joint Statement by A.G. Scheiderman, States, Cities And Counties in Response to Temporary Stay of Clean Power Plan (Feb. 10, 2016), http://www.ag.ny.gov/press-release/joint-statement-ag-schneiderman-states-cities-and-counties-response-temporary-stay. About eighteen states have halted their discussions in light of the stay, and nine were still weighing their options as of February 22, 2016. *See* Elizabeth Harball & Emily Holden, *Clean Power Plan: After the Stay: Where All 50 States Stand*, CLIMATEWIRE (Feb. 22, 2016), http://www.eenews.net/climatewire/2016/02/22/stories/1060032728.

20. Following the Court's rejection of the Maximum Achievable Control Technology ("MACT") standards rule in *Michigan v. EPA*, the agency indeed bragged that it had achieved substantial compliance during the pendency of litigation. *See also* Oral Argument at 36:12–36:58, White Stallion Energy Ctr. v. EPA, 748 F.3d 1222 (D.C. Cir. 2015) (No. 12-1100) (counsel for coal-fired electric generating units ("EGUs") arguing court should not vacate Mercury and Air Toxics Standards ("MATS") rule on remand, in part because industry has already complied and would face stranded costs if there were a vacatur), https://www.cadc.uscourts.gov/recordings/recordings2016.nsf/4DE2A2ED99709EB985257F110069816C/$file/12-1100%20%282%29.mp3.

21. *See* Heckler v. Cmty. Health Servs., 467 U.S. 51, 63–64 (1984) (rejecting equitable estoppel argument raised in response to government's attempt to reclaim overpaid benefits).

22. Fed. Commc'n Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 514–15 (2009); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

policy.[23] This is true notwithstanding the sometimes harsh impact of regulatory uncertainty.[24] Furthermore, adherents of the presidential control model[25] of administrative law argue that presidential involvement in agencies' policymaking might even justify *greater* deference than usual.[26] Overall, these events highlight one of the most difficult conundra of administrative law: how should courts review agency actions that are certainly political and subject to the changes of shifting presidential administrations, yet informed by expertise, experience, and legislative delegation?[27]

II. *CHEVRON* AND *BRAND X* AVOIDANCE

Contrary to what some might have suspected, *King v. Burwell* did not announce the end of *Chevron* deference.[28] Under that doctrine, courts reviewing agencies' interpretations of their statutory mandates usually apply the familiar two-step *Chevron* framework, which asks first whether Congress has addressed the issue, and second, whether the agency's interpretation is permissible.[29] Regarding step two, under *Brand X*, a permissible interpretation need not be the only interpretation; an agency is free to change that interpretation, provided the new interpretation is also permissible.[30] For those seeking regulatory certainty, this rule seems problematic: it enables an agency to make 180-degree turns in its

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23. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1209 (2015) (rejecting reliance argument in holding agency need not undertake notice and comment to change a prior rule that was exempt from notice and comment).

24. Even particularized reliance interests are unlikely to gain traction in the courts. *See Heckler*, 467 U.S. at 63–64 (rejecting equitable estoppel argument raised in response to government's attempt to reclaim overpaid benefits).

25. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . ."); *In re* Aiken Cnty., 645 F.3d 428, 440 (D.C. Cir. 2011) (Kavanaugh, J., concurring) ("Presidential control of those agencies thus helps maintain democratic accountability and thereby ensure the people's liberty.").

26. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2375–76 (2001); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009). *But see* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003) (arguing presidential control model overlooks arbitrariness in favor of accountability); Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141 (2012) (arguing presidential control should not be a factor in hard-look review).

27. It bears emphasis that the late Justice Scalia—once an administrative law scholar—was at the center of these developments. With his vacancy come a number of doctrinal uncertainties and a cacophony of political bickering. *See, e.g.*, Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345 (1978).

28. I note, however, that courts frequently do not apply *Chevron*, even in *Chevron*-eligible cases. *See* 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, 1090 (2008) (empirical study showing the Court usually does not apply *Chevron* to *Chevron*-eligible cases).

29. *Chevron*, 467 U.S. at 842–43.

30. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

interpretive policymaking with every new president.[31] Adding to that concern, under *City of Arlington v. FCC*,[32] agencies' jurisdictional interpretations are also awarded *Chevron* deference.[33] Presumably, this means that an agency could also change its view of its jurisdictional authority provided the statute is ambiguous.[34]

In the 2014 decision *Util. Air Regulatory Grp. v. EPA* ("*UARG*")[35] and the 2015 decision *Michigan v. EPA*,[36] however, the Court limited the reach of these *Brand X* results. First, in *UARG* the Court rejected EPA's interpretation of the term "any air pollutant" in the Clean Air Act ("CAA") to include greenhouse gas emissions ("GHGs") for the Prevention of Significant Deterioration ("PSD") program.[37] Although the Court determined that "any air pollutant" was not a term susceptible of a single meaning, the agency concluded that EPA was clearly foreclosed from the interpretation the agency had espoused.[38] As a practical matter and given the context of the statutory scheme, this reasoning meant that EPA truly was foreclosed from adopting a different way of regulating GHGs under the PSD program.[39] In other words, the decision is framed as a step-two decision, but its impact is more like a step-one holding that the statute is clear.

