

# Chevron As Law

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*Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., the foundation for much of contemporary administrative law, is under siege. The central objection, connected with longstanding challenges to the legitimacy of the modern regulatory state, is that the decision amounts to an unwarranted transfer of interpretive authority from courts to the Executive Branch. Skeptics think that the transfer is inconsistent with the proposition that it is the province of the Judiciary to say what the law is. To assess such objections, the starting point is simple: whether courts should defer to agency interpretations of law depends largely on legislative instructions. Under the Constitution, Congress has broad power to require courts to defer to agency interpretations (in the face of ambiguity), or to forbid them from doing so. If congressional instructions are the touchstone, and if the Administrative Procedure Act is the guiding text, then it is far from clear that Chevron was wrong when decided, especially if the text of the APA is considered in its context. Though the argument for overruling Chevron is unconvincing, its critics have legitimate concerns. Those concerns should be addressed by (1) insisting on a fully independent judicial role in deciding whether a statute is ambiguous at Step One; (2) invalidating arbitrary or unreasonable agency interpretations at Step Two; and (3) deploying canons of construction, including those that are designed to serve nondelegation functions and thus to cabin executive authority.*

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## I. THE CRACKING OF THE FOUNDATIONS

*Chevron, U.S.A., Inc. v. National Resource Defense Council, Inc.*<sup>1</sup> has a strong claim to being the most important case in all of administrative law. It is now under siege. Almost thirty-five years old, it may not see the age of forty.

This will be a lengthy discussion, and it will be useful, or perhaps a form of mercy, to offer the central claims at the outset. First, an investigation of the historical context shows that *Chevron* is not incompatible with the original meaning of the governing provision of the Administrative Procedure Act (APA).<sup>2</sup> (This is contrary to a widespread view.) Second, there is no constitutional problem if Congress has instructed courts to defer to reasonable agency interpretations of genuinely ambiguous law. Third, *Chevron* should not be overruled. Fourth, its critics do have legitimate claims, which can and should be accommodated by insisting on (a) the primacy of the statutory text, (b) the legal prohibition on arbitrariness, and (c) the use of canons of construction that cabin agency discretion, serve separation-of-powers functions, and trump *Chevron*. As we shall see, a defense of these claims will require exploration of some of the largest issues in legal theory, including the best understanding of the system of checks and balances, the appropriate approach to legal interpretation, and the legitimacy of the administrative state.

### A. THE SPECTER OF TYRANNY

*Chevron*’s foundations are cracking. Justice Neil Gorsuch objects that *Chevron* “[t]ransfer[s] the job of saying what the law is from the judiciary to the executive.”<sup>3</sup> Justice Clarence Thomas argues that *Chevron* is inconsistent with the Constitution.<sup>4</sup> In his view, the decision “wrests from Courts the ultimate interpretive authority to ‘say what the law is,’ and hands it over to the Executive.”<sup>5</sup> Chief

1. 467 U.S. 837 (1984).

2. See 5 U.S.C. § 706 (2012).

3. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016).

4. See Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J. concurring).

5. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

Justice John Roberts seeks ways to confine *Chevron*'s reach.<sup>6</sup> As he puts it, "The Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities."<sup>7</sup> The Chief Justice adds:

When it applies, *Chevron* is a powerful weapon in an agency's regulatory arsenal. Congressional delegations to agencies are often ambiguous—expressing "a mood rather than a message." By design or default, Congress often fails to speak to "the precise question" before an agency. In the absence of such an answer, an agency's interpretation has the full force and effect of law, unless it "exceeds the bounds of the permissible."

It would be a bit much to describe the result as "the very definition of tyranny," but the danger posed by the growing power of the administrative state cannot be dismissed.<sup>8</sup>

No longer on the Court, Justice Anthony Kennedy captured a widespread view in his parting shot at *Chevron*. He wrote that "reflexive deference [to agency interpretations] is troubling," and "when deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still."<sup>9</sup> Justice Kennedy suggested that "it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."<sup>10</sup> He invoked the heavy artillery of the Constitution itself, suggesting that "[t]he proper rules [of deference] should accord with constitutional separation-of-powers principles and the function and province of the Judiciary."<sup>11</sup>

Focusing on the question of legal foundations, Justice Brett Kavanaugh describes *Chevron* as "an atextual invention by courts" and as "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."<sup>12</sup> More colorfully, he writes, "when the Executive Branch chooses a weak (but defensible) interpretation of a statute, and when the courts defer, we have a situation where every relevant actor may agree that the agency's legal

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6. See *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (citation omitted).

7. *Id.*

8. *Id.* at 314–15 (citations omitted).

9. See *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

10. *Id.* at 2121.

11. *Id.*

12. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)). There is an obvious mystery in this claim. *Chevron* seems to transfer authority away from courts, not from Congress. Justice Kavanaugh's claim makes sense only if we see *Chevron* as allowing agencies to reject the best reading of congressional instructions—which is not at all part of the *Chevron* framework, but which, on his understanding, is precisely what it does.

interpretation is not the best, yet that interpretation carries the force of law. Amazing.”<sup>13</sup>

Whether or not that is amazing, *Chevron* has become the flashpoint for contemporary concerns over the power and the legitimacy of the modern administrative state.<sup>14</sup> Reviving prominent arguments from the 1930s and 1940s, which emphasized the risk of “absolutism” and law “as a disappearing phenomenon,”<sup>15</sup> some think that contemporary agencies are inconsistent with the Founding vision and have a dubious constitutional status.<sup>16</sup> In their view, modern agencies endanger both liberty and self-government. A defining problem is the delegation of what is effectively lawmaking power; agencies have broad discretion to make policy.<sup>17</sup>

13. *Id.* at 2151.

14. See, e.g., Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

15. See ROSCOE POUND, *ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE, AND SIGNIFICANCE* 7 (1942) [hereinafter POUND, *ADMINISTRATIVE LAW*]; see also *id.* at 132 (“We must bear in mind that the theories of disappearance of law go along with, have developed side by side with, absolute theories in politics. . . . The real foe of absolutism is law.”); Roscoe Pound, *The Place of the Judiciary in a Democratic Polity*, 27 A.B.A. J. 133, 133 (1941) [hereinafter Pound, *The Place of the Judiciary*] (contending that a recent veto message instructing judges to “confine the judicial process to cases ‘appropriate for its exercise’” was in line with the “Marxian idea of the disappearance of law” and “in the spirit of the absolute ideas”). For a valuable discussion and overview of the time period, see generally Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

16. For a representative statement, see Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 139, 146 (2016) (“Highly discretionary executive branch lawmaking is a departure from America’s constitutional traditions and norms of democratic accountability. . . .”). For an extreme version of this view, see generally PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014). For important statements in the aftermath of the New Deal, see POUND, *ADMINISTRATIVE LAW*, *supra* note 15, and Roscoe Pound, *Administrative Law and the Courts*, 24 B.U. L. REV. 201, 223 (1944). For illuminating connective tissue between the 1930s and the contemporary period, see generally Metzger, *supra* note 15.

With his fear of absolutism, his emphatic objection to agency discretion, and his enthusiasm for judicial checks on the administrative state, Pound repays careful reading. He is the most important historical predecessor of those who now insist on the doubtful or uneasy constitutional position of the administrative state. Pound would have no patience for *Chevron*. See *infra* Section IV.B.1. But there is an intriguing difference between Pound’s arguments (and those from the 1930s and 1940s) and like-minded contemporary commentators: the former were primarily purposivist and functional, speaking of constitutional democracy in the large, whereas the latter are far more formal, textual, and historical, speaking of what they regard as concrete constitutional commitments.

For different perspectives drawing on history and suggesting that administrative discretion and the administrative state are not at all constitutionally troublesome, see generally JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012), and Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002). For a valuable perspective on the history of the nondelegation doctrine, see generally Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017). For an interesting treatment of state constitutional law, see Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619 (2017). For an emphasis on the importance of focusing on social welfare, rather than on cabinining agency discretion as such, see generally CASS R. SUNSTEIN, *THE COST-BENEFIT REVOLUTION* (2018).

17. See DeMuth, *supra* note 16, at 168 (explaining that executive agencies having “wide-ranging lawmaking power” can “undermine the rule of law, the foundation of representative constitutional government” (quoting Kenneth S. Lowande & Sidney M. Milkis, “We Can’t Wait”: Barack Obama, *Partisan Polarization and the Administrative Presidency*, 12 FORUM 3, 19 (2014))).

In these circumstances, *Chevron* is deeply worrisome, even perverse. It aggravates the structural problem.<sup>18</sup> It authorizes the fox to guard the henhouse. The current struggle over *Chevron* might well be seen a proxy war in a larger battle over the legitimacy of the administrative state, or perhaps as a significant skirmish in that battle.

B. LIBERTY, SELF-GOVERNMENT, AND PATHS FORWARD

A remarkable shift, to which I shall devote some attention, involves *Chevron*'s political valence—that is, the perceived connection between *Chevron* and identifiable sets of political convictions. Once celebrated by the right and sharply criticized by the left, *Chevron* is now under assault from the right and (for the most part) accepted on the left. More particularly: The decision was originally embraced by the right as an effort to cabin the illegitimate exercise of policymaking authority of unelected judges, who were often requiring greater regulatory activity, and to insist instead on the primacy of officials within the Executive Branch, who have the advantage of democratic accountability. On this view, *Chevron* shifted authority from unaccountable judges, who had policy goals of their own, to policymaking officials.

The principal objections came from the left, which saw *Chevron* as an effort to weaken judicial review and as a capitulation to the (insufficiently zealous) administrative state, which was often captured by powerful private interests, and which often failed to regulate as Congress directed. Relatively aggressive judicial review, certainly on questions of law, was necessary to counteract the risk of “capture” and violations of congressional directions. On this view, *Chevron* increased the likelihood that statutory enactments would be rendered meaningless, or at least less meaningful, as a result of the exercise of agency discretion.

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18. Candor compels an acknowledgement that over thirty years ago, I embraced a version of this view. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 465–69 (1987). See, in particular, this passage:

*Chevron* suggests that administrators should decide the scope of their own authority. That notion flatly contradicts separation-of-powers principles that date back to *Marbury v. Madison* and to *The Federalist No. 78*. The case for judicial review depends in part on the proposition that foxes should not guard henhouses—an injunction to which *Chevron* appears deaf. It would be most peculiar to argue that congressional or state interpretations of constitutional provisions should be accepted whenever there is ambiguity in the constitutional text; such a view would wreak havoc with existing constitutional law. Those limited by a provision should not determine the nature of the limitation. The relationship of the Constitution to Congress parallels the relationship of governing statutes to agencies. In both contexts, an independent arbiter is necessary to determine the nature of the limitation.

