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DEFERENCE TO THE RULEMAKER, NOT TO THE RULE: THE D.C. CIRCUIT'S ENABLING REJECTION OF THE SEC'S FIXED INDEXED ANNUITIES RULE IN *AMERICAN EQUITY INVESTMENT LIFE INSURANCE CO. V. SEC*

Abstract: On July 12, 2010, the U.S. Court of Appeals for the District of Columbia Circuit, in *American Equity Investment Life Insurance Co. v. SEC*, vacated the Securities and Exchange Commission's Rule 151A due to flaws in the SEC's cost-benefit analysis. Rule 151A aimed to expand the SEC's oversight to include purportedly "risky" hybrid annuity products—known as fixed indexed annuities—currently regulated by state insurance commissioners. In vacating the rule, however, the court actually embraced an expansive view of a federal agency's authority to regulate in an area historically reserved to the states. This Comment argues that courts should avoid such broad deference when evaluating federal agency rules that threaten to encroach upon an area presumptively occupied by state regulation.

INTRODUCTION

Since the federal securities laws went into effect in 1933, courts have often struggled with the proper application of investor protections to a rapidly changing financial services industry.¹ Annuity contracts have been an especially frequent source of uncertainty for courts.² As consumers have grown increasingly wary of the devastating effects of inflation on retirement savings, insurers have responded by developing innovative products that combine a traditional annuity structure with potentially riskier, and thus more rewarding, investment features.³ The-

¹ See generally Lewis D. Lowenfels & Alan R. Bromberg, *What Is a Security Under the Federal Securities Laws?*, 56 ALB. L. REV. 473 (1993) (illustrating the difficulty that courts have had determining when a financial product is a "security").

² See *id.* at 495–500. Compare *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 212 (1967) (reading certain annuity contracts as securities), and *SEC v. Variable Annuity Life Ins. Co. (VALIC)*, 359 U.S. 65, 73 (1959) (same), with *Malone v. Addison Ins. Mktg. Inc.*, 225 F. Supp. 2d 743, 751 (W.D. Ky. 2002) (reading fixed indexed annuities as insurance contracts).

³ See *United Benefit*, 387 U.S. at 204 (recognizing that hybrid annuities are "a recent effort to meet the challenge of inflation by allowing the purchaser to reap the benefits of a professional investment program while gaining the security of an insurance annuity").

se hybrid products aim to combine the safety of an annuity with the long-term capital growth typically associated with equity exposure.⁴

Hybrid annuities are particularly vexing for courts because they straddle the boundary between state and federal regulatory authority.⁵ Annuities are regulated by the various state insurance commissioners, who restrict the fees and commissions that insurers may charge, the investment activities they may undertake, and the representations they may make to prospective customers.⁶ The SEC, however, is charged with protecting investors in securities from fraud and other deceptive sales practices and may seek to regulate hybrid products that pose unusual levels of risk.⁷ For this reason, a court called upon to determine whether a state-regulated annuity is risky enough to warrant federal oversight must confront difficult and sensitive questions regarding the “respective spheres of operation of federal and state law.”⁸

In 2010, in *American Equity Investment Life Insurance Co. v. SEC*, the U.S. Court of Appeals for the District of Columbia Circuit rejected the SEC’s attempt to regulate one such hybrid product, known as a fixed indexed annuity (“FIA”).⁹ The D.C. Circuit’s decision was widely viewed as a victory for state insurance commissioners, who had taken the lead in regulating FIAs and had brought suit to protect their jurisdictions from federal encroachment.¹⁰ One commentator even praised the court for attempting to put an end to the SEC’s “overreaching,” and

⁴ See *id.*

⁵ See Lowenfels & Bromberg, *supra* note 1, at 495–500 (discussing the U.S. Supreme Court’s efforts to classify hybrid annuities in *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. at 69, and *SEC v. United Benefit Life Ins. Co.*, 387 U.S. at 209).

⁶ See, e.g., MASS. GEN. LAWS ch. 175, § 144A1/2 (2010); CAL. CODE REGS. tit. 10, § 2547.1–.11 (2010).

⁷ See Lowenfels & Bromberg, *supra* note 1, at 534–39 (illustrating that “the presence or absence of a meaningful degree of investment risk that rests with the purchaser” of a financial product is critical to determining whether the product is a “security”); *The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/about/whatwedo.shtml> (last visited Feb. 27, 2011).

⁸ Henry M. Hart & Herbert Wechsler, *Preface to the First Edition* of RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, at vi (6th ed. 2009). See generally *United Benefit*, 387 U.S. 202 (examining the status of state-regulated Flexible Fund Annuity contracts under the federal securities laws); *VALIC*, 359 U.S. 65 (examining the status of state-regulated variable annuity contracts under the federal securities laws).