Second, in *Michigan v. EPA*, the Court again offered a strong version of step two that essentially tied the agency's hands going forward. There, the Court held that EPA's interpretation of a different CAA provision, "appropriate and necessary," precluding cost considerations was flatly unreasonable.[40] The impact of this holding again is to circumvent *Brand X*: the agency must now always include costs in making a threshold decision to regulate under the relevant statutory provision. To be sure, the Court did not tell the agency *how* to consider cost.[41]

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31. *See* Hammond & Pierce, *supra* note 2, at 7; *see generally* Pierce, *supra* note 7 (criticizing *Brand X* for creating regulatory uncertainty).

32. City of Arlington v. Fed. Commc'n Comm'n, 133 S. Ct. 1863 (2013).

33. *Id.* at 1868 ("No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority.").

34. This observation helps show why it does not make sense to use *Chevron* to analyze one of the jurisdictional issues in the CPP litigation. Where Congress has passed two different statutory provisions—one which would confer jurisdiction and one which would not—there is no basis for engaging in the *Chevron* fiction of Congress's intent to delegate interpretive authority. *See* Hammond & Pierce, *supra* note 2, at 7 (providing analysis relevant to CAA section 112 exemption issue and arguing for the *King v. Burwell* approach that would uphold EPA's jurisdiction). Thus, we can also avoid the problematic result of EPA changing its mind whether those conflicting provisions give it jurisdictional authority to regulate GHGs from EGUs.

35. Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014).

36. Michigan v. EPA, 135 S. Ct. 2699 (2015).

37. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2439.

38. *Id.* at 2442.

39. For details, see Hammond & Pierce, *supra* note 2, at 8. Note that this impact is limited to sources not already regulated under the PSD program. *See id.* at 2443.

40. *Michigan*, 135 S. Ct. at 2708 ("[I]t is unreasonable to read an instruction to an administrative agency to determine whether 'regulation is appropriate and necessary' as an invitation to ignore cost."). Notably, the dissent agreed with this proposition. *Id.* at 2714 (Kagan, J., dissenting).

41. *Id.* at 2711.

EPA is, however, not free on remand to interpret this ambiguous language in a way that ignores costs.

These opinions—both authored by Justice Scalia who was critical of *Brand X*[42]—can be viewed in two ways. First is part of the ordinary *Chevron* taxonomy. That is, even if a statute is ambiguous, an agency's impermissible interpretation will not survive review.[43] If a court holds an agency's reasoning unlawful at step two, the agency is not free on remand to adopt precisely the same interpretation on precisely the same grounds.

But that leads to my second observation. Courts and scholars have developed a rich literature engaging the argument that the step-two analysis is a special example of arbitrary and capricious review.[44] If that is truly the case, then why couldn't an agency on remand adopt exactly the same interpretation the court held to be impermissible, but do so on permissible grounds? After all, that result is precisely what the arbitrary and capricious standard allows.[45] Even if this result is theoretically possible, *UARG* and *Michigan* foreclosed it as a practical matter for the two CAA provisions at issue. The result—less discretion for EPA—also means more regulatory certainty and a (slightly) diminished role for presidential control. It could also mean the Court is checking itself less, which opens the door for politically motivated judicial decision-making.

III. HARD-LOOK REVIEW AND THE COURT'S TRANSLATION FUNCTION

The presidential control model is often described as either complimentary to, or in tension with, the expertise model of administrative law.[46] In arguing that there is a role for each, I have urged courts to view their task in arbitrary and capricious review as straddling a number of normative goals. Rather than apply "super deference,"[47] which places science on a pedestal at the expense of the courts' role in furthering administrative law values,[48] courts should apply traditional hard-look review even in matters of scientific uncertainty or technical complexity.[49]

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42. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1017 (2005) (Scalia, J., dissenting).

43. *See* Emily Hammond et al., *Judicial Review of Statutory Issues Under the Chevron Doctrine*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 94–100 (describing step two and collecting examples).

44. *See id.* at 94–98 (discussing the literature and arguments).

45. Indeed, this principle's pedigree is long. *See* Sec. Exch. Comm'n v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 196, 207 (1947) (upholding agency order reaching same result as prior order, but on different grounds).

46. *See supra* note 26 (collecting sources on presidential control).

47. *See generally* Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review of Agency Science*, 109 MICH. L. REV. 733 (2011).

48. These values include participation, deliberation, and transparency. *See* Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 316–17 (2013).

49. *See* Hammond Meazell, *supra* note 47, at 778–79.

