OKLAHOMA CITY UNIVERSITY
LAW REVIEW

VOLUME 41 WINTER 2016 NUMBER 3

ESSAY

REMEMBERING *GILCHRIST* AND THE IMPORTANCE OF FEDERAL EXECUTIVE RESTRAINT

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I. INTRODUCTION

As courts wrestle with unilateral actions of the executive branch, the *Chevron* decision of 1984 could prove problematic to traditional checks and balances because *Chevron* created a test that, in some instances, gives inordinate deference to an executive agency's decision-making.[1] This paper explores why it may be necessary for the United States Supreme Court to reconsider its approach in *Chevron*, placing a greater emphasis on protecting the scope of congressional authority. When reconsidering

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The views expressed in this paper are exclusively those of the author and do not necessarily represent the views of the author's current employer or any former employer or the forum where this is published.

1. *See* Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).

Chevron, the Court should compare it with an early American judicial opinion, *Gilchrist*, which also concerned the balance of executive and legislative power. Finally, the author proposes a modification to *Chevron*'s test that better protects both federalism and the Constitution's separation of powers.

II. THE PRELUDE TO *GILCHRIST*

Mid-afternoon, June 22, 1807. Commodore James Barron, commander of the American frigate *Chesapeake*, watched the fifty-cannon British war vessel *Leopard* trail his ship as the *Chesapeake* left the waters of the Chesapeake Bay. Barron and his ship had recently passed Cape Henry, which guarded the wide mouth of the Chesapeake Bay, and were heading into open waters. The *Chesapeake* was destined for the Mediterranean to relieve the *Constitution*, a fellow American naval vessel that had overstayed its naval tour and needed to return to the United States.[2]

It was not unusual to see British ships in the region. There typically were several in the theater, harrying French and American vessels and searching for British deserters.[3] The *Chesapeake*, with its forty cannons, had a crew of 329 sailors and 52 marines. Barron did not expect combat, especially so close to home, and his ship was unprepared. Several civilian passengers were aboard, and their luggage littered the main deck. Other supplies were on the decks and not stowed. Making matters worse, illness was running through the crew: thirty-two men were on the frigate's sick list. Many of these men lay in hammocks strung from the cannons.[4]

The *Leopard* continued to close the distance and eventually pulled alongside the *Chesapeake* and hailed Commodore Barron. Captain Salusbury Pryce Humphreys of the *Leopard* sent Lieutenant John Meade in a boat to the *Chesapeake*. As was customary and courteous, Barron welcomed Meade aboard. Once aboard, Meade handed Barron a note from Sir George Cranfield Berkeley, the British admiral in charge of North

2. 1 WILLIAM M. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER: A DOCUMENTED HISTORY 467 (1974). My depiction of this event is taken primarily from my reading of three texts, GOLDSMITH, *supra* at 467–68, SPENCER C. TUCKER & FRANK T. REUTER, INJURED HONOR: THE *CHESAPEAKE-LEOPARD* AFFAIR JUNE 22, 1807, at 1–17 (1996), and PAUL BARRON WATSON, THE TRAGIC CAREER OF COMMODORE JAMES BARRON (1942).

3. GOLDSMITH, *supra* note 2, at 467.

4. TUCKER & REUTER, *supra* note 2, at 1–2.

American operations.[5]

The dispatch demanded that the *Chesapeake* return British deserters purportedly on board. Barron refused. Aboard his ship were three Americans who had been illegally pressed into British service. Barron had no intention of giving them over to the British.[6]

Rebuffed by Barron, Meade returned to the *Leopard*. During all of this time, the *Chesapeake* had not made ready its guns, which naval protocol called for when another power's fighting vessel approached. Notably, on the *Leopard*'s approach, the *Leopard* had opened its lower-deck ports and removed the plugs from the muzzles of the exposed cannons. But that also did not cause Barron to ready his ship. An attack by the British, he believed, was highly unlikely—it would be "extravagant"—he later said.[7]

But an attack came. In three broadsides, seventy-five devastating cannon shots pummeled the *Chesapeake*. The frigate managed but one shot in response. The *Chesapeake* was ruined. Three sailors died. Eighteen were wounded, eight severely.[8]

To the American navy, the defeat was embarrassing. To the American people, it was a rallying cry.[9]

Since the end of the Revolutionary War, the American people had never felt such emotion as they had after the *Chesapeake* incident.[10] As historian Henry Adams wrote, "For the first time in their history the people of the United States learned, in June, 1807, the feeling of true national emotion."[11] For years, British and French ships had been harassing and often stopping and boarding American vessels. The *Chesapeake* incident brought years of frustration and anger to a boil.[12] The people demanded action against the British. There were widespread calls for a military response.[13]

The president at the time, Thomas Jefferson, resisted the calls for war. He understood that America was unprepared for more war, and

5. *Id.* at 2–4.

