

# Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench<sup>1</sup>

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For me, speaking in Room 100 of Hutchins Hall is always like coming home again. In law school I took more classes in this room than I can remember, but the one I remember best, of course, was Commercial Transactions with James J. White. I have never had a better professor anywhere than Jim White. I took that class twenty-six years ago, which is a bit hard to believe, and in those days we were here each morning, four days a week, at 8:00 a.m. sharp. In Professor White's class everything was sharp, not least his sense of humor, which I have often since described as "predatory." One day's class comes to mind, especially today. We had been working on some issue arising under the Uniform Commercial Code. At the end of class, Professor White chose three panels of three students apiece and told each panel to prepare an opinion on the issue and to read it to the class the next day. I got picked for one of the panels and then somehow got the task of writing up our opinion and reading it to the class. What I wrote up by hand at 7:15 a.m. the next morning was more "talking points" than a judicial opinion, but I figured I could just wing it from there when I presented to the class. Well, when I got to class I knew I was in trouble when I saw that the other eight students on the panels were wearing suits, whereas I was wearing jeans and a t-shirt. And then I saw that the other two panels had printed out copies of their opinions, indeed enough for the whole class, whereas I had my sheet from a legal pad. So I sat up on this very dais with two students from the other panels, feeling a bit like Bill Murray in *Caddyshack*, as each of them read their panel's opinion. Then I stumbled through mine, saying something like, "The creditor can't recover here because, you know, he didn't perfect his interest, so, you know, he loses." At the end of that performance Professor White

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1. The following is adapted from a lecture delivered on December 4, 2017, at University of Michigan Law School.

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nodded rather gravely and said, “Mr. Jones and Ms. Smith, I see that you have copies of the opinions you’ve prepared, so please distribute those to the class.” Then he turned to me and said, “Mr. Kethledge, what have you got there—scraps of paper?” I think I said, “It’s actually just one piece of paper,” but that didn’t do me much good. Well, I’m wearing a suit today, and I’ve written some opinions in the meantime, so I hope I can make amends now.

Today, after almost ten years on the bench, I’d like to offer some reflections about cases involving statutory interpretation and administrative law. The law governing statutory interpretation, especially, has changed significantly since the time I was here as a student. That was the tail end of the era when lawyers would resort to the statutory text only if the legislative history was ambiguous. What brought that era to an end, of course, was the jurisprudence of Justice Antonin Scalia. Now, as Justice Kagan recently declared, “we are all textualists.”<sup>2</sup>

Yet as a practical matter textualism has a certain fragility. Not in a doctrinal or logical sense: there is a straight line from the bicameralism and presentment requirements of Article I; to a statutory text that has met those requirements; to the meaning that the citizens bound by that text would ascribe to it, which is to say its public meaning; and to what is then the law, which as judges we are bound to apply. In these respects, the inquiry is essentially the same as the one in constitutional cases: namely, what is the meaning that the citizens bound by the law would have ascribed to it at the time it was approved. By fragility, instead, I mean a certain fragility in application. For the first reflection I offer is this: There is nothing so liberating for a judge as the discovery of an ambiguity.

For once a judge discovers an ambiguity, it is 1978 again. The statutory text approved by Congress and (usually) signed by the President becomes an afterthought. In its place, legislative history—in practice written and approved only by staff—plays a dominant role. So too does the idea of statutory purpose—which judges sometimes try to extract from legislative history, but just as often seem to construct themselves. And then, in deciding the case, the judges apply the values set forth in these materials—which sometimes (though not always) seem to be the judges’ own values—rather than the values set forth in the text approved pursuant to Article I.

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2. Justice Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* at 8:09 (Nov. 17, 2015), <https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/> [<https://perma.cc/W7L8-5APW>].