This principle assumes special importance in light of the awkward constitutional position of the administrative agency. Without the ordinary electoral safeguards or the usual checks and balances, risks of factionalism and self-interested representation increase.

*Id.* at 467–68 (footnotes omitted). I much disliked this passage fifteen years ago. I dislike it less now. But I still dislike it. As Justice Jackson once put it, quoting Baron Bramwell, “The matter does not appear to me now as it appears to have appeared to me then.” *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950) (Jackson, J., concurring) (quoting *Andrews v. Styrap* (1872) 26 L.T. 704 (Exch.) 706 (Eng.)).



With respect to *Chevron*, the right and the left have switched sides. To get a bit ahead of the story: *Chevron*'s critics, mostly on the right, see the decision as a way of aggrandizing agency power, increasing agency discretion, producing lawlessness, and authorizing intrusions on liberty. If so, *Chevron* makes hash of the system of separation of powers. In addition, critics of the decision often embrace textualism as an approach to statutory interpretation, and for textualists, *Chevron* seems unacceptable; why should agencies be allowed to interpret statutory text? These concerns deserve serious consideration.

My principal goals are to cast doubt on the most vigorous contemporary objections to *Chevron* while also making space for, and thus accommodating, the strongest of those objections.<sup>19</sup> To do so, it will be necessary to go back to basics, and in that way (I hope) to lower the temperature by showing that the central questions are concrete and manageable, and generally do not involve large-scale issues at all.

More particularly, I offer five major claims. The first is that the question of whether courts should defer to agency interpretations of law turns on just one thing: congressional instructions. *Chevron* stands or falls on those instructions. In identifying them, I embrace a form of "APA originalism," embodied in the claim that the original public meaning of the APA is presumptively authoritative. The claim is subject to serious qualifications—for example, when and if a body of

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19. There is of course a difference between *Chevron* as written and *Chevron* as a contemporary doctrine, with its complexities, qualifications, and epicycles. See *infra* Section VI.A for a brief outline. For most of the discussion here, the difference between the two is not relevant, and so I bracket it.

It is an understatement to say that the academic literature on *Chevron* is voluminous. For some informative early views, see, for example, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987) [hereinafter Strauss, *One Hundred Fifty Cases Per Year*].

*Chevron*'s framework is also quite complicated, often raising large theoretical claims about interpretation, institutional authority, and the numerous exceptions to, or qualifications of, the framework. For a highly selective sampling of good work, see, for example, Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017); Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549 (2009); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255 (1988); Jacob E. Gersen & Adrian Vermeule, *Chevron As A Voting Rule*, 116 YALE L.J. 676 (2007); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933 (2017); Michael Herz, *Chevron is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867 (2015); Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992) [hereinafter Merrill, *Judicial Deference*]; Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994); Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009); Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight,"* 112 COLUM. L. REV. 1143 (2012) [hereinafter Strauss, *"Deference" is Too Confusing*]; Note, *"How Clear is Clear" in Chevron's Step One?*, 118 HARV. L. REV. 1687 (2005).

precedent has developed that is inconsistent with the original public meaning of the APA, or when and if the APA itself delegates discretionary authority to federal courts, allowing them to act on their own and free from the original meaning. (In such cases, we might say that acting inconsistently with the original meaning turns out to be required by the original meaning.) But because the APA is authoritative, and is generally not best taken as a foundation for judge-made common law, it is necessary to engage with its original public meaning with some care.

My second claim is that constitutional objections to *Chevron*—or, for that matter, constitutional defenses of the ruling—are unconvincing. In fact, they are overheated. With respect to *Chevron*, the Constitution is largely irrelevant. What matters are congressional instructions. But the word “largely” is important, and I offer some qualifications to this claim.

My third claim is that if the focus is placed on congressional instructions, *Chevron* is a reasonable reading of section 706, the relevant provision of the APA.<sup>20</sup> Although that provision is intriguingly difficult to parse,<sup>21</sup> the decision can be fit with its original public meaning. It is true that a plausible reading of its text, taken out of context, suggests that *Chevron* was wrong. But an understanding of the context raises serious complications. In the 1940s and 1950s, legislators, courts, and commentators were not at all clear that the relevant provision required independent judicial judgments about questions of law. Revealingly, no one on the Supreme Court itself read the provision that way.

The fourth claim is that in these circumstances, the argument for overruling *Chevron* is weak—in part because of the power of stare decisis, and in part because an entirely new start, with respect to judicial review of agency interpretations of law, would introduce a high degree of uncertainty. Perhaps worst of all, it would also increase the role of judicial policy preferences in the interpretation of regulatory statutes.

But the critics of *Chevron* do have legitimate concerns. They are right to fear that if *Chevron* allows agencies to seize on arguable ambiguities to move statutes in their preferred directions, it authorizes them to override congressional judgments. That would be patently unacceptable. It is important—and this is my fifth and final claim—to accommodate the legitimate concerns of *Chevron*’s critics. When Congress has been clear, above all in the statutory text, courts should insist that agencies respect its instructions. When agencies have acted unreasonably, their decisions must be invalidated. Prevailing canons of interpretation operate as a check on the operation of *Chevron*, and they are extremely important. Some of these are nondelegation canons, and they are grounded in the same concerns that animate *Chevron*’s fiercest critics. These various points can be seen as an effort

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20. See 5 U.S.C. § 706 (2012).

21. For valuable discussions, see Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 976–95 (2017) (explaining how “section 706 is best interpreted as an attempt to . . . instruct courts to review legal questions using independent judgment and the canons of construction”), and John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 130–38 (1998) (examining the legal community’s reception of the APA when it was passed).



to obtain an incompletely theorized agreement about how to handle *Chevron*—an agreement about how to proceed amidst large and perhaps intractable theoretical disagreements.<sup>22</sup>

### C. THE PLAN

The remainder of this Article is organized as follows. Part II explores *Chevron* itself, with particular attention to its foundations, the contemporaneous criticisms, the role of pragmatic arguments in the Court's analysis, and the political background. Part II also investigates ambiguities in the notion of "ambiguity"—the trigger for *Chevron* deference—and some of the complexities in judgments based on institutional competence.

Part III argues that congressional instructions are primary and that Congress has very wide room to maneuver. It also contends that constitutional restrictions are modest, at least with respect to steps that Congress might realistically take. Part IV, in some ways the heart of the Article, investigates the APA. Embracing APA originalism, it shows that the key provisions, taken in context, are far less clear than many contemporary readers, including distinguished judges with real expertise in the field, have taken them to be. It connects the debates over the intensity of judicial review to fundamental objections to the administrative state in the 1930s and 1940s, and it explores the surprising absence of anything like a clear judgment from relevant actors in the 1940s and 1950s that the APA requires independent judicial review of agency interpretations of law. In these circumstances, it is much harder than one might think to justify the widespread view that *Chevron* is a significant departure from the APA's settlement.

Part V turns to current understandings and debates. It explores nearly contemporaneous discussions by Justices Stephen Breyer and Antonin Scalia, emphasizing their agreement on a fundamental point: *Chevron* must be evaluated in terms of whether it is an accurate reflection of congressional instructions. Part V also investigates the evolution of the Court's thinking and the current emphasis on implicit legislative instructions in organic statutes. Those instructions are taken to require courts to defer to agency interpretations of law when agencies are exercising rulemaking or adjudicative authority. Finally, Part V explores the shifting political appeal of *Chevron*, with an emphasis on the reasons for the current attack from the political right, rooted above all in skepticism about the administrative state.

Part VI asks what is to be done. It argues that even if *Chevron* was wrong, it would be a large mistake to overrule it,<sup>23</sup> because that step would introduce a great deal of confusion and uncertainty, and because it would ensure, in practice, a greater role for judicial policy preferences in statutory interpretation. Instead of

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22. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1734–38 (1995) (discussing the possibility of agreement on outcomes amidst disagreement on theories).

23. For simplicity and ease of exposition, I use the word "overrule" throughout, though the technically correct term would be "reject the framework of"; no one is suggesting that the Court should reconsider the actual holding of *Chevron*, which would be necessary for the decision to be overruled.

being overruled, *Chevron* can (and should) be domesticated through three identifiable steps that take account of the strongest arguments of its critics: (1) insisting on a fully independent judicial role in deciding whether a statute is ambiguous at Step One; (2) invalidating arbitrary or unreasonable agency interpretations at Step Two; and (3) deploying canons of construction, including those that are designed to serve nondelegation functions and thus to cabin executive authority. All of these steps can be rooted in existing law. The current task is to entrench and fortify them.

## II. *CHEVRON* ITSELF

My focus in this Part is on *Chevron* itself—on what the Court said and the context in which it said it. I shall emphasize that the Court's analysis is written largely as a form of federal common law; it is rooted in pragmatic considerations. That is a serious problem, at least in the absence of some kind of bridge between those considerations and enacted law. Since 1984, a great deal of work has been done by courts and academics to construct that bridge. Their efforts, explored in Part V, have not been entirely successful.

### A. THE FRAMEWORK

Though *Chevron*'s two-step framework should be familiar, a brief refresher will be helpful, with particular reference to what the Court actually said. As it turns out, the Court's analysis is both more subtle and more infuriating than contemporary readers might expect.<sup>24</sup>

Under the Clean Air Act Amendments of 1977, a permit is required whenever a company builds a new industrial source or modifies an existing one, unless the incremental pollution falls within the statutory limits.<sup>25</sup> The particular issue in *Chevron* was whether a "source" had to be a single building or smokestack (as environmental groups argued), or whether it could be an entire plant (as the government urged).<sup>26</sup> A plantwide definition of "source" would give companies greater flexibility.<sup>27</sup> It would create a kind of "bubble" over the plant, allowing companies to build new pollution-emitting devices or to modify old ones, so long as they did not exceed the total statutory limit.<sup>28</sup> Under the plantwide definition, a

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24. See David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212–13 ("Chevron barely bothered to justify its rule of deference, and the few brief passages on this matter pointed in disparate directions.").

25. See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 172(b)(6), 91 Stat. 685, 747 (1977) (codified as amended at 42 U.S.C. § 7502(c)(5) (2012)).

26. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

27. See Ellen M. Saideman, *An Overview of the Bubble Concept*, 8 COLUM. J. ENVT'L. L. 137, 142–48 (1982) (discussing the EPA's definition of source, which "allow[ed] an entire plant . . . to be considered a single source"). See generally Robert W. Hahn & Gordon L. Hester, *Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program*, 6 YALE J. ON REG. 109 (1989) (exploring the history and effectiveness of emissions trading programs and describing how federal and state regulatory systems limit the ability of firms to use emissions trading effectively).

28. See *Chevron*, 467 U.S. at 840.

company might build a new pollution-emitting device within its plant, but also take one offline, and in that way avoid the Act's permit requirements.

The plantwide definition of "source" had been adopted by the Reagan Administration, which rejected the narrower definition from the Carter Administration.<sup>29</sup> Environmental groups were deeply skeptical of the Reagan Administration, and they sought to challenge the decisions of its Environmental Protection Agency at every turn.<sup>30</sup> They believed that the plantwide definition was harmful from an environmental perspective and that it was inconsistent with the purposes of the Act.<sup>31</sup> The United States Court of Appeals for the District of Columbia Circuit agreed.<sup>32</sup> No one should have been surprised. That court had long been aggressively reviewing agency action, especially in the environmental context, and had been pressing agencies in directions favored by environmental groups.<sup>33</sup>

The Supreme Court offered its framework in that context. In the Court's own words: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>34</sup> Step One has come to be understood to require an inquiry into whether Congress's instructions are ambiguous.<sup>35</sup> If they are, courts must proceed to Step Two: "[I]f 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."<sup>36</sup> With the second step, courts ask whether the agency's interpretation is "permissible," not whether it is right.<sup>37</sup>

As the law has developed, the framework means that if the underlying statute is ambiguous, agencies may adopt their preferred interpretation so long as that interpretation is not unreasonable.<sup>38</sup> Some people have argued that Step One and Step Two are not different, on the ground that the permissibility or reasonableness of the agency's decision at Step Two requires an assessment of whether the agency has run afoul of clear congressional instructions (the Step One

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29. *See id.* at 857–58.

30. *See* Michael E. Kraft & Norman J. Vig, *Environmental Policy in the Reagan Presidency*, 99 POL. SCI. Q. 415, 415 (1984) (noting environmental groups' "intense opposition" to President Reagan's "new course" for federal environmental regulation).

31. *See Chevron*, 467 U.S. at 842 n.7.

32. *See* Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982), *rev'd sub nom. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

33. *See, e.g.,* Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971) (rejecting the Atomic Energy Commission's interpretation of the National Environmental Policy Act of 1969).

34. *Chevron*, 467 U.S. at 842–43.

35. *See, e.g.,* Babbitt v. Sweet Home Chapter of Cmty. for a Great Or., 515 U.S. 687, 703 (1995).

36. *Chevron*, 467 U.S. at 843.

37. *Id.*

38. *See, e.g.,* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 (2009) (citing *Chevron*, 467 U.S. at 843–44) (explaining that the EPA's interpretation "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts").

question).<sup>39</sup> On one understanding of Step Two, that argument is exactly right. But as the Court has usually understood Step Two, it is genuinely distinctive. An agency's interpretation of a statutory term may be unreasonable—in the sense of being arbitrary or senseless—even though it does not violate any congressional instruction.<sup>40</sup> An example is *Chevron* itself: at Step One, the EPA was entitled to adopt a plantwide definition or not. But if the EPA decided (say, tomorrow) to reject a plantwide definition, its decision might well be unreasonable, because it would impose significant costs without producing environmental benefits.<sup>41</sup>

It is important to note that in Step One, there is no deference to the agency. Courts decide, *on their own*, whether a statutory term is ambiguous. Agencies are not entitled to any deference on that question. That is an important limit on *Chevron*. If agencies were allowed to say whether statutes are ambiguous, there might be a serious question under Article III. But as the law stands, agencies have interpretive authority only in the face of (what the court finds to be) ambiguity. That is hardly everything. Nonetheless, agencies are far better off with *Chevron* than they would be without it, in the sense that they have room to interpret ambiguous provisions as they reasonably see fit.<sup>42</sup>

*Chevron* inaugurated a doctrinal revolution that rapidly came to dominate the law governing judicial review of agency interpretations of statutes. Ironically, no one on the Court meant to produce a revolution or anything close to it. Nonetheless, it happened.<sup>43</sup>

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39. See, e.g., Gersen & Vermeule, *supra* note 19, at 691–92, 708.

40. See *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (suggesting that “agencies must operate within the bounds of reasonable interpretation” and that the “EPA strayed far beyond those bounds when it read [the relevant statute] to mean that it could ignore cost when deciding whether to regulate power plants” (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014))); see also *Judulang v. Holder*, 565 U.S. 42, 55 (2011) (explaining that “agency action must be based on non-arbitrary, ‘relevant factors,’” which meant that the Board of Immigration Appeals’ interpretation of a statute needed to be “tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system” (citations omitted)).

41. See Hahn & Hester, *supra* note 27, at 144–45.

42. See E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 3–8 (2005); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1024–25.

43. For a fascinating account of how this came to be, see Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253 (2014), and in particular this summary, *id.* at 282–83:

*Chevron* became a landmark decision due to the cumulative effect of a series of fortuitous events, among them Justice White’s assignment of the case to Justice Stevens, Justice Stevens’ creative restatement of certain principles of judicial review of questions of law, the lack of scrutiny given the Stevens opinion by other justices, Judge Patricia Wald’s quick embrace of the two-step formula in the D.C. Circuit, Justice Scalia’s elevation to the Supreme Court from the D.C. Circuit two years later, and the Justice Department’s unrelenting campaign to make *Chevron* the universal standard for judicial review of agency interpretations of law. Individually, each of these events is readily explicable; cumulatively, they would have to be described as an accident.

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## B. THE JUSTIFICATION

What is the legal source of the two-step framework? What statute justifies or authorizes it? In *Chevron* itself, the Court did not answer those questions. It did not speak of statutory text. It spoke instead of congressional intentions. But importantly, it acknowledged that with respect to the question of whether agencies should be allowed to resolve ambiguities, Congress might not have had any kind of intention at all:

Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.<sup>44</sup>

This is a mysterious and infuriating passage, above all because of its recognition that Congress might not have had any intention with respect to the question whether courts should defer to agency interpretations of law, and its suggestion that on that question, the reason for the absence of congressional clarity “matters not.” If congressional intentions are important, how can that possibly be?<sup>45</sup> In the end, the Court justified its framework by reference to some purely pragmatic points:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself

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The wonder of it all is that the Court that rendered this decision had utterly no intention of producing such an opinion. Indeed, the Court did not even realize it had produced such an opinion until others pointed this out.

Particularly illuminating—and perhaps a key to the actual ruling in *Chevron*—is Justice Stevens’s remark in conference: “When I am so confused, I go with the agency.” *Id.* at 272.

44. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

45. I am bracketing throughout the question whether what matters are “intentions” or instead “meaning.” But for the discussion here, my own emphasis is on the meaning of legislative enactments rather than on the intentions of legislators. See Justice Scalia’s approval of this suggestion: “We do not inquire what the legislature meant; we ask only what the statute means.” ANTONIN SCALIA, *SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* 237 (Christopher J. Scalia & Edward Whelan eds., 2017). It should be obvious that the Court in *Chevron* was focused on intentions, to the extent that it was focused on either.



either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.<sup>46</sup>

There are two claims here. First, the appropriate definition of the word “source” within the meaning of the Clean Air Act may require *technical expertise*. What would be the effects of one or another definition? In terms of clean air or cost, would a plantwide definition be beneficial or harmful? Strictly legal knowledge is insufficient to answer these questions. Perhaps a plantwide definition would compromise environmental values but also reduce compliance costs. If so, we might think that the ultimate judgment would be a technical one, turning on the outcome of some kind of cost–benefit analysis.

Second, the appropriate definition may turn on *political* considerations—on “the incumbent administration’s views of wise policy.”<sup>47</sup> The answer to the definitional question may be taken to pose a tradeoff among various values, which means that the *Chevron* framework respects democratic accountability.<sup>48</sup> Within the limits of the text, the tradeoff might rest on a political judgment, which different administrations might legitimately make in different ways. If so, we might think that agencies should be giving those answers, not courts. *Chevron* respects the greater democratic pedigree of the Executive Branch. It creates a kind of “policy space” for public officials.<sup>49</sup> Without *Chevron*, such officials would ask for, and receive, point estimates from their lawyers, as in: You can do this, and that too, but probably not that, and certainly not that. With *Chevron*, public officials are given a space or a range, and they can specify their preferred point.<sup>50</sup> If the goal is to empower technocrats or to give policymakers some discretion, that is a great improvement.

These pragmatic arguments can be invoked in any case in which resolution of a statutory ambiguity cannot be based on purely legal expertise. Consider, for example, the definition of the word “harm” within the meaning of the Endangered Species Act.<sup>51</sup> Suppose the question is whether destruction of breeding territory counts as “harm.” If we stipulate that the statutory term is ambiguous,<sup>52</sup> we might agree that interpretation essentially requires resolution of a policy question: Is a broad definition of “harm” a good idea, given its

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46. *Chevron*, 467 U.S. at 865–66.

47. *Id.* at 865.

48. See generally Hahn & Hester, *supra* note 27, at 144–45 (exploring relevant tradeoffs in emissions trading policy).

49. See Strauss, “Deference” Is Too Confusing, *supra* note 19, at 1158–59; see also *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (similarly referring to “a space, so to speak, for the exercise of continuing agency discretion”). For a discussion of one way to think about this policy space, see generally Lawrence B. Solum & Cass R. Sunstein, *Chevron as Construction* (Dec. 12, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3300626> [<https://perma.cc/Y4GB-ZYEM>].

50. See Elliott, *supra* note 42, at 11–12.

51. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 690–91, 697 (1995).

52. This is a stipulation. See *id.* at 696–97. For vigorous disagreement, see *id.* at 716 (Scalia, J., dissenting). For orientation, see Solum & Sunstein, *supra* note 49, at 3–4.



consequences? That might be taken to be a technical question, requiring assessment of costs and benefits and application of expertise. Or it might be taken to be a political question, requiring some judgment about how to balance the underlying values. In either case, *Chevron* seems to make a great deal of sense.