⁹ 613 F.3d 166, 168 (D.C. Cir. 2010).

¹⁰ See, e.g., Editorial, *The SEC’s Annuity Smackdown*, WALL ST. J., July 22, 2010, at A18.

portrayed the decision as an example of the robust judicial review needed to keep federal agencies in check.¹¹

Those who worry about the ever-growing power of federal administrative agencies are unlikely to be entirely satisfied with the *American Equity* decision.¹² Although the D.C. Circuit ultimately vacated the SEC's rule applying the securities laws to FIAs, it endorsed an expansive view of a federal agency's authority to regulate in an area historically reserved to the states.¹³ Writing for a unanimous panel, Chief Judge David B. Sentelle concluded that the existing regulation of FIAs by state insurance commissioners did not bar the SEC from further regulating those products.¹⁴ The court's opinion suggests that the SEC may apply the securities laws to any annuity that it deems sufficiently risky and thus may establish the limits of its own regulatory authority in the process.¹⁵ For this reason, the court accepted the SEC's conclusion that FIAs expose annuity holders to "investment risk" and therefore require federal oversight.¹⁶

In short, the court deferred to the SEC's rule, even though the rule threatened to upset the existing balance of federal and state power in the regulation of hybrid products.¹⁷ Yet the court showed little or no deference in requiring the agency to justify its encroachment on state regulation by providing a convincing cost-benefit analysis.¹⁸ This Comment examines the court's decision and suggests that an even less deferential approach is needed to prevent federal agencies from encroaching on areas of traditional state regulation.¹⁹

This Comment begins in Part I with a brief overview of FIAs and their regulation by state and federal authorities.²⁰ Part II discusses the practice of judicial deference to administrative interpretations of law, including rules issued by federal agencies such as the SEC.²¹ It then discusses the D.C. Circuit's decision in *American Equity*, including its unique treatment of the SEC's authority to regulate FIAs and its choice

¹¹ See *id.*

¹² See, e.g., Christina Flanagan, Comment, *The SEC's Overreach: Against Rule 151A*, 78 U. CIN. L. REV. 1573, 1574-75 (2010) (discussing the federalism and "dual-sovereignty" implications of the SEC's attempt to apply the federal securities laws to FIAs).

¹³ See *American Equity*, 613 F.3d at 167-68.

¹⁴ See *id.* at 173.

¹⁵ See *id.* at 174.

¹⁶ See *id.*

¹⁷ See *id.* at 174.

¹⁸ See *id.* at 177.

¹⁹ See *infra* notes 75-137 and accompanying text.

²⁰ See *infra* notes 24-55 and accompanying text.

²¹ See *infra* notes 56-73 and accompanying text.

to vacate Rule 151A due to flaws in the SEC's cost-benefit analysis.²² Finally, Part III argues that courts should limit deference when federal agencies use statutory interpretation to encroach upon state law, and that the SEC should be required to provide an adequate analysis of the marginal costs and benefits of its efforts to regulate in areas historically reserved to the states.²³

I. THE REGULATION OF FIXED INDEXED ANNUITIES

Fixed indexed annuities are financial products sold by life insurance companies that are similar, in form and in function, to traditional fixed annuities.²⁴ Like fixed annuities, FIAs have two phases: an "accumulation" period and a "payout" period.²⁵ During the accumulation period, the holder makes premium payments to the insurer and is credited interest thereon.²⁶ Moreover, his investment is guaranteed never to fall below a minimum value established by state law.²⁷ The guaranteed minimum value of the contract is typically set at 87.5% of premiums, adjusted upwards at a rate of 1% to 3% per year.²⁸ During the payout period, the insurer distributes the accumulated funds to the holder through a stream of payments that typically continues for the rest of the holder's life.²⁹ This payment structure protects the annuity holder from outliving his savings in retirement.³⁰

FIAs are distinct from fixed annuities, however, because the interest rate credited to the holder's premium payments is not fixed but rather based upon the performance of an equity index, such as the S&P 500.³¹ In years when the equity index rises, the holder is credited an interest rate derived from the index's percentage gain.³² In years when the index declines, however, the holder's funds are not debited.³³ The holder is not credited any index-linked interest for that year, but the

²² See *infra* notes 74–107 and accompanying text.

²³ See *infra* notes 108–137 and accompanying text.

²⁴ Opening Brief of Petitioners American Equity Inv. Life Ins. Co. et al. at 6, Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010) (No. 09-1021).