Ambiguities are liberating because these materials are easier to manipulate than is a fixed statutory text. Legislative history is easy to manipulate in part because there is so much of it: committee reports, colloquies between senators or house members, hearing transcripts, earlier drafts of the legislation that later became law. These materials inevitably include all sorts of values and principles not included in the statutory text; and choosing among those values, as Judge Harold Leventhal famously observed, is like “looking over a crowd and picking out your friends.”<sup>3</sup> Yet, as Justice Kagan once said in a different context, there is a deeper pathology at work here.<sup>4</sup> The purpose of legislative history is often not to explain the statutory text, but to advocate—to convince the courts, or perhaps to allow them, to read into the text certain values that lacked the votes to be included there.

One of my cases, *Sherfel v. Newson*,<sup>5</sup> illustrates the point. There, an employer, Nationwide Insurance Company, sought a declaration that the Wisconsin Family and Medical Leave Act was preempted by ERISA—the federal pension statute, and probably the most preemptive statute in the entire United States Code—to the extent that the Wisconsin Act required Nationwide to pay short-term benefits contrary to the terms of Nationwide’s ERISA plan. (An ERISA plan is a health or benefit plan that is subject to regulation under ERISA.) I wrote an opinion, joined in full by a Clinton appointee and in part by an Obama appointee, that held the Wisconsin Act was indeed, to that extent, preempted “five different ways.”<sup>6</sup> The State tried to avoid that conclusion by citing a so-called “savings clause”—which is a clause that limits the preemptive effect of a federal statute—in the federal Family and Medical Leave Act. But that clause merely said that “[n]othing in *this Act*”—meaning the federal Family and Medical Leave Act—shall be construed to preempt “any State or local law that provides greater family or medical leave rights than the rights established under this Act . . . .”<sup>7</sup> The text of that clause thus did nothing to prevent preemption by *other* acts, such as ERISA. But the State argued that the clause’s legislative history did prevent preemption by ERISA. Specifically, the State relied upon a committee report—which in the genus of legislative history is the highest form of life—that said this very same savings clause “makes it clear that state and local laws providing greater leave rights than those provided in [the federal

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3. See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (citing conversation with Judge Leventhal).

4. See *Yates v. United States*, 135 S. Ct. 1074, 1101 (2015) (Kagan, J., dissenting).

5. 768 F.3d 561 (6th Cir. 2014).

6. *Id.* at 568.

7. 29 U.S.C. § 2651(b) (2012) (emphasis added).

Family and Medical Leave Act] are not preempted by the bill *or any other federal law*.”<sup>8</sup> Well, the reference to “the bill” was accurate because the savings clause says that “this Act” does not preempt more generous state laws. But that is all the clause says; and thus the committee report lacked any basis for saying that no “*other federal law*”—notably ERISA—could preempt them. Hence we concluded that “[t]his sentence from the Report . . . purports to rewrite [the savings clause] rather than clarify it.”<sup>9</sup>

Yet the State had still more legislative history to offer, namely a colloquy, which is a simpler organism than a committee report, and not a helpful one. In our opinion we described the colloquy this way:

The colloquy is purportedly a 1993 exchange between Senators Feingold and Kohl (both representing Wisconsin at the time), on the one hand, and Senator Dodd (the Senate sponsor of the [federal Family and Medical Leave Act]), on the other. The Wisconsin Senators each ask, “[i]s it the intent of the sponsors of” the [federal Act] that ERISA “shall not” preempt the [relevant] provision of the Wisconsin Act; and Senator Dodd in each instance duly answers yes. But the idea that this colloquy ever passed the lips of any Senator is an obvious fiction. Colloquies of this sort get inserted into the Congressional Record all the time, usually at the request of a lobbyist; and here virtually the same colloquy, with verbatim much of the same stilted phrasing, appeared in the Congressional Record two years before, in connection with a predecessor bill that the President vetoed. The principal difference between the two colloquies is that the later one assigns to Senator Feingold (who had just been elected) some of the questions that Senator Kohl is shown to ask in the earlier one. Thus, from the 1993 colloquy, one can reasonably conclude, at most, that the Wisconsin Senators sought to protect their State’s Act from preemption by ERISA, and that Senator Dodd was willing to oblige by lending his name to the colloquy—though not, apparently, by amending the [federal Family and Medical Leave Act] to that effect. But the idea that this colloquy reflects the intent of Congress as a whole is as fictional as the colloquy itself.<sup>10</sup>