6. GOLDSMITH, *supra* note 2, at 468.

7. TUCKER & REUTER, *supra* note 2, at 4–6 (quoting 2 HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE SECOND ADMINISTRATION OF THOMAS JEFFERSON 12 (New York, Charles Scribner's Sons 1890)).

8. GOLDSMITH, *supra* note 2, at 468; *see also* WATSON, *supra* note 2, at 21.

9. *See* GOLDSMITH, *supra* note 2, at 468–69.

10. *See id.* at 468–69.

11. ADAMS, *supra* note 7, at 27; *accord* 17 ANNALS OF CONG. 12 (1807) ("The violence of her conduct has united all America.").

12. GOLDSMITH, *supra* note 2, at 467.

13. *Id.* at 469–70; *see also* WATSON, *supra* note 2, at 22.

particularly on the seas, the United States Navy was no match for the British. Instead, Jefferson needed to buy time and strengthen the country's defenses.[14] In late 1807, Congress passed legislation, which Jefferson signed, that called for adding 188 new gunboats to the 59 already in service in order to protect the coastline, rivers, and coastal waterways.[15] In addition, Congress and the President allocated one million dollars for new coastal fortifications.[16] Constructing the gunboats and fortifications would take time. America needed more time to ready itself for any potential conflict with the British.[17]

III. THE EMBARGO ACT AND THE DETENTION OF ADAM GILCHRIST'S MERCHANT SHIP

Instead of war, Jefferson's plan was to strike at the British economy. In late 1807, Congress passed and Jefferson signed into law an embargo act, amending it several times over the following months to give it more teeth.[18] The act worked. It did substantial harm to Great Britain's manufacturing.[19] But the act, which basically brought all "foreign trade to a standstill," was also difficult on the United States, harming state economies and wiping out millions of dollars in annual excise taxes that the federal government levied on foreign trade.[20]

To enforce the embargo, Congress authorized "the collectors of the customs . . . to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever in their opinions, the intention is to violate or evade any of the provisions of the acts laying an embargo. . . ."[21] In other words, Congress expressly granted discretion to the state port collectors to detain any ship that appeared to be violating, or attempting to violate, the embargo.[22] The act provided that a captain could appeal to the President, but only after a collector first detained the

14. *See* Thomas Jefferson, President's Annual Message, 17 ANNALS OF CONG. 14–18 (1807).

15. Act of Dec. 18, 1807, ch. 4, 2 Stat. 451.

16. GOLDSMITH, *supra* note 2, at 469–71.

17. *See id.* at 471.

18. Act of Dec. 22, 1807, ch. 5, 2 Stat. 451 (repealed 1809); *accord* GOLDSMITH, *supra* note 2, at 471–73.

19. GOLDSMITH, *supra* note 2, at 476.

20. *Id.* at 473.

21. Act of Apr. 25, 1808, ch. 65, § 11, 2 Stat. 499, 501 (amending Act of Dec. 22, 1807, ch. 5, 2 Stat. 451).

22. GOLDSMITH, *supra* note 2, at 553.

captain's ship.[23]

Importantly, the collectors held their "office absolutely at the will of the executive."[24] On May 6, 1808, Secretary of Treasury Gallatin, acting under the executive authority of President Jefferson, sent a letter to all of the port collectors to guide (or perhaps, direct) their decision whether to stop ships.[25] Gallatin warned the collectors "that the president considered unusual shipments, particularly of flour and other provisions, of lumber and of naval stores, as sufficient causes for the detention of the vessel. Pot and pearl ashes and flaxseed, ought to have been added to the list."[26] The letter stated that the President "recommends therefore that every shipment of the above articles, for a place where they cannot be wanted for consumption, should be detained."[27]