²⁵ *Id.* at 7.

²⁶ *Id.* at 6–7.

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *id.* FIA holders may choose from a variety of different payment options, including annuitization. Opening Brief of Petitioners, *supra* note 24, at 7.

³⁰ *Id.* at 5.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 7.

guaranteed minimum value of his investment continues to grow at the rate established by state law.³⁴ This interest rate structure allows FIA holders to benefit, to a limited extent, from market gains without bearing the risk of market losses—that is, without shouldering any “investment risk” as that term is typically understood.³⁵ In this manner, FIAs combine the guarantees that make annuities attractive with a rate of return that is more likely to keep up with inflation.³⁶

Since FIAs were first developed in the 1990s, they have been regulated by the various state insurance commissioners.³⁷ State laws comprehensively regulate all aspects of the market for FIAs and provide the same level of protection for FIA holders that they do for other annuity holders.³⁸ Moreover, FIAs have typically been considered exempt from federal oversight.³⁹ Under the Securities Act of 1933, federal investor protections do not apply to “annuity contract[s]” regulated by the insurance commissioner of a state.⁴⁰ The McCarran-Ferguson Act of 1945 also stipulates that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance”⁴¹ Both the 1933 Securities Act and the McCarran-Ferguson Act confirm the primary and historical role of the states in regulating insurance and annuity products.⁴²

In 2008, the SEC issued Rule 151A, designed to change the status of FIAs under the federal securities laws.⁴³ Rule 151A redefined the

³⁴ *Id.*; see Matt Van Heuvelen, Note, *Duplicative, Confusing, and Legally Inaccurate: The SEC’s Attempt to Regulate Fixed Indexed Annuities*, 35 J. CORP. L. 663, 666 (2010).

³⁵ See Opening Brief of Petitioners, *supra* note 24, at 5–7; Van Heuvelen, *supra* note 34, at 666.

³⁶ See Opening Brief of Petitioners, *supra* note 24, at 5 (citing *Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 565 (7th Cir. 1991) (“Traditional annuities in which the exact (monthly or total) amounts to be paid to the purchaser are fixed are not responsive to inflation.”)).

³⁷ See Brief of Petitioners Nat’l Ass’n of Ins. Comm’rs (NAIC) at 2–8, *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010) (No. 09-1021) (summarizing the many state statutes and regulations that apply to FIAs); Van Heuvelen, *supra* note 34, at 665.

³⁸ See Brief of Petitioners NAIC, *supra* note 37, at 2; Opening Brief of Petitioners, *supra* note 24, at 8.

³⁹ See Van Heuvelen, *supra* note 34, at 664.

⁴⁰ 15 U.S.C. § 77c(a)(8) (2006).

⁴¹ *Id.* § 1012(b) (2006).

⁴² See *id.* §§ 77c(a)(8), 1012(b); Brief of Petitioners NAIC, *supra* note 37, at 12; Flanagan, *supra* note 12, at 1573.

⁴³ Indexed Annuities and Certain Other Insurance Contracts, 74 Fed. Reg. 3138, 3138 (Jan. 16, 2009). Section 3(a)(8) of the Securities Act of 1933 excludes from the Act’s reach “any” “annuity contracts” that are issued “by a corporation subject to the supervision of the insurance commissioner” of a state. 15 U.S.C. § 77c(a)(8). Rule 151A redefined the term “annuity contract” to exclude any contract that: (1) calculates the interest payable “at or

term “annuity contract,” as used in the 1933 Act, such that FIAs no longer fit within the scope of that term.⁴⁴ Consequently, the rule declared that FIAs would be subject to the full range of investor protections under federal law.⁴⁵

The SEC premised Rule 151A on the understanding that hybrid annuities deserve to lose their exemption from federal oversight when they place a significant amount of investment risk on the annuity holder.⁴⁶ Typically, an annuity holder pays his insurer in the present in exchange for a guaranteed stream of payments in the future; the insurer may invest the premiums, but it bears the entire risk of its investments because the annuity holder remains entitled to his return.⁴⁷ With a hybrid annuity, however, the insurer allows the annuity holder to share in some of the gains from the invested premiums and thus passes on to the annuity holder some of the risk that the investments may decline in value.⁴⁸ When a hybrid annuity shifts all, or most, of the risk from the insurer onto the holder, it triggers the protections of the federal securities laws.⁴⁹