Now I should confess that my views about legislative history were shaped in part by my experience in writing some of it. Shortly after I graduated from here, I worked as a Senate staffer for about two and a half years, specifically for Senator Spencer Abraham, who then represented Michigan. Mostly I worked on matters arising in the Judiciary Committee, of which Senator Abraham was a member. And on one occasion I wrote part of a committee report for legislation that, as it later turned out, did not become law. The experience was rather like being a teenager at home while your parents are away for the weekend: there was no supervision. I was able to write more or less what I pleased. That is not a reflection on any particular senator; that is just the way the work gets done. Senators approve legislation, and staff write and approve reports. Indeed I submit that most members of

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8. S. Rep. No. 103–3, at 38 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 40 (emphasis added).

9. *Sherfel*, 768 F.3d at 570.

10. *Id.* (second alteration in original) (citations omitted).

Congress (with Senator Grassley being a notable exception) have no idea at all about what is in the legislative history for a particular bill. The audience that the writers of legislative history have in mind, rather, is an audience in robes. And so for these reasons I think that Justice Scalia during his tenure on the Court, and Justice Kagan today, are rightly skeptical that legislative history should play some kind of central role in determining the rights and obligations of our citizens.

Yet legislative history does play that role once a judge declares the statutory text ambiguous. It matters very much, therefore, that judges work very hard to identify the best objective meaning of the text before giving up and declaring it ambiguous. It should take a great deal more than a couple of competing dictionary definitions to cast aside the statutory-interpretation caselaw of the past thirty years. Nor should it be enough that a statute is complicated, even very complicated. That a statute is complicated does not mean it is ambiguous. It just means that the judge needs to work harder to determine—in the sense of ascertain—the statute’s meaning. (As an aside, I would say that the term “plain meaning” is not only overused but also a misnomer, precisely because a judge often needs to work hard to determine a statute’s meaning.) And I would suggest that the persistence and willingness of judges to work hard before declaring statutes ambiguous is an important but perhaps overlooked difference between judges.

Now some observers say the idea that judges can determine the best objective reading of a particular text is naïve or even fraudulent. This is a kind of linguistic nihilism, which is contrary to my experience as a judge. Indeed I suggest that it is contrary to our common experience as people who communicate in English. All of us do that every day, sometimes concerning subjects critically important to us, without being left with the sense that the content of those communications is ultimately unknowable. It is true, of course, that people sometimes manipulate the meaning of a sentence or phrase. But usually we know when someone is doing that—we say the person is taking words out of context, or distorting their meaning. And any textualist will tell you that even a narrow sliver of text should be construed in the context of the statute as a whole.

What is necessary for textualism to work is simply that the judge construe the text in a principled way. There are plenty of principles and rules to direct that process: we have definitions for every word in the language, and rules of grammar, and, perhaps most important, our own ordinary usage of the language (a lot of which is codified in so-called canons of interpretation). Unlike legislative history, these materials limit the judge rather than liberate him. And when used without bias, they allow the judge to identify not merely the plausible interpretations

of the text, but the best one. For, in my experience at least, if one works hard enough, all the other interpretations are eventually revealed as imposters.