Admittedly, the hard-look standard is difficult to pin down. As articulated in the classic opinion *Motor Vehicle Mfs. Ass'n v. State Farm Mut. Auto. Ins. Co.*:

> "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[50]

This passage captures two things. First, the "deference" aspect of the standard means courts may not substitute their judgment for that of the agencies. Although it may be impossible to completely insulate a jurist's decision-making from his or her policy preferences, the second part of the standard helps. That second component, which requires the agency to examine the data and explain itself, is best applied with similar judicial reasoning. In other words, courts should explain the applicable science or technology, any uncertainties, and how those fit within the particular statutory context.[51] By doing so, courts fulfill a normative role by translating complex information for generalist consumers of agency decision-making.[52] Moreover, by providing a detailed analysis, a court can also constrain itself, placing on itself the check of reasoned analysis.

The Court's 2016 decision in *FERC v. Elec. Power Supply Ass'n* ("*EPSA*") did just that.[53] At stake was FERC's Order 745, which set a uniform compensation rule for demand response ("DR") bids in the wholesale markets.[54] The Court considered two issues: (1) FERC's jurisdiction to issue the rule under the Federal Power Act; and (2) whether the way the rule set compensation was arbitrary and capricious.[55] The D.C. Circuit had ruled against FERC on both grounds, but its analysis on the second issue was particularly disappointing for its brevity.[56] In a single paragraph, the court barely described the parties' arguments, let alone the details of the pricing scheme, in reaching the conclusion that the scheme was arbitrary and capricious.[57]

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50. Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

51. Hammond Meazell, *supra* note 47, at 778.

52. *See id.* I acknowledge the many concerns others have raised about the impact of hard-look review on agencies, ossification in particular. *See, e.g.*, Richard J. Pierce, Jr., *Seven Ways to De-Ossify Rulemaking*, 47 ADMIN. L. REV. 59. I contend the benefits of hard-look review as I conceive it are worth those risks, but direct interested readers to Hammond Meazell, *supra* note 47, for a full engagement of the issues.

53. Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760 (2016).

54. Demand Response Compensation in Organized Wholesale Energy Markets, 76 Fed. Reg. 16,658 (Mar. 24, 2011) (codified at 18 C.F.R. § 35.28(g)(1)(v)).

55. *See EPSA*, 136 S. Ct. at 767.

56. *See* Elec. Power Supply Ass'n v. Fed. Energy Regulatory Comm'n, 753 F.3d 216, 225 (D.C. Cir. 2014), *overruled by* Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016).

57. *See Id.* at 225. In a prior portion of its opinion, the court dedicated a scant two paragraphs to the wholesale markets and pricing scheme. *See id.* at 219–20.

The Supreme Court reversed on both issues. Of note here is its approach to the second issue. Wholesale electricity markets operate against a complex background of technical constraints owing to the physics of power generation and transmission.[58] How electricity is priced on such markets operates against yet another set of complexities relating both to technical constraints and to regulatory requirements.[59] DR—which amounts to an aggregated bid *not* to use electricity—introduces an entirely new set of complexities.[60] In an opinion authored by Justice Kagan, the Court proceeded to carefully, clearly, and informatively discuss these many complexities.[61] Although the Court mentioned that it owed deference to the agency's technical decision-making,[62] its actual analysis illustrates the best of hard-look review for its detailed explanation and careful look at the agency's reasoning.

CONCLUSION

What can we take from these recent forays into deference? First, contrary to the cries of deference's demise, the actual way the *Chevron* and hard-look lines of cases function does not represent such a serious departure from the doctrine as some might suggest. There may be a slight shift, however, which is worth noting and watching. Regarding *Chevron* deference, the *Brand X* avoidance varietal of step-two analysis tips the scales just barely away from presidential control, reinforcing regulatory certainty but at the cost of diminished Article III legitimacy. There is some tension with this approach and the typical arbitrary and capricious analysis that provides agencies flexibility on remand. But regarding ordinary hard-look review, it is heartening to see a carefully crafted opinion that provides a searching review, yet is ultimately deferential to the agency's decision.

As observers of environmental, energy, and administrative law look ahead to the next Justice of the Supreme Court, review of the CPP, and many other environmental- and energy-related agency actions working their way through the courts, perhaps the outlook is not so bleak. Perhaps it is not a curse after all to live in interesting times.

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58. *See generally EPSA*, 136 S. Ct. at 768–69.

59. *See generally id.* at 769–70.

60. DR is important to environmental policies for several reasons. The two most important are (1) consumers that reduce demand frequently use diesel back-up generators and may displace cleaner-burning sources of electricity, but (2) DR is helpful in balancing renewable intermittency. *See* Del. Dep't of Nat. Res. & Envtl. Control v. EPA, 785 F.3d 1, 4–5 (D.C. Cir. 2015) (rejecting EPA's emissions standards for back-up generators); Joel B. Eisen, *Distributed Energy Resources, "Virtual Power Plants," and the Smart Grid*, 7 ENVTL. & ENERGY L. & POL'Y J. 191 (2012) (documenting DR's use in balancing wind).

61. *See EPSA*, 136 S. Ct. at 782–84.

62. *See id.* at 782.