Rule 151A, however, made use of an unusual conception of investment risk to characterize the dangers involved in holding FIAs.⁵⁰ According to the SEC, FIA holders are exposed to investment risk because they are likely to earn *more*, not less, than the guaranteed value of the contract.⁵¹ Rule 151A clearly equated investment risk with volatility—the likelihood that a financial product will yield a return that deviates from the norm.⁵² The rule failed to distinguish between “upside” risk—the likelihood that a product will increase in value—and “downside” risk—the likelihood that a product will lose value.⁵³ Thus, the SEC characterized FIAs as risk-bearing products mainly because an FIA’s index-based

after the end of one or more specified crediting periods” based, in whole or in part, on the performance during the crediting period of a security, including a “group or index of securities;” and (2) is “more likely than not” to result in payouts that “exceed the amounts guaranteed under the contract.” Indexed Annuities and Certain Other Insurance Contracts, 74 Fed. Reg. at 3149.

⁴⁴ See Indexed Annuities and Certain Other Insurance Contracts, 74 Fed. Reg. at 3149.

⁴⁵ *Id.* at 3139.

⁴⁶ See *id.* at 3138.

⁴⁷ See *id.*; *Annuities*, U.S. SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/answers/annuity.htm> (last visited Feb. 27, 2011).

⁴⁸ See Indexed Annuities and Certain Other Insurance Contracts, 74 Fed. Reg. at 3138.

⁴⁹ See *id.*

⁵⁰ See Van Heuvelen, *supra* note 34, at 677.

⁵¹ See Indexed Annuities and Certain Other Insurance Contracts, 74 Fed. Reg. at 3149.

⁵² See *id.*; Van Heuvelen, *supra* note 34, at 677.

⁵³ See Van Heuvelen, *supra* note 34, at 677.

interest rate changes from year to year.⁵⁴ The fact that FIAs protect holders against loss of principal was not considered dispositive.⁵⁵

II. JUDICIAL REVIEW OF THE SEC'S RULE 151A

A. *Judicial Deference to Administrative Interpretations of Law That Threaten to Encroach Upon State Autonomy*

Typically, courts evaluate interpretations of law by federal administrative agencies, such as the SEC, under the rubric established by the U.S. Supreme Court's 1984 decision in *Chevron USA, Inc. v. Natural Resources Defense Council*.⁵⁶ The *Chevron* doctrine holds that when an agency interprets ambiguous terms in a statute that it has been charged with administering, courts must defer to the agency's interpretation so long as it is reasonable.⁵⁷

The *Chevron* doctrine mandates a two-step inquiry.⁵⁸ Under *Chevron* Step One, a court must determine whether the statutory term in question is ambiguous—that is, whether “Congress has directly spoken to the precise question at issue.”⁵⁹ If Congress's purpose is evident from the statutory text, the inquiry is at an end, as courts must give effect to Congress's clearly manifested intent.⁶⁰ If Congress has not clearly and unambiguously manifested its intent, however, then the court must proceed to *Chevron* Step Two.⁶¹ The court must determine whether the agency's interpretation of the ambiguous term is reasonable or “permissible” in light of the given statutory scheme.⁶² If so, the agency's interpretation must stand, regardless of whether it is the court's preferred construction.⁶³

It is unclear, however, if an agency is entitled to *Chevron* deference when it uses statutory interpretation to expand its reach into an area already regulated by the states.⁶⁴ To be sure, Supreme Court precedent

⁵⁴ See Indexed Annuities and Certain Other Insurance Contracts, 74 Fed. Reg. at 3138; Van Heuvelen, *supra* note 34, at 677.

⁵⁵ See Indexed Annuities and Certain Other Insurance Contracts, 74 Fed. Reg. at 3138; Van Heuvelen, *supra* note 34, at 677.

⁵⁶ 467 U.S. 837, 842–45 (1984).

⁵⁷ *Id.* at 843.

⁵⁸ *Id.* at 842–43.

⁵⁹ *Id.* at 842.

⁶⁰ *Id.* at 842–43.

⁶¹ *Id.* at 843.

⁶² *Chevron*, 467 U.S. at 843.

⁶³ *Id.*

⁶⁴ See Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 66–73 (2008) (illustrating how courts have withheld

suggests that the *Chevron* doctrine must be consistently and uniformly applied, regardless of whether an agency's interpretation aims to change important public policies or even to expand the agency's own jurisdiction.⁶⁵ *Chevron* is meant to permit agencies, rather than courts, to make the difficult choices arising from the implementation of federal regulatory schemes.⁶⁶ The doctrine may fail to accomplish this important purpose if courts do not apply it reliably.⁶⁷