Here I would offer another observation relevant to the project of textualism: the idea that most statutes are badly written is a myth. Instead, perhaps the one expertise that Congress has as an institution is that of writing laws. That expertise is concentrated within a particular office in Congress, namely the Office of Legislative Counsel. Their task is to take the policy goals of any member who comes to them and to convert those goals into legislative text. I occasionally worked with them during my time as a Senate staffer. They are nonpartisan, they are professionals, and in my experience—both as a staffer and a judge—they do very good work. Their writing is technical rather than stylish, in the sense that they choose their words based upon the sole criterion of clarity, rather than with more rhetorical purposes in mind. And though for that reason their work lacks the aesthetic appeal of, say, a Bach concerto, it often displays the same iron-fisted logical control over a complex mass of information. The judge's task is then to discern that logic and to follow it wherever it might lead—whether to a so-called conservative outcome or to a liberal one. And the judge who succeeds in that task thereby does her part to maintain our constitutional separation of powers.

In my own opinions as a judge, I have never yet had occasion to find a statute ambiguous. In my view, statutory ambiguities are less like dandelions on an unmowed lawn than they are like manufacturing defects in a modern automobile: they happen, but they are pretty rare, given the number of parts involved. Two examples from my cases will help to illustrate why.

One is *United States v. Zabawa*.<sup>11</sup> There, Phillip Zabawa, a criminal defendant with a long criminal record, chose to start a fight with a federal law-enforcement officer, David Murphy, when Murphy was trying to place Zabawa in a holding cell in the federal courthouse in Detroit. During the fight, Murphy headbutted Zabawa; after it, Murphy had a laceration over his left eye, though he could not say for sure whether it came from the headbutt or from a punch by Zabawa. Based on that incident, Zabawa was convicted of assaulting a federal officer in violation of 18 U.S.C. § 111(a)(1) and (b). Subsection (b), in particular, provides for an enhanced sentence—up to twenty years—if the defendant “inflicts bodily injury” during the assault. The only bodily injury that Murphy suffered during the fight was the cut over his eye. The question, then, was whether Zabawa “inflicted” the cut, even

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11. 719 F.3d 555 (6th Cir. 2013).

though it might have resulted from the actions (namely, the headbutt) of Murphy himself.

The government argued, and the district court agreed, that “inflict” is synonymous with “cause” and that Zabawa caused all the injuries in the fight—because he started it. Now, my own intuition at the outset of the case—based on my own experience with the English language for forty-plus years—was that the government and the district court were wrong in saying that “inflict” is the same as “cause.” But I had to test that intuition with the materials that I described earlier. The dictionary offered two definitions of “inflict”: the first was “to cause (something unpleasant),” which arguably supported the government’s position; the second was “to give by or as if by striking,” which clearly favored Zabawa, because he did not do the “striking” so far as the headbutt was concerned.<sup>12</sup> (Had this been an agency case, the government surely would have told us we owe them deference.) But the fact that each side found support in the dictionary did not mean that § 111(b) was ambiguous. Instead, we went on to examine the ordinary usage of “inflict.”

Ordinary usage is a frequently overlooked but often colorful and fun part of the job of statutory interpretation. And so it was here. We began with a couple of usage examples from the dictionary: “*inflicted heavy losses on the enemy; a storm that inflicted widespread damage.*”<sup>13</sup> What those examples have in common is that “inflict” is used to show direct *physical* causation of physical harm. So we tested that meaning against some other examples; and we found, as the opinion says, that

[t]his meaning holds almost anywhere one looks: the thermal and barometric conditions giving rise to a storm . . . do not inflict widespread damage; the storm does. Othello dies from a wound that he inflicts upon himself, even though Iago proximately caused him to do it. Field Marshal Montgomery blundered by ordering his paratroopers to take “a bridge too far” at Arnem, but he did not inflict the heavy losses that followed; the Germans did. And neither did General Eisenhower inflict the injuries that his men suffered on D-Day.<sup>14</sup>

Thus we concluded—as a matter of public meaning, and thus as the meaning of § 111(b)—that “[i]nflict means something more precise than merely ‘[t]o be the cause of or reason for . . .’”<sup>15</sup> Rather, we said, “What inflict conveys is a sense of physical immediacy: to cause harm directly, by physical force. . . . The person whose action was the direct physical cause of Murphy’s laceration, therefore, is the person who inflicted it for purposes of § 111(b). And even the government admits

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12. *Id.* at 559–60.