### C. COMPARATIVE COMPETENCE AND SOCIAL WELFARE

But does it, really? Let us begin by taking the pragmatic arguments on their own terms. What seems necessary is a judgment about *comparative competence*. But comparative competence with respect to what? We should agree that there is a universe of cases in which statutes are ambiguous. Unfortunately, the very term “ambiguous” has ambiguity.<sup>53</sup> Consider three possibilities:

1. A statute counts as ambiguous if and only if courts are in genuine equipoise after they have used the appropriate tools of statutory construction.<sup>54</sup> Judges simply do not know the right answer; it is a fifty–fifty call.<sup>55</sup> If that is the proper understanding of equipoise, then how often does that happen? Some judges think that it is fairly common; some judges think that it is pretty rare.<sup>56</sup>
2. A statute counts as ambiguous whenever there are objectively reasonable arguments both ways—that is, arguments that reasonable people hold in good faith. Under this view, a court would defer to an agency unless it is nearly certain that the agency is wrong—certain, say, with at least ninety percent confidence. If that is the proper understanding of *Chevron*, then we can understand Justice Kavanaugh’s use of the word “amazing.”<sup>57</sup> If all judges

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53. For valuable discussion, see Kavanaugh, *supra* note 12, at 2134–44. To decide whether and when a statute is ambiguous, one needs a theory of interpretation. Some believe that legal questions always have right answers, so that judicial conclusions, based on the tools of the legal profession, can fairly be said to be right or wrong. *See, e.g.,* Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978). For present purposes, we can bracket that question. Even if there are right answers, the question remains who can identify them, and on the basis of what tools. On plausible assumptions, agencies might be better than courts at identifying right answers, at least if something other than legal expertise is relevant.

54. I am bracketing the question of what these tools are, taking the judges’ theories as given. One way to think about this category of cases is that courts are in a “construction zone”; they run out of materials to interpret. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 469–72 (2013). If they are in the construction zone, they might think agencies are in a better position to make the relevant decisions. I am grateful to Lawrence Solum for raising this possibility, which could lead to a distinctive understanding and defense of *Chevron*. *See* Solum & Sunstein, *supra* note 49.

55. *Cf.* Kavanaugh, *supra* note 12, at 2137–38 (describing the level of clarity different judges require in order “to call a statute clear”).

56. *See, e.g.,* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (“In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a ‘strict constructionist’ of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.”). At this point, it is worth emphasizing that we need a theory of meaning to inform any account of when a statute is ambiguous. Without insisting on it, I use the idea of “original public meaning” as the foundation for interpretation.

57. *See* Kavanaugh, *supra* note 12, at 2151. I say “understand” without necessarily embracing his opinion. On a certain view of institutional competence, it is not amazing at all.

on a three-judge panel are eighty-nine percent sure that an agency's interpretation is wrong, and if the agency wins anyway, then *Chevron* is indeed a significant shift in interpretive authority. It allows agencies to prevail even if all judges agree that the agency is overwhelmingly likely to be wrong.

3. A statute counts as ambiguous unless courts think, with a fair degree of confidence, that one interpretation is best—say, sixty-five percent confidence.<sup>58</sup> This approach would grant a large degree of discretion to agencies, but it would not exactly count as “amazing.” After all, judges are deferring when they think that agencies are thirty-five percent likely to be right, and thirty-five percent is not so low.

Let us bracket these possibilities for the moment and notice that in a certain percentage of cases, *Chevron* unquestionably shifts authority from courts to agencies. Is that good? An affirmative answer would be more likely if, in such cases, purely legal expertise is insufficient to sort out ambiguities.<sup>59</sup> If such ambiguities cannot be resolved without the application of technical expertise, the pragmatic argument for *Chevron* would be more forceful. So too if resolution of ambiguities would not be possible without resort to judgments of value that are best made by a politically accountable entity.<sup>60</sup>

By contrast, the answer would seem to be negative if purely legal expertise is sufficient to discern the meaning of statutes. If it is, then *Chevron* shifts policy-making authority not from *courts* to agencies, but from *Congress* to agencies, which might seem both indefensible and grave. The reason is simple: if legal expertise is all that is required to discern congressional instructions, and if courts are comparatively expert in resolving legal questions, then there is a serious risk that *Chevron* will allow agencies to violate congressional instructions. Why should courts accept an interpretation that gets Congress's instructions wrong? We should be able to see, in this light, why textualists would have a serious problem with *Chevron*, or would at least insist that under Step One, courts should interpret statutes as they see fit.

We would also have reason to reject *Chevron* if it authorizes agencies to diminish liberty, reduce welfare, or aggrandize their own power in ways that go beyond congressional limitations (bracketing the question of exactly how to discern them). Accepting *Chevron* in those circumstances could be a recipe for authoritarianism, or at least something in that direction. These points suggest that if we look at *Chevron* in purely pragmatic terms, it is not clear whether we should celebrate or deplore it. A great deal would seem to depend on the meaning of ambiguity.

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58. This is roughly the approach that Justice Kavanaugh says that he adopts. *See id.* at 2137.

59. For an illuminating illustration, see *United States v. Fifty-Three Eclectus Parrots*, 685 F.2d 1131, 1137 (9th Cir. 1982) (adopting the government's definition of “wild,” motivated in part by the enforcement challenges presented by the rejected definition).

60. For relevant evidence, see Kent Barnett et al., *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1468 (2018) (finding *Chevron* deference strongly constrains partisanship in judicial judgments).

Let us begin by embracing standard assumptions about institutional competence: judges should be resolving issues of law, to the extent that purely legal tools are sufficient in that endeavor, and agencies should be making decisions of policy,<sup>61</sup> so long as their decisions are not arbitrary. If so, it would be sensible to say that the argument for *Chevron* is strong insofar as we understand ambiguity in accordance with (1), but not so sensible if we understand ambiguity in accordance with (2). Under (1), courts resolve ambiguities to the extent that conventional legal tools—for example, statutory text and applicable canons of construction—allow them to do so, and defer to agencies if and only if those tools are insufficient. That matches a standard understanding of what courts are good at doing.<sup>62</sup> Under (2), courts do not resolve ambiguities even if they really can; it is not clear why that would make any sense. On pragmatic grounds, we should reject *Chevron* insofar as it is consistent with (2).

On those same grounds, it is not altogether clear how to evaluate *Chevron* if it is understood in accordance with (3). If courts are fairly clear that the agency's interpretation is wrong, and if we trust courts to be right when they are fairly clear about what statutes mean, then (3) has a problem. On the other hand, the existence of considerable doubt raises the possibility that we do best if an agency, with the advantage of its superior technical expertise and relative accountability, is authorized to make its own judgments. In cases where courts are genuinely unsure (with, say, a conviction of fifty-five or sixty percent, to the extent that numbers are helpful), perhaps expertise and accountability should be allowed to tip the scales in the direction of agency interpretations.

Note, however, that if we do not adopt standard assumptions about institutional competence and are concerned instead about social welfare writ large, we cannot rule out (2)—and on identifiable assumptions we might not even be content with (1). If we stipulate that agencies are generally trustworthy in terms of promoting social welfare, (2) might turn out to be a good idea. Agencies might be deviating from the best reading of the statute, but on the stipulated assumption, they are promoting social welfare. If, by contrast, courts are excellent at making judgments about policy and principle (including social welfare), and agencies are not, then (1) would not turn out to be best. If agencies are incompetent, foolish, or captured, we might want courts to make those judgments. On social welfare grounds,

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61. I am bracketing the fact that in some cases, statutory interpretation by judges turns on considerations of policy, as, for example, when statutes are construed so as to avoid absurdity. *See, e.g.,* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2389–90 (2003).

62. This is broadly consistent with the judgments in *Kavanaugh*, *supra* note 12, at 2153–54. Justice Kavanaugh emphasizes the importance of exploring whether the relevant statutory term is “broad and open-ended,” in which case deference would be warranted. *Id.* at 2153. As Justice Kavanaugh reasonably understands it, the use of a broad term can be taken as evidence of delegation to an agency, while a specific term cannot easily be so taken. *See id.* at 2153–54. Unfortunately, the line between broad and specific terms is not always clear. Is the word “source” broad and open-ended? The word “employee”? The word “diagnosis”?

we would need to think long and hard, and do a great deal of work, before choosing among (1), (2), and (3).<sup>63</sup>

D. ARE PRAGMATIC ARGUMENTS EVEN RELEVANT?

But what legal standing do pragmatic arguments have? Are they relevant at all? Let us turn to that question and assume, for purposes of analysis, that some statute gives courts an authoritative direction.<sup>64</sup> Pragmatic arguments would appear to be irrelevant. If Congress had made its own decision about whether courts should give deference, the pragmatic arguments would be beside the point. Those arguments would amount to claims about appropriate policy—no more and no less. Such claims are the province of Congress, not courts. And if Congress had delegated to courts the decision of whether and when to give *Chevron* deference, the answer would be clear: courts would have to make that decision on their own, because Congress said so.

In an overlooked sentence in *Skidmore v. Swift & Co.*, the Court went out of its way to note that “[t]here is no statutory provision as to what, if any, deference courts should pay to the Administrator’s conclusions” with respect to law.<sup>65</sup> Absent such a provision, courts might have no alternative to assessment of pragmatic considerations. But since 1946, Congress has had something to say.<sup>66</sup>

If congressional directives are authoritative, there is a large puzzle here. *Chevron* was unanimous, and it did not say a word about the legal sources for its framework. How could that be? Why did no Justice raise that as a problem? There are two potential answers. The first is that for decades, the scope of judicial review of agency interpretations of law had been regarded as a question for courts, to be answered in common law fashion by reference to pragmatic considerations.<sup>67</sup> If that was the approach before and after the enactment of the APA, it should be no surprise that it was also the approach in the 1980s. The Court had never paid much attention to the relevant provision of the APA—section 706<sup>68</sup>—in deciding on the proper approach to agency interpretations; *Chevron* was in that respect continuous with longstanding practice. Puzzlingly, serious judicial interest in section 706 is quite recent.

The second answer is that the Court was under the influence of the Legal Process school, according to which hard questions of statutory interpretation should be answered by assuming that the national legislature consists of

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63. In my view, the standard assumptions must ultimately be defended in terms of social welfare, probably on rule-consequentialist grounds, but I cannot offer that defense here. For relevant remarks, see generally Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636 (1999).