When agency action threatens to upset the existing balance of decision-making authority between the federal government and the states, however, courts have at times refused to apply the *Chevron* doctrine.⁶⁸ This doctrinal shift suggests that some courts are wary of according *Chevron* deference when it would permit federal administrative agencies to preempt, displace, or encroach upon state law.⁶⁹ Such far-reaching modifications of the statutory scheme are often considered "major question[s]" that Congress could not have intended to delegate implicitly to an agency.⁷⁰

The SEC characterized Rule 151A as an interpretation of the term "annuity contract" in the Securities Act of 1933, a statute that the agency was tasked with implementing.⁷¹ Nonetheless, the SEC's rule was clearly designed to alter the balance of federal and state power in the

Chevron deference in the past when a federal agency threatens to encroach upon state law); see also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 231–47 (2006) (showing how courts have declined to apply the *Chevron* doctrine when a federal agency attempts to resolve major questions of policy).

⁶⁵ See, e.g., *Miss. Power & Light Co. v. Moore*, 487 U.S. 354, 380–82 (1988) (Scalia, J., concurring) ("In particular, it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction.")

⁶⁶ See *id.* ("[D]eference is *appropriate* because . . . Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction."); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG., 283, 312 (1986) ("*Chevron* shifts power from the courts to the agencies, shifting with it the site of the real battle over regulatory decisions.")

⁶⁷ See Sunstein, *supra* note 64, at 193 (arguing that the inconsistent application of *Chevron* "increase[s] . . . judicial policymaking without promoting important countervailing values").

⁶⁸ See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (refusing to apply the *Chevron* doctrine when doing so would allow a federal agency to encroach upon state law); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000) (refusing to apply the *Chevron* doctrine when federal agency action addressed major questions of policy that it was unlikely for Congress to have intended to delegate); *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994) (same). See generally Keller, *supra* note 64; Sunstein, *supra* note 64.

⁶⁹ See Keller, *supra* note 64, at 49–50.

⁷⁰ See Sunstein, *supra* note 64, at 193.

⁷¹ Indexed Annuities and Certain Other Insurance Contracts, 74 Fed. Reg. 3138, 3138 (Jan. 16, 2009).

regulation of hybrid products.⁷² Ultimately, the level of deference accorded to such a rule depends on the willingness of the court to venture outside the *Chevron* framework to limit the SEC's reach into an area historically reserved to the states.⁷³

B. *The D.C. Circuit's Compromise: Embracing Deference to the SEC While (Temporarily) Preventing Encroachment upon State Law*

Immediately after the SEC finalized Rule 151A on January 16, 2009, a group of insurance companies filed a petition for review in the D.C. Circuit.⁷⁴ Shortly thereafter, the National Association of Insurance Commissioners filed a separate challenge to the rule and the two suits were consolidated into a single action.⁷⁵ The petitioners argued that the SEC had exceeded its statutory authority, encroached upon the autonomy of states, and failed to evaluate adequately the costs and benefits of the rule.⁷⁶ On July 21, 2009, the D.C. Circuit weighed in on the matter, remanding the rule to the SEC to permit the agency to reconsider its cost-benefit analysis.⁷⁷ One petitioner then moved for a panel rehearing and, after further argument regarding the proper remedy, the court reissued its opinion in *American Equity* and vacated the rule on July 12, 2010.⁷⁸

Given Rule 151A's intrusion into an area historically occupied by state regulation, a crucial question in *American Equity* was whether the rule was entitled to *Chevron* deference.⁷⁹ Federalism and "dual-sovereignty" could be compromised if the SEC could invoke its interpretive freedom under *Chevron* to extend its reach to FIAs, despite the states' strong historical claim to preeminence in the field of annuities regulation.⁸⁰ The scope of judicial review thus took on heightened significance in *American Equity*.⁸¹

⁷² See Flanagan, *supra* note 12, at 1574.

⁷³ See Keller, *supra* note 64, at 70–81; Sunstein, *supra* note 64, at 193–94.

⁷⁴ See Editorial, *The SEC's Annuity Grab*, WALL ST. J., Mar. 7, 2009, at A10.

⁷⁵ See *id.*

⁷⁶ See Opening Brief of Petitioners, *supra* note 24, at 27.

⁷⁷ See *Am. Equity Inv. Life Ins. Co. v. SEC*, 572 F.3d 923, 936 (D.C. Cir. 2009), *amended and superseded by* 613 F.3d 166, 179 (D.C. Cir. 2010).

⁷⁸ *American Equity*, 613 F.3d at 179.

⁷⁹ See *id.* at 172.

⁸⁰ See Flanagan, *supra* note 12, at 1585.

⁸¹ See *American Equity*, 613 F.3d at 179; see also *Chevron*, 467 U.S. at 842–45; Flanagan, *supra* note 12, at 1574.