13. *Id.* at 560.

14. *Id.*

15. *Id.*

that Murphy himself might have been that person.”<sup>16</sup> Thus the government did not prove Zabawa’s guilt beyond a reasonable doubt, and we reversed his conviction for the enhanced offense.

In fairness I should offer a more complicated example, which is *Sierra Club v. Korleski*.<sup>17</sup> I will try to make this brief. At issue there was the so-called “citizen-suit” provision of the Clean Air Act, which allows private parties (or anyone else) to sue “any person . . . who is alleged to have violated . . . an emission standard or limitation” under the Act.<sup>18</sup> By way of background, states typically enter into arrangements with the federal government under which the states agree to enforce certain requirements of the Clean Air Act. Ohio had such an arrangement, but in 2006 Ohio passed a law that barred the Director of the Ohio EPA from enforcing a certain emission standard under the Clean Air Act. The issue in our case was whether the Ohio Director “violated” that standard when he failed to enforce it. To answer that question, we examined not only the citizen-suit provision but a host of other provisions in the Act. We found that the Act authorized the Director of the federal EPA to impose civil penalties of up to \$25,000 per day upon any person who “has violated” the Act. And we found that the Act authorized a prison sentence of up to five years for any person who “knowingly violates” the Act. We were skeptical—just as the Supreme Court was skeptical in interpreting a nearly identical citizen-suit provision under the Endangered Species Act<sup>19</sup>—that the Clean Air Act would authorize those kinds of civil and criminal penalties against the Director of the Ohio EPA.<sup>20</sup> But more to the point, another provision in the Act specifically defined a state’s failure to enforce an emission standard as a “deficiency,” rather than a “violation.” And we therefore held that, per the Act’s terms, the Ohio Director’s failure to enforce the emission standard was a deficiency, rather than a violation.<sup>21</sup> That meant the plaintiffs could not sue the Ohio Director under the citizen-suit provision, since that provision authorized suits only for violations. But we did hold—perhaps ironically, since the federal EPA had sided with the plaintiffs in our case—that another provision of the Act allowed the plaintiffs to sue the federal EPA to force them to impose sanctions on the State.<sup>22</sup> But the relevant point here is that, though the

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16. *Id.*

17. 681 F.3d 342 (6th Cir. 2012).

18. 42 U.S.C. § 7604(a)(1) (2012).

19. *See Bennett v. Spear*, 520 U.S. 154, 173–74 (1997).

20. *See Sierra Club*, 681 F.3d at 349.

21. *Id.* at 350–51.

22. *Id.* at 352–53.



statute in that case was complicated, the answer provided by its text was clear.

That brings me to some observations about cases involving federal agencies. As many of you already know, those cases often involve what is called the *Chevron* doctrine, which applies in cases where a federal agency administers the statute whose meaning is at issue in a case.<sup>23</sup> The federal EPA, for example, administers the Clean Air Act. In cases where *Chevron* applies, the court must first determine—in what is called *Chevron*'s “step one”—whether the relevant statutory provision is ambiguous. If the provision is ambiguous, then—in *Chevron*'s “step two”—the court must defer to any “reasonable” interpretation offered up by the agency.<sup>24</sup> Now, the *Chevron* doctrine itself was created by the courts—by the Supreme Court in particular—and recently there has been a lot of debate about it. The doctrine's critics focus specifically on separation-of-powers concerns. Article III of the Constitution vests in Article III courts “[t]he judicial Power of the United States”—which means not some of it, but all of it.<sup>25</sup> Meanwhile, Hamilton said in Federalist No. 78 that “[t]he interpretation of the laws is the proper and peculiar province of the courts.”<sup>26</sup> Chief Justice Marshall said almost verbatim the same thing in *Marbury v. Madison*, with all but an exclamation point at the end.<sup>27</sup> Yet in cases where *Chevron* applies—or at least where the court reaches *Chevron*'s step two—the law's interpretation becomes the province of an executive agency. One may fairly ask, therefore, whether the doctrine allocates core judicial power to the executive—or perhaps simply blocks the exercise of judicial power in cases where the doctrine applies.