64. If Congress has been unclear, pragmatic arguments might matter; perhaps courts legitimately take them into account when imputing an intention or instruction to Congress. Justices Breyer and Scalia have so argued. See *infra* Section V.A. My purpose here is to establish the primacy of law rather than freestanding pragmatism; to do that, it is best to begin with cases in which Congress has been clear.

65. 323 U.S. 134, 139 (1944).

66. See Administrative Procedure Act (APA), ch. 324, § 10, 60 stat. 237, 243–44 (1946) (establishing the scope of judicial review of agency action) (codified as amended at 5 U.S.C. § 706 (2012)).

67. See, e.g., *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 127 (1944).

68. 5 U.S.C. § 706.

“reasonable [persons] pursuing reasonable purposes reasonably,” at least in the face of ambiguity.<sup>69</sup> If that is the right assumption, pragmatic considerations would be important, at least if Congress had not spoken with clarity on the question of whether courts should defer to agency interpretations of law. In the absence of a clear congressional answer, *Chevron* could be seen as one way of following the Legal Process prescription.<sup>70</sup> And if so, there is no need to fuss terribly much over the precise language of the APA, unless that language is clear.<sup>71</sup> Debates over appropriate deference rules would be undertaken by asking what reasonable legislators would want.

In the years since *Chevron*, textualism has played an increasingly central role in statutory interpretation. We can even call it the Textualist Revolution, led by Justice Scalia,<sup>72</sup> which put severe pressure on Legal Process approaches. A central goal of the Textualist Revolution has been to focus insistently on the legal sources for judicial decisions. The Textualist Revolution requires courts to ask not about reasonable legislators acting reasonably but instead: *What provision of law authorizes one or another approach, and what exactly does it say?* That question was bound to have an effect on debates over *Chevron*. Indeed, Justice Scalia was concerned about *Chevron*’s textual sources from the very start, and the question preoccupied him for many years.<sup>73</sup> Increasing focus on the text and context of the APA is a natural outgrowth of the Textualist Revolution.

#### E. SOME REALISM ABOUT CHEVRON

It is impossible to understand *Chevron*’s success without a sense of the legal and political background, which seems to have been lost in recent years and which some people might find surprising.<sup>74</sup> In the 1960s and 1970s, federal courts had been aggressively reviewing agency action (and inaction), often with the goal of producing greater regulation—sometimes on the ground that it was required by law, sometimes on the ground that the agency did not use adequate procedures, and sometimes on the ground that the agency’s policy choice was arbitrary and capricious.<sup>75</sup>

69. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1125 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

70. See generally John F. Manning, *Chevron and the Reasonable Legislator*, 128 HARV. L. REV. 457 (2014) (arguing that the Legal Process approach consistently governed judicial interpretation of agency action before Congress enacted the APA).

71. For further discussion, see *infra* Part IV.

72. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22–25 (Amy Gutmann ed., 1997).

73. See *infra* Section V.A.2.

74. For an essential, fine-grained account of the legal and political background, see generally Merrill, *supra* note 43. I paint with a broader brush here.

75. See, e.g., *Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm’n*, 547 F.2d 633, 655 (D.C. Cir. 1976) (holding that a rule promulgated by the Nuclear Regulatory Commission was arbitrary and capricious), *rev’d sub nom. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978); *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d



There was a pervasive sense of battle between lower courts and agencies, and in general, the political valence was entirely clear. Relatively speaking, the judges were on the political left. They were seeking to protect what they saw as the goals of statutory enactments, which (on one view) agencies often failed to respect under the sway of powerful private interests. A structural theory, and not merely politics, lay behind the embrace of an aggressive judicial role in overseeing the administrative state. The beneficiaries of regulatory statutes frequently face a severe collective action problem that the objects of regulation do not. In these circumstances, courts are needed to remedy a systematic imbalance and to ensure faithful implementation of statutory enactments.<sup>76</sup> Administrative law could correct a systematic failure in democratic processes.<sup>77</sup>

There was unmistakable continuity, in fact, between what judges were doing to promote regulation and what the Warren Court had been doing to protect what it saw as individual rights.<sup>78</sup> In 1971, Judge David Bazelon made the connection clear:

We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts.

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[Now] courts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health, and liberty. These interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a ratemaking or licensing proceeding.

To protect these interests from administrative arbitrariness, it is necessary . . . to insist on strict judicial scrutiny of administrative action.<sup>79</sup>

To their defenders, the lower federal courts assumed a kind of heroic stance, holding agencies' feet to the fire. As the D.C. Circuit put it, also in 1971:

These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural

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1109, 1111–12 (D.C. Cir. 1971) (holding that the Atomic Energy Commission's rules did not comply with the National Environmental Policy Act); *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 624–25 (2d Cir. 1965) (overturning Federal Power Commission decision on the basis of an insufficient record). For an influential synthesis of the background, see generally Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974). For an ambitious, sympathetic reconstruction, which is well worth reading today, see generally Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713 (1977).

76. For valuable documentation and analysis of this phenomenon, see Burton A. Weisbrod, *Conceptual Perspective on the Public Interest: An Economic Analysis*, in *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 4, 17–29 (Burton A. Weisbrod et al. eds., 1978).

77. See *id.*; Stewart, *supra* note 75, at 763–64.

78. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73–75 (1980).

79. *Env'tl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597–98 (D.C. Cir. 1971).



environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material “progress.” But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role.<sup>80</sup>

What is most striking about this passage is the scare quotes around the word “progress,” alongside the stark insistence that the judicial role was to ensure that the “promise” of environmental legislation “will become a reality.”<sup>81</sup> The basic idea was that careful judicial review of agency judgments was necessary to ensure fidelity to congressional will.<sup>82</sup> In numerous cases, courts used statutory interpretation and “hard look” review to require agencies to move in particular directions.<sup>83</sup> Much of the time, those directions were precisely those sought by environmental groups. Those who sought aggressive judicial review, and those who favored more rather than less regulation, could and did enthusiastically support independent judicial judgments about the meaning of law. On their assumptions, the idea of judicial “deference” to agency interpretations would seem positively bizarre. An independent judicial role was necessary to counteract a kind of “process failure” within the administrative state; that role was democracy-reinforcing.<sup>84</sup>

Everyone knew that *Chevron* itself pitted environmental groups against the Reagan Administration, which was moving in directions that such groups deplored.<sup>85</sup> *Chevron* seemed to insist on a comparatively modest judicial role—a form of salutary humility. It was of a piece with the Court’s decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,<sup>86</sup> which also reflected humility, and which threw the role of some courts of appeals, with their enthusiasm for “strict judicial scrutiny,” into serious doubt.<sup>87</sup> At the same time, *Chevron* counted as a resounding victory for President Reagan, who was overseeing a movement in favor of regulatory retrenchment.<sup>88</sup>

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80. *Calvert Cliffs’ Coordinating Comm., Inc.*, 449 F.2d at 1111 (footnote omitted). For an influential example of litigation seeking judicial invalidation of agency action in order to protect the environment, see generally *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc).

81. *Calvert Cliffs’ Coordinating Comm., Inc.*, 449 F.2d at 1111.

82. For an account with reference to the idea of “interest representation,” see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1723–1813 (1975).

83. A prominent example in the Supreme Court is *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (explaining that “the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry”). For further discussion of this case, see Stewart, *supra* note 82, at 1785–86.

84. The link here to John Hart Ely’s understanding of judicial review is plain. See generally ELY, *supra* note 78. Just as Ely argues for an approach to constitutional law that makes up for deficits in democratic processes, so administrative law theorists, in the relevant period, argued for an approach to judicial review that made up for democratic failures in agency implementation.

85. See Kraft & Vig, *supra* note 30, at 415.

86. 435 U.S. 519 (1978).

87. See generally Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345.

88. For different perspectives, compare SUNSTEIN, *supra* note 16, at 6–15, with Thomas O. McGarity, *Regulatory Reform in the Reagan Era*, 45 MD. L. REV. 253 (1986).

For that reason, it should not be surprising that *Chevron* itself was generally celebrated by the right<sup>89</sup> and that the left was generally skeptical.<sup>90</sup> Those who defended *Chevron* often argued that it was responsive to judicial overreaching in the service of the judges' preferred policy goals.<sup>91</sup> By recognizing that interpretation of statutory terms often involved a policy choice, it signaled the importance of an institutional shift, one that favored agency over judicial policymaking, and so it put policymaking in the right hands.

To get a bit ahead of the story, everything from the late 1970s and early 1980s has been turned on its head. One reason is skepticism about the administrative state; another is the rise of textualism. We will get there in due course.

### III. THE PRIMACY OF CONGRESSIONAL INSTRUCTIONS

From the contemporary point of view—or from the standpoint of conventional legal analysis—the problem with *Chevron* is plain: it is not up to courts to decide, on their own, whether they should defer to agency interpretations of law. That is a question for Congress to decide, subject to constitutional limitations.<sup>92</sup> Here is another way to put the point: *Vermont Yankee*'s narrow holding is that courts may not impose procedural requirements on federal agencies that go beyond those in the Administrative Procedure Act.<sup>93</sup> But *Vermont Yankee* can also be understood to stand for a much broader proposition, to the effect that administrative law generally is not a matter of federal common law.<sup>94</sup> The initial question,

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89. See, e.g., Kmiec, *supra* note 19, at 277–78, 283, 285; Scalia, *supra* note 56, at 517–18; Starr, *supra* note 19, at 310 (“Agency administrators, who have extensive experience with both the regulatory scheme and the regulated industry, are much better placed than generalist judges to make the policy decisions that such broad terms seem to invite. In my view, *Chevron* quite properly recognized that such terms constitute an implicit, but nonetheless valid, delegation of authority to the agency.”).

90. See, e.g., Farina, *supra* note 19, at 456; Abner J. Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1, 7–9 (1986).

91. See Starr, *supra* note 19, at 312.

92. See generally Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637 (2003) (exploring the role of congressional instructions in defining agencies' authority to interpret law).

93. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546–48 (1978).

94. This understanding is recognized and deplored in Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978). Forty years ago, Stewart saw the APA as “a flexible restatement of evolving judge-made law that should not be read to embalm doctrines three decades old by precluding continuing judicial innovation.” *Id.* at 1815. We could imagine that his view would be strengthened if we substituted “seven” for “three.” The *Chevron* framework, in its modern form, looks a lot different from the corresponding principles in 1946, or 1986, or even 2006. The arc of the doctrine suggests that Stewart's account fits well with some of actual practice. For a similar view to Stewart's, see, for example, Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3.