Later in May, Gallatin's instructions (and Jefferson's expansion of executive power) were tested in court. Adam Gilchrist, a ship owner, had his vessel detained in Charleston by order of the port collector Simon Theus.[28] Gilchrist's ship carried a load of rice and cotton, and Gilchrist alleged that it was destined for Baltimore.[29] Gilchrist filed a mandamus action with the circuit court, requesting an order allowing his ship to depart. Theus stated that he would not have detained the ship but for the letter from the Secretary of Treasury.[30] He believed that Gallatin's letter obligated him to detain the ship.[31]

Before the court was "whether the instructions of the president, through the secretary of the treasury, unsupported by act of the Congress, will justify the collector in that detention."[32] Justice William Johnson, who in 1804 was appointed to the United States Supreme Court,[33] was sitting

23. Letter from Justice Johnson, Assoc. Justice, U.S. Supreme Court, Circuit Justice, U.S. Circuit Court for the Dist. of S.C. (Aug. 26, 1808), *in* Gilchrist v. Collector of Charleston, 10 F. Cas. 355, 360 (C.C.S.C. 1808) (No. 5,420) [hereinafter Justice Johnson's Letter].

24. *Id.* at 361.

25. GOLDSMITH, *supra* note 2, at 553; *see also* DONALD G. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER 58 (1954).

26. Justice Johnson's Letter, *supra* note 23, at 360.

27. *Id.*

28. *Id.*

29. *Id.*

30. Gilchrist v. Collector of Charleston, 10 F. Cas. 355, 355–56 (C.C.S.C. 1808).

31. Justice Johnson's Letter, *supra* note 23, at 360–61.

32. *Gilchrist*, 10 F. Cas. at 356.

33. MORGAN, *supra* note 25, at 51–52.

as a circuit justice, and he deliberated over the matter.[34]

Justice Johnson held that in the embargo act, Congress allotted "absolutely to the discretion of the collector . . . the right of granting clearances" to sail.[35] Only in the case where the collector denied clearance to sail could the ship's owner appeal to the President.[36] He wrote:

> Congress might have vested this discretion in the president, the secretary of the treasury, or any other office, in which they thought proper to vest it; but, having vested the right of granting or refusing in the collector, with an appeal to the president only in case of refusal—the right of granting clearances remains in him unimpaired and unrestrained.[37]

He ruled, "We are of opinion that the act of congress does not authorize the detention of this vessel. That without the sanction of law, the collector is not justified by the instructions of the executive . . . ."[38] Johnson questioned whether the "spirit and meaning" of Gallatin's letter would apply to Gilchrist's ship's detention, but regardless, "even if this case had been contemplated by the letter alluded to," the collector's actions would not be justified by Gallatin's letter because in the embargo act Congress did not sanction the President (or the Department of Treasury) with the discretion to detain ships.[39]

Johnson's opinion also rebuked executive overreach, stating that "there can be no doubt" "whether the instructions of the president, through the secretary of the treasury, unsupported by act of the congress, will justify the collector in th[e] detention" of Gilchrist's ship.[40] He wrote, "The officers of our government, from highest to the lowest, are equally subjected to legal restraint; and it is confidently believed that all of them feel themselves equally incapable, as well from law as inclination, to attempt an unsanctioned encroachment upon individual liberty."[41]

Gilchrist was an extraordinary decision. It was a trailblazing moment that said the checks and balances of the Constitution are very real and must

34. *Gilchrist*, 10 F. Cas. at 356.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 357.
39. *Id.*
40. *Id.* at 356.
41. *Id.*

be followed. It was all the more remarkable because Johnson had been nominated by President Jefferson.[42] Indeed, following the decision, critics in the populace accused Johnson of betraying Jefferson, the chief proponent of the embargo act.[43] The backlash did not end there. Two months after the decision, in July 1808, the attorney general of the United States penned a letter critical of the decision and published it in a Charleston newspaper.[44] Johnson responded with a letter of his own, where he stated:

> I assume it as an incontestable proposition, that every inhabitant of the United States has a perfect right to carry on commerce from one port to another, unless restricted by law; that no officer of our government can legally restrict him in the exercise of that right, except in cases specified by law. I would as soon attempt to prove his right to the air that he breathes, or the food that he consumes, as to support these doctrines by a course of reasoning; nor is it less clear, that in all cases of uninterdicted commerce, the collector is bound to grant a clearance whenever the forms imposed by law have been complied with. It is the obligation on him correlative to the right of the citizen.[45]

Johnson also wrote that based on his reading of the embargo act, discretion of granting clearances to vessels was "absolute in the collector":

> That the discretion in granting clearances is absolute in the collector, in the first instance; and only results to the president in case of the collector's refusal. From which it will follow that the president could not prescribe to him a line of conduct in granting clearances which was inconsistent with his own judgment; and, in fact, it will be found that the only effect in granting the mandamus

42. *See* GOLDSMITH, *supra* note 2, at 553 ("Jefferson had reason to believe that he would receive more sympathetic treatment at the hands of Johnson, one of his own appointed judges, than he had from Marshall and his Federalist colleagues. Much to his chagrin he did not. Justice Johnson proved to be a man of incorruptible judicial objectivity, and partisan considerations apparently did not enter into his judgments.").

43. *See* MORGAN, *supra* note 25, at 65 ("When Johnson next showed his face in the Circuit Court rooms in Georgia he faced a grand jury agitated by his recent conduct.").

44. Letter from C. A. Rodney, Attorney General of the United States, to Thomas Jefferson, President of the United States (July 15, 1808), *in Gilchrist*, 10 F. Cas. at 357, 359.

45. Justice Johnson's Letter, *supra* note 23, at 360.

> in the case of The Resource was to secure to the collector the exercise of the power vested in him by the foregoing section, and to the citizen the benefit of the collector's being released from a restraint which the law did not impose on him.[46]

Implicit in Johnson's remarks is the concept that because Congress specified that the President had only the authority to review a detention, had Congress wanted the President to have more power, Congress would have stated so in the act. "That the only case, in which the law authorizes the president to act upon the subject, is, when the collector having detained a vessel, a reference is made to the president for his decision on the correctness of the grounds of such detention."[47] This is also implicit in Johnson's statement that "Congress might have vested this discretion in the president, the secretary of the treasury, or any other officer."[48]

Gilchrist, particularly with the backdrop of Jefferson having nominated Johnson, is an intriguing and important early decision on the separation of powers between the executive and legislative branches. That *Gilchrist* receives little notice is unfortunate.

IV. THE *CHEVRON* DECISION

The guiding decision in recent decades for an executive agency's ability to make rules within the parameters of congressional direction has been *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[49]

Chevron involved a challenge to the Environmental Protection Agency's interpretation of a provision in the Clean Air Act Amendments of 1977. The amended Act established a strict permitting requirement "for the construction and operation of new or modified major stationary sources."[50] The EPA regulation implementing this requirement allowed "State[s] to adopt a plantwide definition of the term 'stationary source'" where "an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment if the alteration will not increase the total emissions from the plant."[51] The Supreme Court held that

46. *Id.*
47. *Id*.
48. *Gilchrist*, 10 F. Cas. at 356.
49. Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
50. *Id.* at 850 (quoting Clean Air Act Amendments of 1977, sec. 129(b), § 172(b)(6), Pub. L. No. 95-95, 91 Stat. 685, 747 (1977) (codified at 42 U.S.C. § 7502(b)(6) (1982))).
51. *Id.* at 840.

the "EPA's definition of the term 'source' is a permissible construction of the statute."[52]

The Court developed a two-step test for examining whether an executive agency has exceeded the scope of permissible action. First, if the federal statute "is clear, that is the end of the matter," and "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[53] Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[54] Regarding the second step, if a court finds "that Congress did not actually have an intent" expressed in the plain words of the statute, then the question is whether the agency's viewpoint is "reasonable."[55]

After analyzing the EPA's interpretation of "stationary source" under the new two-step test, the Court stated that it would give "deference" to the EPA's interpretation and that the EPA's interpretation was "a permissible construction."[56] Congress's failure to specifically define "stationary source" in the Clean Air Act Amendments of 1977 opened the door for the EPA to decide the meaning for itself.[57] After *Chevron*, the judiciary "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[58]