But my purpose here again is to offer some observations from my own cases. Although I personally have never had occasion to reach *Chevron*'s step two in any of my cases, there have been plenty of cases where the agency wanted us to. And from those cases, it seems to me that the agency is not trying to answer the same question that we are. The court tries to find the best objective interpretation of the statute, based on the statutory text. The agency instead asks if there is a colorable interpretation that will support the policy result that the agency wants to reach. When judges engage in that kind of analysis, we call it judicial activism. And most observers condemn judicial activism as an arrogation of legislative power to the judiciary. It is not clear to

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

24. *See id.* at 842–44.

25. U.S. CONST. art. III (emphasis added).

26. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

27. *See* 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

me why the result is any better when the arrogation is done by the executive.

Some other observations concern *Chevron's* secondary effects. One of those is an effect upon the judicial branch, and on this point a metaphor comes to mind. Around this time of year I like to hunt for grouse (or partridge, as we call them in Michigan) with my son in the forests Up North. Sometimes the birds are in cedar swamps that are full of alder bushes and dense secondary growth. More than once I've decided that, even if the birds are in there, it's not worth pushing through all those branches to get to them. Interpreting statutes like the Clean Air Act is often similar. The statute presents a dense undergrowth of sections and subsections and subsections within those. The answer to the specific question in the case might lie somewhere in those sections and subsections, but working through them is hard. And meanwhile the agency is there to offer a path already cleared. Down that path might lie a woodcock rather than a partridge, but both are game birds, and the judge might be tempted to conclude that under the circumstances a woodcock is good enough. And so in agency cases it often seems that the court pauses only briefly at step one, without much effort to hack through the undergrowth, before proceeding straightaway down the cleared path of step two.

The other effects are upon the agencies themselves. There is no getting around the fact that *Chevron* deference has created a palpable sense of entitlement among executive agencies, particularly when they show up in court. At times it seems that some lawyers in agency cases (though not all) regard their task as not so much to persuade us as to put us in our place. More than once, in response to a question challenging the agency's interpretation of a provision, an agency lawyer has simply told me, "Well, on that question this court owes the agency deference." And at least once I have responded in turn, "Well, humor me."

But those exchanges are minor compared to some of *Chevron's* other secondary effects. One is sloppy work. Deference brings latitude, which can bring a sense that one is less accountable, which can bring a temptation to cut corners. One of my cases from this year, *Montgomery County v. FCC*,<sup>28</sup> involved a couple of major rulemaking orders, entered by the FCC, that affected the ability of local governments to regulate cable providers. The local regulators challenged both rules, arguing among other things that the FCC's interpretation of "franchise fees," as defined by the Communications Act, undermined various other provisions in that same Act. As we said in our opinion, the FCC offered

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28. 863 F.3d 485 (6th Cir. 2017).

little response to those arguments; instead, both in the FCC's administrative proceedings and before us, the FCC simply announced its interpretation rather than explained it. In the end we vacated portions of both rules and remanded "for the FCC to set forth a valid statutory basis, if there is one," for each of them.<sup>29</sup>