The underlying question—which pits Stewart and Davis on the one hand against what might be called APA fundamentalism, on the other—comes up in many areas, and the Stewart–Davis view has often prevailed. For examples, see Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1934–36 (2018). But APA fundamentalism is on the ascendency, as an outgrowth of the rise of textualism. See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206–07 (2015) (finding it inconsistent with the APA to require an agency to follow notice-and-comment rulemaking when altering its initial interpretive guidance for a regulation). The future of the common law view of administrative law is newly in doubt.

and perhaps the only question, is: what has Congress required?<sup>95</sup> If this is indeed the key question, then large-scale debates about the legitimacy of the administrative state are beside the point. We can see *Vermont Yankee* as reflecting a form of APA originalism; so understood, it raises a question that *Chevron* itself did not adequately answer.

*Chevron* stands or falls, I suggest, on whether it can be seen as a faithful response to congressional instructions. If Congress has resolved the issue either way, courts would be bound.<sup>96</sup> If Congress has not been clear, courts should do the best they can to read its signals. For all of the internal disagreement within the Court, and the occasional reference to constitutional fundamentals, there remains a working consensus in favor of that proposition. As the Court has made clear, *Chevron* deference is now premised on “a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.”<sup>97</sup> It is instructive that on the primacy of congressional instructions, Justice Antonin Scalia (a longtime defender of *Chevron*) and Justice Stephen Breyer (a longtime critic of *Chevron*, at least in its strongest and simplest forms) were in fundamental agreement.<sup>98</sup>

I will soon turn to the justification for *Chevron*’s presumption. Let us begin with the question of congressional primacy, including an exploration of why the Constitution does not much constrain Congress’s judgments. I will answer that question, and explore the constitutional constraints, by reference to three stylized scenarios.

#### A. SCENARIO ONE: CONGRESS REJECTS *CHEVRON*

To fix ideas, suppose that Congress specified, in some regulatory statute, that in the face of ambiguity, the meaning of a statutory term would be settled by courts rather than the implementing agency. For example, Congress might say that the word “take” in the Endangered Species Act is to be interpreted by federal courts without deference to the views of the Department of the Interior. Or

95. If Congress says that agencies can sort out ambiguities, there is no constitutional question; that is the issue on which I am focusing here. If Congress says that agencies can understand words to mean whatever they want them to mean, the issue would be different. If Congress granted agencies that broad discretion, ordinarily hyperbolic concerns about authoritarianism would be justified. *See, e.g.*, Pound, *The Place of the Judiciary*, *supra* note 15, at 136–37.

96. It is tempting to see *Chevron* as a realistic adaptation to contemporary realities, in which agencies must apply statutory terms to unanticipated problems. If so, it allows agencies to act relatively freely, and is not so different from situations in which old statutes need to be adapted to address new problems, or in which statutory terms must be applied to contexts and conditions that the enacting Congress could not anticipate. This does seem to be a pragmatic advantage of *Chevron*. *See* Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2102–03 (1990). But the point must be put in perspective. Congressional instructions must have priority, and courts cannot defy them.

97. *Smiley v. Citibank (S.D.)*, N. A., 517 U.S. 735, 740–41 (1996). This idea is concretized and narrowed in *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

98. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 379 (1986); Scalia, *supra* note 56, at 516.

suppose that Congress said that the word “diagnosis” in the Occupational Safety and Health Act is to be interpreted by federal courts without deference to the views of the Department of Labor. In either case, the congressional settlement would be decisive.

The only possible response would be that the Constitution *requires* judicial deference to agency interpretations of law, but that view would be very difficult to defend. The argument would have to be that the executive power, established by Article II, necessarily includes the power to interpret ambiguities.<sup>99</sup> But why should that be so? Whatever Article II includes, the execution does not necessarily include interpretive power.<sup>100</sup> A subtler response would be that resolution of ambiguities may involve a degree of policymaking, rather than the use of narrowly legal materials, such as text and structure. Perhaps that was true in *Chevron* itself. But even if that is so, a degree of policymaking is sometimes part of legal interpretation, and it is not unconstitutional for Congress to allocate some policy-making discretion to judges.<sup>101</sup>

Now suppose that Congress specified more globally, in the Administrative Procedure Act itself, that courts, rather than agencies, must settle the meaning of statutory terms.<sup>102</sup> That would be a general resolution of the *Chevron* question, contrary to *Chevron*. And indeed, legislation has been introduced that would do

99. See Kmiec, *supra* note 19, at 277–78, 283, 285.

100. See Scalia, *supra* note 56, at 515. Of course, the power of execution will often turn out, in practice, to entail interpretation, see Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2298–301 (2006), but outside of narrow contexts (at most), it would be extreme to suggest that when the executive interprets the law, its view must prevail over that of the Judiciary.

101. Justice Scalia put it more elaborately:

Now there is no one more fond of our system of separation of powers than I am, but even I cannot agree with this approach. . . . Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce “absurd” results, or results less compatible with the reason or purpose of the statute. This, it seems to me, unquestionably involves judicial consideration and evaluation of competing policies, and for precisely the same purpose for which (in the context we are discussing here) *agencies* consider and evaluate them—to determine which one will best effectuate the statutory purpose. Policy evaluation is, in other words, part of the traditional judicial tool-kit that is used in applying the first step of *Chevron*—the step that determines, *before* deferring to agency judgment, whether the law is indeed ambiguous. Only when the court concludes that the policy furthered by *neither* textually possible interpretation will be clearly “better” (in the sense of achieving what Congress apparently wished to achieve) will it, pursuant to *Chevron*, yield to the agency’s choice. But the reason it yields is assuredly *not* that it has no constitutional competence to consider and evaluate policy.

See Scalia, *supra* note 56, at 515. I am bracketing the question whether Justice Scalia was right to say that “policy evaluation” is a proper ingredient of Step One. *Id.* I tend to think that it is not, except insofar as avoidance of absurdity involves policy evaluation. But policy evaluation is unquestionably part of Step Two. See generally Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L. REV. 1 (2017) (exploring the relationship between cost-benefit policy analysis and arbitrariness review at Step Two).

102. On whether Congress did that in 5 U.S.C. § 706, see *infra* Part IV.

exactly that.<sup>103</sup> Here again, the settlement would be authoritative. There is no constitutional obstacle to congressional allocation of law-interpreting power to courts, whose job, after all, is to interpret the law.

#### B. SCENARIO TWO: CONGRESS ENACTS *CHEVRON*

Now suppose that Congress has taken the opposite tack. Suppose that in some regulatory statute, it has said that the implementing agency—not the courts—should settle the meaning of any ambiguous statutory term. In fact, Congress often does exactly that. It enacts some statutory terms and then adds “as defined by the Administrator” or “as defined by the Secretary.”<sup>104</sup> Here again, a congressional settlement would be decisive. The only possible objection would be that the Constitution *forbids* judicial deference to agency interpretations of law. That objection might take one of two forms.

The first objection would invoke Article I, Section 1 of the Constitution.<sup>105</sup> If an agency is entitled to interpret the statutes that it administers, is it making law? Has Congress made an unconstitutional delegation? The answer turns on whether Congress has bound agency discretion with some kind of “intelligible principle.”<sup>106</sup> So long as its enactment contains such a principle, a grant of interpretive authority is hardly an impermissible delegation.<sup>107</sup> If Congress uses a word like “take,” “source,” or “diagnosis,” and stipulates that the agency may sort out ambiguities in such terms, then it has provided an intelligible principle; it has not given any kind of blank check. Those terms have content. True, the agency has more discretion if it has interpretive authority than if it does not. But it is not allowed to do whatever it wants to do.

The only possible question is whether the incremental amount of discretion, conferred by interpretive authority, pushes a grant of discretion from the realm of the permissible to the realm of the impermissible. Most of the time, the answer is clear: it does not. We can imagine cases that would test that conclusion. Suppose that Congress constrains agency discretion with a relatively open-ended word—

103. This has been true in several periods since *Chevron*. For a recent example, see Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. For a pre-*Chevron* legislative effort, see Ronald M. Levin, *Review of “Jurisdictional” Issues Under the Bumpers Amendment*, 1983 DUKE L.J. 355.

104. See, e.g., 7 U.S.C. § 1922(a) (2012) (“individuals who are related by blood or marriage, as defined by the Secretary”); 10 U.S.C. § 7309(c) (2012) (“inflatable boat or a rigid inflatable boat, as defined by the Secretary of the Navy”); 42 U.S.C. § 7545(k)(10)(B)(i) (2012) (“high ozone period (as defined by the Administrator)”); 49 U.S.C. § 44506(c) (2012) (“institutions of higher education (as defined by the Administrator)”); 49 U.S.C. § 44724(a) (2012) (“aeronautical competition or aeronautical feat, as defined by the Administrator”); 49 U.S.C. § 47124(b)(3)(A) (2012) (“nonapproach control towers, as defined by the Secretary”).

105. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States. . .”).

106. *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 472 (2001) (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

107. *Id.*



say, “reasonable” or “appropriate.”<sup>108</sup> Suppose that it also specifies that agencies have the authority to interpret such words.<sup>109</sup> If so, we might be tempted to think that it has effectively delegated lawmaking power. But those are exotic cases,<sup>110</sup> and even in such cases, a nondelegation challenge would likely fail.<sup>111</sup> However such cases may be resolved, they do not justify the conclusion that a grant of interpretive authority is by itself, or by definition, a violation of Article I.

The second objection, and the less obviously insubstantial one, would invoke Article III.<sup>112</sup> As the Court in *Marbury v. Madison* famously announced, “it is emphatically the province and duty of the judicial department to say what the law is.”<sup>113</sup> We might insist that Article III contemplates fully independent judicial judgments about the meaning of statutory terms. If Congress has said that it is the province of the executive department to say what the law is, it is acting unconstitutionally. The problem is not solved if it has said that emphatically. Congress

108. See generally Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407 (2008) (quoting 29 U.S.C. § 652(8) (2000)) (discussing the possible constitutional attack on a statute granting an agency power to issue regulations that are “reasonably necessary or appropriate”).