V. A WAY FORWARD BY LOOKING BACK TO *GILCHRIST*

In recent years, the executive branch has been testing the limits on its power to execute the laws.[59] Consequently, *Chevron* is back. And the

52. *Id.* at 866.
53. *Id.* at 842–43.
54. *Id.* at 843.
55. *Id.* at 845.
56. *Id.* at 865–66.
57. *Id.*
58. *See id.* at 843–44.
59. *See, e.g.*, Texas v. United States, 809 F.3d 134, 185 (5th Cir. 2015) ("[I]t was the failure of Congress to enact such a program that prompted [the President] . . . to 'change the law.'" (quoting Texas v. U.S., 86 F. Supp. 3d 591, 657 (S.D. Tex. 2015) (quoting Press Release, White House Office of the Press Secretary, Remarks by the President on Immigration—Chicago, Ill. (Nov. 22, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/25/remarks-president-immigration-chicago-il [https://perma.cc/VM9Z-H77B]))). *Texas* concerned executive-branch action related to illegal immigration. *Id.* at 146–47. For an example of similar federal executive-branch action concerning the Second Amendment, see *President Obama's Executive Gun Control*, HERITAGE ACTION (Jan. 8, 2016), http://heritageaction.com/2016/01/president-obamas-executive-gun-con

Chevron deference to executive agencies could prove troublesome. The *Chevron* Court, wary of *judicial* activism and overreach, wanted to avoid deciding "policy arguments" that were "more properly addressed to legislators or administrators."[60] But missing from the decision was a concern for *executive* overreach.

Consider that Congress likely never contemplated that the term "stationary source" could be ambiguous. Congress, presumably, passes legislation reflecting its intent. Regarding the language at issue in *Chevron*, even if a stationary source referred to an entire plant rather than a single smokestack, installing new smokestacks at the same plant would be a plant "modification," so either way it would require a permit.[61] The plain face of the amended Act would seem to control.

Unfortunately, *Chevron* unduly places on Congress a burden to hyper-regulate with exacting specificity. Under *Chevron*, the Court assumes that Congress intended to pass an entire regime to the executive branch and that Congress intended to retain authority only where the statutory language was exact.[62] It places on Congress the difficult, if not impossible, task of foretelling every potential dispute over language in a bill. If Congress fails to do so, then it runs the risk of inadvertently granting legislative power to an executive agency.

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trol/ [https://perma.cc/GXU5-7X9D] ("The White House cited Congress's failure to take action as justification for its executive actions."). This executive-branch expansion is similar to what is happening more broadly to the scope of the federal government's authority. *See generally* Steven T. Voigt, *Toward a Judicial Bulwark Against Constitutional Extravagance—A Proposed Constitutional Amendment for State Consent over Federal Judicial Appointments*, 7 CONLAWNOW 7, 7–10 (2015), http://ideaexchange.uakron.edu/conlawnow/vol7/iss1/2/ [https://perma.cc/SYF2-ZEW4] (discussing the judiciary's tendency toward federal expansion); Steven T. Voigt, *Two Early Events that Can Help Us Better Understand the Commerce Clause*, 30 J.L. & POL. ONLINE 1, 16 (2015), http://www.lawandpolitics.org/jlp-online [https://perma.cc/AQF9-4HHF] ("The two inquiries in this Article reinforce that the true scope of federal authority, particularly under the commerce clause, is much narrower than its modern application.").

60. *Chevron*, 467 U.S. at 864.

61. 42 U.S.C. § 7502(b)(6) (1982) (requiring permits for new or modified stationary sources); *see also* 42 U.S.C. § 7501(4) (1982) (defining "modification" the same as § 7411(a)(4)); 42 U.S.C. § 7411(a)(4) (1982) ("The term 'modification' means any physical change in, the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.").

62. *Cf.* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

The better approach is to remember *Gilchrist*. First, it is important to understand that the holdings of *Chevron* and *Gilchrist* bear little similarity. *Gilchrist* limited executive authority.[63] *Chevron* gave additional deference to the executive agency to decide for itself undefined questions as to its powers.[64]

Said another way, if *Chevron* had been decided before *Gilchrist*, *Gilchrist* probably would have been decided differently. The embargo act did not explicitly state whether port collectors could or should take direction from the Department of Treasury.[65] The port collector Theus interpreted Gallatin's letter as having an authority that Justice Johnson said it did not have.[66] Because the embargo act was silent on the issue, under *Chevron*, unless Johnson decided that Theus's interpretation was an impermissible construction of the embargo act, Justice Johnson would have been bound to give deference to Theus's interpretation.