The D.C. Circuit held that the SEC was indeed entitled to *Chevron* deference.⁸² Because the SEC had explicit statutory authority to define the “accounting, technical, and trade” terms of the Securities Act of 1933, the court concluded that it was required to defer to the agency’s rules interpreting that statute, including Rule 151A.⁸³ Giving short shrift to the petitioners’ arguments that *Chevron* deference could not be invoked to “invade the jurisdiction of the states,” the court did not consider alternatives to *Chevron* deference in light of the important structural questions implicated by Rule 151A.⁸⁴

The court then determined that the term “annuity contract,” as used in the Securities Act of 1933, was ambiguous under *Chevron* Step One.⁸⁵ According to the court, the 1933 Act was “at the very least silent” as to whether the term “annuity contract” embraces all contracts that may be described as annuities.⁸⁶ Thus, Congress never made it absolutely clear that FIAs were meant to be exempt from the securities laws.⁸⁷

Moreover, the court concluded that the Supreme Court’s seminal cases interpreting the 1933 Act’s exemption for annuity products, the 1967 case *SEC v. United Benefit Life Insurance Co.* and the 1959 case *SEC v. Variable Annuity Life Insurance Co. (VALIC)*, were similarly ambiguous as to whether investor protections applied to FIAs.⁸⁸ The court interpreted *VALIC* and *United Benefit* as establishing a fluid, case-by-case approach to evaluating new hybrid products.⁸⁹ The court declined to read the cases as establishing any test for distinguishing between risky and non-risky hybrid products on the basis of investment risk allocation, as the petitioners urged.⁹⁰

Proceeding to *Chevron* Step Two, the court held that the SEC acted reasonably in reinterpreting the term “annuity contract” so that FIAs no longer fit within the scope of that term.⁹¹ The court agreed with the SEC that FIAs closely resemble securities, especially insofar as an FIA’s index-based interest rate is calculated retrospectively, based on an eq-

⁸² *American Equity*, 613 F.3d at 172.

⁸³ *Id.*; see 15 U.S.C. § 77s(a) (2006).

⁸⁴ See *American Equity*, 613 F.3d at 172; Opening Brief of Petitioners, *supra* note 24, at 26.

⁸⁵ *American Equity*, 613 F.3d at 173.

⁸⁶ *Id.*

⁸⁷ See *id.*

⁸⁸ *Id.* at 173; see *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 202 (1967); *SEC v. Variable Annuity Life Ins. Co. (VALIC)*, 359 U.S. 65, 71 (1959).

⁸⁹ *American Equity*, 613 F.3d at 173.

⁹⁰ *Id.*; Opening Brief of Petitioners, *supra* note 24, at 32.

⁹¹ *American Equity*, 613 F.3d at 174.

uity index's performance over the previous year, rather than prospectively, as are most fixed interest rates.⁹²

The court also concluded that the SEC's method of gauging investment risk was reasonable, agreeing that FIA holders are exposed to risk because "there is variability in [an FIA's] potential return."⁹³ The court rejected the petitioners' argument that investment risk can only be understood to mean loss of principal.⁹⁴ The court noted that an FIA promising a return between 1% and 10% is in fact "riskier" than a fixed annuity with a guaranteed 5% rate, although both products insure the holder against loss of principal.⁹⁵ Therefore, the court denied that the SEC's concept of investment risk was novel and "insupportable."⁹⁶ The SEC's definition was at least as defensible as the petitioners' and thus was entitled to deference.⁹⁷

Despite deferring to the SEC's interpretation of the term "annuity contract," the court went on to hold that the SEC failed to meet its statutory obligation under section 2(b) of the 1933 Act to consider Rule 151A's effect on efficiency, competition, and capital formation.⁹⁸ The court concluded that the SEC's section 2(b) analysis was "arbitrary and capricious" and consequently vacated the rule.⁹⁹

The SEC's competition analysis was flawed, the court reasoned, because it failed to show precisely how federal regulation would *enhance* competition beyond the levels already existing under state law.¹⁰⁰ The SEC argued that the fuller public disclosure and increased price transparency mandated by the securities laws would likely increase competition.¹⁰¹ The court was unconvinced, however, because the SEC failed to assess the "baseline level of price transparency and information disclosure under state law."¹⁰² Without such an inquiry, no account of the *marginal* benefits of federal regulation could be provided.¹⁰³

The court concluded that the SEC's efficiency and capital formation analyses were similarly flawed.¹⁰⁴ The SEC argued that the applica-

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*; Opening Brief of Petitioners, *supra* note 24, at 39.