109. Note that in the pre-*Chevron* case of *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), the Court did not even hint that the Secretary of Labor would receive deference in his interpretation of OSHA. On the contrary, the Court said:

In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government’s view. . . . Expert testimony that a substance is probably a human carcinogen—either because it has caused cancer in animals or because individuals have contracted cancer following extremely high exposures—would justify the conclusion that the substance poses some risk of serious harm no matter how minute the exposure and no matter how many experts testified that they regarded the risk as insignificant. That conclusion would in turn justify pervasive regulation limited only by the constraint of feasibility. In light of the fact that there are literally thousands of substances used in the workplace that have been identified as carcinogens or suspect carcinogens, the Government’s theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit.

If the Government were correct in arguing that neither [relevant provision] requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a “sweeping delegation of legislative power” that it might be unconstitutional. . . . A construction of the statute that avoids this kind of open-ended grant should certainly be favored.

*Id.* at 645–46 (quoting *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935)). If the case arose today, the Secretary might well win on textualist grounds. If not, it would be because of some background principle, perhaps the avoidance canon or perhaps the canon in favor of consideration of cost. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2707, 2712 (2015) (invalidating an agency interpretation that did not consider cost in the decision to regulate power plants). But discussion of those issues is beyond the scope of my topic here.

110. See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 26 (1983) (noting that the nondelegation doctrine “could impose some limits at least at the margins, prohibiting, for example, a legislative scheme that is tantamount to making the agency interpretation of the reach of its statutory mandate wholly conclusive upon the courts”).

111. See Kavanaugh, *supra* note 12, at 2152 (arguing that *Chevron* deference actually makes “a great deal of sense” when Congress has used a broad and open-ended term).

112. See Hamburger, *supra* note 14, at 1195 (discussing Article III objections to judicial deference toward agency interpretations of law).

113. 5 U.S. (1 Cranch) 137, 177 (1803).



cannot undo the constitutional settlement, which says that interpretation of federal law is for courts, not agencies.

In 1983, Professor Henry Monaghan offered a powerful response to this objection.<sup>114</sup> He explained that Article III means the court must interpret statutes, which means in turn that “it must decide what has been committed to the agency,” which means that it must “fix the boundaries of delegated authority.”<sup>115</sup> So far, so good. But suppose as well that some interpretive authority has been conferred on the agency by Congress. If so, there is no abdication of the “constitutional duty to ‘say what the law is’” if the court ends up “deferring to agency interpretations of law: it is simply applying the law as ‘made’ by the authorized law-making entity. Indeed, *it would be violating legislative supremacy by failing to defer to the interpretation of an agency.*”<sup>116</sup>

Here is a way to understand Monaghan’s argument: it is (emphatically) the province of the judiciary to say what the law is. But sometimes the law is what the Executive Branch says that it is. When is that? When Congress says so.

As we have seen, it is hardly uncommon for Congress to insert an “as defined” phrase after a potentially ambiguous term: “as defined by the Secretary” or “as defined by the Administrator.”<sup>117</sup> That is not a violation of Article III. It is an acknowledgement that sorting out an ambiguity may present questions of policy or principle (or perhaps that the agency has special access to the meaning of congressional instructions<sup>118</sup>). So long as a judgment stays within the reasonable boundaries of the text—so long as the agency is not defining a “source” as (say) a “fish,” a “bat,” or a “vegetable”—those questions may be resolved by agencies rather than courts. The same conclusion holds if Congress uses some word like “reasonable” or “feasible” and if the context shows that the agency was supposed to give content to that word.<sup>119</sup> And the same conclusion holds once more if Congress declares, in some omnibus statute, that agencies will resolve ambiguities in statutory terms, subject to something like the *Chevron* framework. Nothing in Article III forbids that practice.<sup>120</sup>

To be sure, it would not be strictly impossible to conclude otherwise. We could read *Marbury* to say that Article III simply forbids Congress from granting any

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114. See Monaghan, *supra* note 110, at 26–28.

115. *Id.* at 27.

116. *Id.* at 27–28 (emphasis added).

117. See *supra* note 104.

118. This is not fanciful. Perhaps the agency was involved in drafting the legislation or is in a special position to know what the statute actually meant.

119. See Kavanaugh, *supra* note 12, at 2153.

120. See Solum & Sunstein, *supra* note 49, at 3–12. Hamburger also makes a due process objection to *Chevron*. See Hamburger, *supra* note 14, at 1211. In his view, the decision creates a systematic bias, and those who face that bias can rightly object. See *id.* The simple answer is that the Due Process Clause does not forbid Congress from giving agencies the authority to resolve ambiguities. We could imagine some purported interpretations that would raise due process questions—for example, if they result in the imposition of penalties without providing fair notice. But there the problem is that people have been deprived of life, liberty, or property without due process of law—not that an agency has interpreted a statutory term.

kind of law-interpreting authority to agencies. On that view, Congress cannot allow agencies to interpret ambiguities; that is a job for courts. But that would be an adventurous conclusion. It would be a kind of free-form constitutionalism to say that Congress lacks the constitutional power to enact terms followed by such phrases as “as defined by the Administrator.” Congress has often done exactly that;<sup>121</sup> has it really violated Article III? And if Congress has the power to do that in specific provisions, it also has the power to do that in a general way by embracing *Chevron*. After all, the idea of judicial deference to agency interpretations of law did not come out of the blue in the 1980s. It came out of a lengthy though admittedly complex tradition, in which various forms of deference were not uncommon.<sup>122</sup>

At this point, it is important to reiterate that under *Chevron*, the court is always required to exercise its own independent judgment at Step One in deciding whether there is ambiguity. The word “take” cannot mean “cat,” or “admire,” or “sneeze.” *It is only after the court has made an independent judgment that the term is ambiguous that Chevron’s framework applies.* We could imagine, and should emphasize, that a serious constitutional question would arise if Congress prohibited that independent judgment—if it said that agencies, rather than courts, will decide whether there is ambiguity in the law. But *Chevron* does not rest on any such prohibition. On the contrary, courts remain in the driver’s seat, in the sense that they are entitled to decide whether the statute really is ambiguous. If *Chevron* accurately captures Congress’s instructions—an issue to which I will turn shortly—there is no convincing objection from Article III.

### C. SCENARIO THREE: CONGRESS DELEGATES THE *CHEVRON* QUESTION TO THE COURTS

Now suppose that Congress has made no judgment about whether agencies should be allowed to sort out ambiguities, but has instead delegated that question to the courts. This is admittedly fanciful, but for purposes of analysis, assume that Congress specified, in a regulatory statute, that it is up to courts to decide whether and how much to defer to agency interpretations of law. It follows from the discussion thus far that such a grant of authority would be both lawful and decisive.

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121. See *supra* note 104.

122. See, e.g., *United States v. Philbrick*, 120 U.S. 52, 59 (1887) (deferring to an agency interpretation of law); *Edwards’ Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827) (noting that “[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect”). For an extensive treatment, see Bamzai, *supra* note 21. Bamzai’s important and illuminating discussion, from which I draw several points here, suggests that modern forms of deference did not begin until the 1940s. *Id.* at 976–95. Regardless of whether that conclusion is convincing, he shows that some forms of deference (involving, for example, respect for customary or contemporaneous interpretations) have been with us for a long time. *Id.* at 930–47. Bamzai also points to the 1904 decision in *Bates & Guild Co. v. Payne*, 194 U.S. 106 (1904), which seems to call for judicial deference to agency interpretations. Bamzai, *supra* note 21, at 966–67; see also Aditya Bamzai, *Marbury v. Madison and the Concept of Judicial Deference*, 81 MO. L. REV. 1057, 1064–73 (2016) (discussing the resurgence of judicial deference and examining the three types of deference in *Marbury*).

Delegating the question to the courts would not violate Article II. Whatever the restrictions on legislative grants of discretion to federal courts, it would not transgress those limits to authorize courts to decide how much deference to give to agency interpretations of law.<sup>123</sup> On the contrary, courts have resolved that question for a long time.<sup>124</sup> From the discussion thus far, it should also be clear that such authorization would not violate Article III. To be sure, courts might invoke the constitutional background to *exercise* their discretion in favor of independent judicial judgments of law. To that extent, Article III is relevant. Alternatively, and for reasons that we will explore, they might exercise their discretion in favor of something like *Chevron*. But in either case, the grant of discretion would be permissible.

#### IV. THE MANY MYSTERIES OF THE APA

What are Congress's instructions? Two sets of provisions are relevant. The first is the APA. The second consists of organic statutes, which create agencies in the first instance and specify their authority. It follows from the previous discussion that if an organic statute explicitly gives interpretive power to agencies—or, for that matter, explicitly denies it—the matter is at an end. Most of the time, Congress does not explicitly resolve that question. Instead, it gives various powers to agencies, including the power to make rules. At first glance, those grants of power do not seem to say anything at all about whether courts should defer to agency interpretations of law. Even so, the Court has said that the grant of rulemaking or adjudicative authority implicitly conveys interpretive authority.<sup>125</sup> I will turn to that claim in Part V. The APA sets out the basic framework, and it is my topic here. If the APA resolves the *Chevron* issue either way, that resolution would control unless an organic statute explicitly displaces it.

Section 706 of the APA states that “court[s] shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”<sup>126</sup> It also says that courts

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123. Recall that in *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944), the Court acted as if the question of deference was for it to resolve because Congress had failed to do so. There was no explicit delegation, but if courts feel free to resolve the question in the face of congressional silence, surely they would feel free to do so with a delegation.

124. *See id.* at 140.

125. *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (“[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that agency interpretation claiming deference was promulgated in the exercise of that authority.”).