Another case, *Meister v. U.S. Department of Agriculture*,<sup>30</sup> involved a management plan prepared by the United States Forest Service for the Huron-Manistee National Forests in northern Michigan. Kurt Meister, a Harvard Law School graduate appearing pro se, challenged the plan on numerous grounds, among which was that the Service had "overestimated snowmobile use and underestimated cross-country ski activity in the Forests."<sup>31</sup> (Those uses tend to compete with each other, and Meister thought the plan unfairly favored snowmobilers.) The Service's estimates began with some surveys that visitors to the Forests had filled out in the year 2000. None of those visitors said that the purpose of their visit was snowmobiling or cross-country skiing. And on that basis the Service estimated that the number of cross-country visitors to the Forests in 2000 was zero, and that the number would stay at zero all the way out to the year 2050. Thus, we said, so far as the Service's estimates were concerned, "the Forests have seen their last cross-country skier."<sup>32</sup>

Yet the Service estimated that the number of snowmobile visitors for the year 2000 was 120,000, and that the number would climb steadily in later years. In its brief to our court, the Service said those estimates were based on the agency's expert "professional judgment." That assertion was followed by three or four cites to the administrative record. So I looked them up. All of the cites referred to a single email from a Michigan State researcher—which was reprinted several times in the record as different people responded to it—who said he "was not ready to present formal estimates," but who speculated that the number of snowmobile visitors might have been 120,000. One of the Service's own scientists cautioned that "it would require a fair bit of work to justify" the 120,000 number. But that work was never done—another Service official said simply to choose a number, "just make sure it's defensible"—and so the Service chose 120,000. And that number in turn became the basis for the plan's allocation of snowmobile and cross-country skiing trails. We said that "[t]he whole episode debases the

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29. *Id.* at 493.

30. 623 F.3d 363 (6th Cir. 2010).

31. *Id.* at 372.

32. *Id.* at 374.

coinage of agency deference,” and held that this part of the plan was arbitrary and capricious.<sup>33</sup>

The last case I’ll mention might be the best known, namely *United States v. NorCal Tea Party Patriots*.<sup>34</sup> This too was a very complicated case, but again I will try to make this brief. Per the findings of the Treasury Department’s Inspector General, the IRS seriously mistreated Tea Party groups when considering their applications for tax-exempt status. (I will say that, had the groups been socialist, the case would have come out precisely the same way. We said as much in the first paragraph of the opinion.<sup>35</sup>) Some of the groups later sued the IRS. In that suit, the district judge—who happened to be a Clinton appointee—repeatedly ordered the IRS to produce internal lists of the groups the IRS had targeted. Repeatedly the IRS refused, to the point where the district judge told the Department of Justice’s lawyers that they were not living up to the Department’s name. Finally the case came to us and we ordered the IRS to comply, in an opinion joined by Judges Damon Keith and David McKeague. Before us, the IRS argued that a particular subsection in § 6103 of the Internal Revenue Code barred the IRS from producing the lists of targeted groups. Section 6103 by its terms protects taxpayer privacy, but over two decades of deference the IRS had construed it to bar disclosure of virtually any “data collected” by the IRS. And so they contended in our case.<sup>36</sup> At the same time, however, the IRS nowhere mentioned two other provisions—namely § 6104 and a different subsection of § 6103—that rendered the IRS’s arguments against disclosure, as we put it in the opinion, “patently meritless.”<sup>37</sup> The IRS largely conceded as much, as to § 6104, during oral argument. So my observations about that case are these. First, the IRS apparently thought we would never stray from the cleared path of the analysis in their brief, and instead seek out the right answer on our own. And second, it seemed to me that, under cover of deference, the IRS had tried to distort the relevant statutes rather than apply them.

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All that said, my message today is a positive one. As judges, interpreting statutes is what we do, both in hard cases and in simpler ones. And when we perform that function in a principled way, with as

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33. *Id.* at 372-74.

34. 817 F.3d 953 (6th Cir. 2016).

35. *See id.* at 955.

36. *See id.* at 962-64.

37. *Id.* at 963.

much energy and persistence as necessary in each case, we do our part to preserve our constitutional separation of powers and thereby to maintain the rule of law.