⁹⁷ *American Equity*, 613 F.3d at 174.

⁹⁸ *Id.* at 173–76, 177; *see also* 15 U.S.C. § 77b(b) (2006).

⁹⁹ *American Equity*, 613 F.3d at 177, 179.

¹⁰⁰ *Id.* at 178.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *Id.* at 179.

tion of federal investor protections to FIAs, including disclosure and sales practice requirements, would allow investors to make better decisions and thereby lead to more efficient markets and increased capital formation.¹⁰⁵ The SEC failed to show, however, that the proposed measures would be *more* effective than existing state laws in assisting investors to make wise and informed decisions.¹⁰⁶ Because the SEC did not inquire into the efficiency, or lack thereof, of the existing state law regime, the court refused to accept the SEC's claim that Rule 151A would *increase* efficiency or capital formation.¹⁰⁷

III. A MISSED OPPORTUNITY TO PROTECT STATE AUTONOMY FROM FEDERAL ADMINISTRATIVE ENCROACHMENT?

By permitting the SEC to invoke *Chevron* deference for Rule 151A, the D.C. Circuit in *American Equity* diminished the judiciary's important role in preventing federal agencies from surreptitiously encroaching on powers historically reserved to the states.¹⁰⁸ The SEC's redefinition of investment risk enlarged the agency's jurisdiction and impermissibly redrew the "boundaries between federal and state regulatory programs."¹⁰⁹ A less deferential approach by the court would have more effectively honored Congress's intent and guarded states' autonomy.¹¹⁰

First, the court's *Chevron* analysis should have hewed much more closely to statutory text.¹¹¹ Under *Chevron* Step One, the court read ambiguity into the Securities Act of 1933 where none existed.¹¹² As the petitioners convincingly argued, the plain meaning of the 1933 Act indicates that FIAs should be exempt from federal oversight.¹¹³ The statute excludes from its reach "any . . . annuity contract" that is regulated

¹⁰⁵ *American Equity*, 613 F.3d at 179.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See* *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 172–76 (D.C. Cir. 2010). *See generally* Keller, *supra* note 64, at 48 (arguing that judicial deference to administrative interpretations of law often fails to protect state autonomy); Starr, *supra* note 66, at 283 (arguing that courts must "ensure that decisions by . . . agencies remain within statutory boundaries").

¹⁰⁹ *See American Equity*, 613 F.3d at 179; *see also* Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation*, 68 N.Y.U. L. REV. 13, 24 (1993) (illustrating how courts are "adjusting the boundaries between state and federal regulatory programs" as they try to define the concept of insurance).

¹¹⁰ *See* Keller, *supra* note 64, at 63.

¹¹¹ *See infra* notes 110–119 and accompanying text.

¹¹² *See American Equity*, 613 F.3d at 172.

¹¹³ *See* Opening Brief of Petitioners, *supra* note 24, at 29.

by the insurance commissioner of a state.¹¹⁴ The statutory text is broad enough to encompass FIAs, as well as any other state-regulated hybrid product that retains a basic annuity structure.¹¹⁵

Under *Chevron* Step Two, the court erred in assuming that any interpretation of the term “annuity contract” based on a defensible concept of investment risk is worthy of deference.¹¹⁶ Although there are surely several different ways to understand investment risk, it does not follow that the statute authorizes the SEC to pick any of them.¹¹⁷ If it did, the SEC could extend its reach to just about any annuity product, either hybrid or traditional.¹¹⁸

The *American Equity* court’s analysis confirms that the *Chevron* doctrine does not make sense when divorced from a traditional, “plain meaning” approach to statutory interpretation.¹¹⁹ Non-textualist approaches to statutory interpretation, combined with *Chevron* deference, tend to concentrate power in administrative agencies and produce significant dislocations of authority.¹²⁰

Second, the court need not have employed the *Chevron* doctrine at all.¹²¹ Rather, the court could have drawn from recent criticism suggesting that judicial deference should be limited when federal agencies threaten to encroach upon state law.¹²² Such an approach could help to fill a void in the doctrinal foundations of *Chevron*.¹²³ Though deference is said to be warranted because ambiguous statutes implicitly delegate authority to administrative agencies, there are clearly some powers that it would be improper for Congress to delegate in such an opaque way.¹²⁴

¹¹⁴ 15 U.S.C. § 77c(a) (8) (2006); Opening Brief of Petitioners, *supra* note 24, at 29.

¹¹⁵ See Opening Brief of Petitioners, *supra* note 24, at 29.

¹¹⁶ See *American Equity*, 613 F.3d at 174.