Gilchrist did not establish an explicit test for judicially ascertaining the boundaries of an executive agency's authority.[67] Instead, Johnson simply assumed that Congress meant what it said.[68] The power to detain was given exclusively to the port collectors.[69] The President's authority was limited to appeals from detained ships.[70] Johnson wrote of "legal restraint" that applies to all in government.[71]

If in coming years *Chevron* is revisited, remembering *Gilchrist* would strengthen the judiciary's approach to deciding the scope of executive authority. *Gilchrist*'s influence on *Chevron* might involve adding these planks to its two-step test:

- When interpreting an ambiguous federal statute, the courts will defer to the principles of separation of powers and federalism.
- If Congress has not expressly delegated authority to the executive, Congress will be presumed not to have intended to delegate authority.

63. *See* Gilchrist v. Collector of Charleston, 10 F. Cas. 355, 356 (C.C.S.C. 1808).
64. *See Chevron*, 467 U.S. at 866.
65. *See Gilchrist*, 10 F. Cas. at 356.
66. *Id.* at 356–57.
67. *See id.* at 356.
68. *See id.*
69. *Id.*
70. *Id.*
71. *Id.*

The first bullet point states a maxim that should apply in all matters where horizontal or vertical powers vie for dominance.[72] The second is likewise important. When Congress's intent is unclear, deferring to an executive agency's rulemaking where the rulemaking is "reasonable" is too lenient and creates a risk of transferring power.[73] Under *Chevron*, a court that defers to an agency's statutory interpretation risks inadvertently transferring power from the legislative branch to the executive branch. Indeed, if courts are unsure of congressional intent, abstaining is potentially a prudent course of action. Presumably, Congress is able to articulate its intention to delegate rulemaking authority. In the case of the amended Clean Air Act, Congress may not have wanted the EPA to decide whether one smokestack or one plant was a stationary source. In some cases, the ability to define words and terms may have little practical impact. In others, it could contradict Congress's intent.

The additional two planks listed above call for prudence. In *Chevron*, that prudence may have meant abstaining from deciding whether the EPA's definition was the proper one. If the *Chevron* Court was unable to decide whether the EPA's definition was the proper one (i.e., if the statute was not plain on its face and if congressional intent was not abundantly clear) the Court could have taken a step back. By abstaining, the Court would have allowed Congress to clarify the amended Act as needed. Doing so would have avoided the potential to disrupt the balance of legislative and executive power, which of course has implications beyond the particular dispute.

72. *See generally* Steven T. Voigt, *How the Tenth Amendment Saved the Constitution, Contradicts the Modern View of Broad Federal Power, and Imposes Strict Limitations*, 64 CLEV. ST. L. REV. ET CETERA 1, 1–3, 12–13 (2016) (LEXIS).

73. *See generally* Steven T. Voigt, *The Divergence of Modern Jurisprudence from the Original Intent for Federalist and Tenth Amendment Limitations on the Treaty Power*, 12 U.N.H. L. REV. 85, 106–07 (2014) ("The presumption has been for a long time to justify big government somehow, some way, rather than to place the onus on the federal government to prove to the people and the states that the power it claims to have it actually holds."); Steven T. Voigt, *The General Welfare Clause: An Exploration of Original Intent and Constitutional Limits Pertaining to the Rapidly Expanding Federal Budget*, 43 CREIGHTON L. REV., 543, 544 (2010) ("This judicial presumption of expanded federal power is inconsistent with the founding fathers' intentions.").

VI. CONCLUSION

The balance of power between the executive and the legislative branches is again a topic in the courts.[74] In the coming years, we shall see if courts reconsider *Chevron* and remember the lessons of *Gilchrist*. We shall see whether the judiciary secures the checks and balances of our government.

74. *See, e.g.*, Texas v. United States, 809 F.3d 134, 146–50 (5th Cir. 2015) (discussing President Barack Obama's unilateral actions on immigration).