¹¹⁷ See *Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006) (“If Congress employs a term susceptible of several meanings, as many terms are, it scarcely follows that Congress has authorized an agency to choose *any* one of those meanings.”).

¹¹⁸ See *Indexed Annuities and Certain Other Insurance Contracts*, 74 Fed. Reg. 3138, 3176 (Jan. 16, 2009) (dissent of Commissioner Troy A. Paredes) (suggesting that “the rule may sweep up other insurance products that otherwise” should be exempt from federal oversight).

¹¹⁹ See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

¹²⁰ See *id.*

¹²¹ See *infra* notes 122–126 and accompanying text.

¹²² See *Keller*, *supra* note 64, at 59–64; Flanagan, *supra* note 12, at 1587 (calling attention to cases like *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), that suggest that agencies do not have power to encroach upon state law unless Congress has explicitly authorized them to do so).

¹²³ See *Keller*, *supra* note 64, at 59–61.

¹²⁴ See *id.*

The power to disturb the authority of the states in an area where state law is historically dominant, such as insurance regulation, is probably one such power.¹²⁵ Given that federalism and “dual-sovereignty” are basic features of our nation’s political order, courts are justified in expecting Congress to speak clearly when altering the balance of federal and state power.¹²⁶

Withholding deference in such cases would ensure that courts can both keep agencies within the boundaries of delegated authority and prevent agencies from encroaching on powers historically reserved to the states.¹²⁷ Limiting deference is more likely to prevent a concentration of power at the federal level than leaving such determinations to the discretion of federal agencies.¹²⁸

Third, the court’s reading of section 2(b) of the 1933 Act left it unclear when the SEC must engage in a cost-benefit analysis.¹²⁹ To be sure, the court deftly interpreted 2(b) to require the SEC to justify the costs of a “dual regulatory system” by explaining how new federal requirements would actually enhance efficiency, competition, and capital formation beyond the levels provided for by existing state regulation.¹³⁰ This reading of the statutory requirement responds well to the specific harms posed by Rule 151A.¹³¹ Because the rule duplicates existing state regulations, it could drive up costs for businesses and consumers, but provide no new benefits.¹³²

The court’s reading of section 2(b)’s mandate, however, may only incentivize the SEC to forgo a 2(b) analysis altogether.¹³³ The SEC in fact argued that a cost-benefit analysis was unnecessary on the ground that 2(b) does not apply to agency rules that merely define or interpret the statute’s terms.¹³⁴ The court responded that it had no power to disregard a flawed 2(b) analysis once the SEC had undertaken one.¹³⁵ The implications for future agency action seem clear: so long as the SEC is merely defining statutory terms, it might forgo any analysis of the mar-

¹²⁵ See Brief of Petitioners NAIC, *supra* note 37, at 12; Flanagan, *supra* note 12, at 1592.

¹²⁶ See Flanagan, *supra* note 12, at 1592.

¹²⁷ See Keller, *supra* note 64, at 61–64.

¹²⁸ See *id.*

¹²⁹ See *American Equity*, 613 F.3d at 177–79.

¹³⁰ See *id.*; Brief of Petitioners NAIC, *supra* note 37, at 14.

¹³¹ See Van Heuvelen, *supra* note 34, at 689.

¹³² See *id.*

¹³³ See *infra* notes 134–137 and accompanying text.

¹³⁴ See Final Brief of Sec. & Exch. Comm’n at 67, *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010) (No. 09-1021).

¹³⁵ See *American Equity*, 613 F.3d at 177.

ginal costs and benefits of its measures and still expect to receive deference from the courts.¹³⁶ The court would have strengthened its opinion by making clear that the SEC must provide a cost-benefit analysis even when a new rule appears in the form of statutory interpretation.¹³⁷

CONCLUSION

In *American Equity*, the D.C. Circuit accorded *Chevron* deference to the SEC's Rule 151A, endorsing an expansive view of the agency's authority to regulate in an area historically reserved to the states. The court did not see fit to take a less deferential approach in light of the potential threat posed to state autonomy. The court vacated Rule 151A, however, due to the SEC's flawed analysis of the rule's effects on efficiency, competition, and capital formation. The SEC failed to demonstrate that the rule's costs were justified by new benefits beyond those already provided by state regulation. In the future, the SEC might be able to avoid the obligation to engage in a cost-benefit analysis by disguising new requirements as interpretations of statutory terms.

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¹³⁶ See *id.*; Final Brief of Sec. & Exch. Comm'n, *supra* note 134, at 67.

¹³⁷ See *American Equity*, 613 F.3d at 177.