126. 5 U.S.C. § 706 (2012). Consistent with APA originalism, I will treat the APA as ordinary law, rather than as a quasi-constitutional statute whose meaning changes over time, or as an invitation to the creation of common law by federal courts. *But see* Davis, *supra* note 94, at 3–4 (“American administrative law is mostly judge-made. The APA is the big exception, but even it is largely a codification of law previously made by judges. . . .”); Stewart, *supra* note 94, at 1815 (“[T]he wise view of the APA [is to read it] as a flexible restatement of evolving judge-made law. . . .”). For those who understand the APA in the latter ways, of course, *Chevron* will be much less troublesome—or if it is troublesome, it is not because it does not carefully follow the text and original meaning of the APA. Those who see the APA as an invitation for judicial creation of a kind of common law might object to *Chevron* on purely pragmatic grounds—as, for example, in the idea that it allows agencies, which may

shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law”<sup>127</sup> or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”<sup>128</sup>

#### A. NOT SO OBVIOUS

To many modern readers, the most reasonable reading of the APA is that judges must interpret the law on their own. At least at first glance, that might seem entirely clear. Note that in section 706, the APA requires courts to “interpret constitutional and statutory provisions,” suggesting an equivalence; and the general view is that courts must interpret constitutional provisions on their own.<sup>129</sup> Nothing in the APA suggests that in deciding “all relevant questions of law,” courts should defer to agency interpretations. By contrast, other provisions of section 706 speak of deference, as with the words “unsupported by substantial evidence”<sup>130</sup> and “arbitrary [or] capricious.”<sup>131</sup>

But on reflection, the most obvious reading is not obvious at all. The text of the APA does not resolve the *Chevron* question.<sup>132</sup> It is true that courts “shall decide all relevant questions of law,” but *the right way to decide those questions might be to consult the agency’s view and to accept it so long as it is reasonable*. One more time: Perhaps the law means what the agency says it means (so long as it is ambiguous). The APA does not say whether and when courts should defer to agency interpretations of law. Perhaps it is meant to codify what courts had been doing. Perhaps it refers the question to organic statutes, which may confer law-interpreting power on agencies.

In my view, section 706 is a lot like the Free Speech Clause of the First Amendment, which also seems, wrongly but to some, to have a plain meaning. Free speech absolutists ask: What part of “no law . . . abridging the freedom of speech” don’t you understand?<sup>133</sup> The problem, of course, is that “abridging” and “the freedom of speech” are not nearly as transparent as they might appear.<sup>134</sup> Those who find clarity in the command that courts “shall decide all relevant questions of law” disregard the possibility, vindicated by the historical context, that

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be subject to capture by well-organized private interests, to decide on the meaning of statutes that govern them.

127. § 706(2)(A).

128. § 706(2)(C).

129. See Farina, *supra* note 19, at 473 n.85, 476 & n.99.

130. § 706(2)(E).

131. § 706(2)(A).

132. Throughout, I speak in terms of the original public meaning of the APA. Other approaches are of course possible, but I bracket them here. One of the most interesting, based on RONALD DWORKIN, *LAW’S EMPIRE* (1986), might suggest that the judicial responsibility would be to put section 706 in the best constructive light, and contend that those who argue about *Chevron* are actually arguing about that question. I suspect that there is a great deal of truth in that suggestion, though I cannot defend it here.

133. See U.S. CONST. amend. I.

134. See generally Jud Campbell, *Natural Rights and the First Amendment*, 127 *YALE L.J.* 246 (2017) (discussing the current indeterminacy of the meaning of freedom of speech and freedom of the press at the Founding).

the command can be understood in multiple ways. The view that the command is clear is not exactly a form of fraud. But it is a mistake.<sup>135</sup>

To know whether the APA called for independent judicial judgments on questions of law, there is no escaping that historical context. A central question is the judicial practice at the time that the APA was enacted. An even more central question is whether the APA was understood to codify, to reform, or to reject that practice.<sup>136</sup> As we shall see, there is some evidence that the APA was understood to codify the practice, which allowed for judicial deference in important cases. As we shall also see, there is surprisingly little contemporaneous evidence that section 706 was understood to require independent judicial judgments about questions of law. In the 1940s, the particular issue received scant attention from Congress. In these circumstances, it is difficult to argue—far more difficult, I think, than most contemporary administrative law specialists would suspect—that judicial deference to agency interpretations of law is foreclosed by the original public meaning of section 706.

Some methodological issues before we begin: I am going to operate under the assumption that APA originalism is the right way to proceed. Distinguished observers disagree with that assumption, arguing instead that the APA should be seen as allowing for evolving judge-made law.<sup>137</sup> I reject that argument on the ground that the APA should be treated as an ordinary statute, at least to the extent that its terms are plain. *Vermont Yankee* was correct on that score, and its holding applies to scope-of-review provisions no less than to procedural provisions. To be sure, APA originalism has to be defended, not asserted, and I am not going to try to mount that defense here. But if the original public meaning of the APA is not binding when it is clear, then administrative law devolves into a form of common law. That approach would violate both the text and purpose of the APA, which in some ways codifies and in some ways repudiates what federal courts had been doing.<sup>138</sup>

As I understand them here, APA originalists are textualists, focused on the original public meaning of the statute. But how do we know what that is? If we

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135. For relevant remarks, see the discussion of conceptualism in H. L. A. HART, *THE CONCEPT OF LAW* 127–31 (3d ed. 2012).

136. A valuable treatment, on which I draw here and from which I have learned a great deal, is Bamzai, *supra* note 21.

137. See, e.g., Stewart, *supra* note 94, at 1820 (“[M]uch administrative law must occur . . . through initiatives by the lower federal courts . . .”).

138. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493–97 (1951) (holding that judicial review of an agency ruling should consider the entirety of the record and not only the evidence supporting the agency). See generally George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996) (exploring how the APA’s contentious drafting resulted in a final law that reflects multiple compromises). I am acutely aware that the choice between the approach defended in Stewart, *supra* note 94, at 1820, and APA originalism cannot be made by fiat or stipulation. It must, I think, be defended on the ground that it will produce a better or more sensible system of law, taking account of the cost of decisions and the costs of errors. There is relevant discussion in Sunstein, *supra* note 63, at 641–43. The arguments there can be adapted, I suggest, in support of APA originalism, though a justification of that conclusion would require a detailed treatment.



focus on the text, taken in its context, and regard it as primary, we may or may not want to pay attention as well to the legislative history. I will spend considerable time with that history here, acknowledging that some textualists will think that an unfortunate choice.<sup>139</sup> In my view, the legislative history is extremely informative for those who seek to ascertain the original public meaning of section 706. If that is the goal, dispensing with the legislative history would be a mistake, because section 706 has no clear textual meaning without an understanding of the particular context. But I hope to show that even if we put the legislative history to one side, the same essential conclusion follows: *Chevron* is a reasonable reading of that section. It is not foreclosed by its text.

#### B. TWISTS AND TURNS

##### 1. Roosevelt's Veto

To keep a long story manageable, we can set the stage in the late 1930s, when the attack on the administrative state reached a fever pitch. The American Bar Association's influential Committee on Administrative Law captured a widespread view in suggesting the following:

[T]he proposition [has been] recently maintained by the jurists of Soviet Russia that in the socialist state there is no law but only one rule of law, that there are no laws—only administrative ordinances and orders. The ideal of administrative absolutism is a highly centralized administration set up under complete control of the executive for the time being, relieved of judicial review and making its own rules. This sort of régime is urged today by those who deny that there is such a thing as law (in the sense in which lawyers understand the term) and maintain that this lawyer's illusion will disappear in the society of the future.<sup>140</sup>

It is worth pausing over those words. Written with the fear of “administrative absolutism” in mind, early drafts of administrative reform bills would have greatly constrained administrative agencies by strengthening procedural and judicial checks on their decisions.<sup>141</sup> In 1940, President Franklin Delano Roosevelt vetoed a version of a bill that had passed the House and Senate, seeing the proposed law as an effort to increase the role of lawyers and to stymie desirable regulation.<sup>142</sup> Roosevelt's veto message, attached here as an appendix, deserves careful attention, because it provides a necessary historical perspective on what the fighting was all about, and about what most concerned both sides. It should also resonate with contemporary defenders of administrative institutions. Importantly, it does not answer with specificity the question whether courts

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139. See, e.g., Scalia, *supra* note 72, at 22–25 (explaining and defending textualism).

140. *Report of the Special Committee on Administrative Law*, in ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 331, 343 (1938) (citations omitted).

141. See generally Shepherd, *supra* note 138 (discussing a catalogue of early efforts toward the APA).

142. See 86 CONG. REC. 13,942–43 (1940) (Walter–Logan Bill—Veto Message).



should defer to agency interpretations of law. But it does provide an essential and instructively broad perspective on the views of important critics and defenders of the administrative state. As we will see in Part V, the views of the 1930s critics are being revived today.

Roosevelt objected to:

[P]owerful interests which are opposed to reforms that can only be made effective through the use of the administrative tribunal. Wherever a continuing series of controversies exist between a powerful and concentrated interest on one side and a diversified mass of individuals, each of whose separate interests may be small, on the other side, the only means of obtaining equality before the law has been to place the controversy in an administrative tribunal.<sup>143</sup>

Roosevelt saw the draft bill as an effort to increase the authority of lawyers and judges at the expense of indispensable new institutions. “The bill that is now before me,” he contended, “is one of the repeated efforts by a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulation.”<sup>144</sup> He also cautioned against “subject[ing] all administrative acts and processes to the control of the judiciary.”<sup>145</sup> It is worth noting that Roosevelt was focused entirely on administrative adjudication. The spread of rulemaking was decades away.<sup>146</sup> Remarkably, and relevantly, the very bill that Roosevelt vetoed did not insist on independent judicial review of agency determinations of law; it focused on strengthening judicial review of agency determinations of fact.<sup>147</sup>

Roosevelt’s veto message was controversial. In a lengthy response, also very much resonating today,<sup>148</sup> Roscoe Pound wrote:

This message is so thoroughly in keeping with the Marxian idea of the disappearance of law, now much in fashion, and so much in the spirit of the absolute ideas which have been making headway all over the world in the past two decades, that it deserves to be made the text for a discussion of the place of the judiciary in our democracy.<sup>149</sup>

In Pound’s account, the debate over administrative reform involved the highest imaginable stakes: the fate of the very idea of constitutional democracy.<sup>150</sup> Pound

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143. *Id.* at 13,943.

144. *Id.*

145. *Id.*

146. *See, e.g., Nat’l Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 698 (D.C. Cir. 1973) (first recognizing the Federal Trade Commission’s rulemaking authority more than thirty years after Roosevelt’s veto message).

147. *See Bamzai, supra* note 21, at 982 & n.312. As Bamzai shows, Roscoe Pound, by contrast, was focused on exactly that issue, vigorously complaining of the shift in interpretive authority from courts to agencies. *Id.* at 982–83. *See generally* Pound, *The Place of the Judiciary*, *supra* note 15.

148. *See infra* Part V.

149. Pound, *The Place of the Judiciary*, *supra* note 15, at 133.

150. *See id.* at 135–36.

spoke specifically of the dangers of any system in which agencies were entitled to interpret the law that purported to confine them.<sup>151</sup> He offered a grim warning: “If administration cannot be carried on within constitutional and legal limits and in accord with due process of law, we may as well give up all pretence of being a constitutional democracy and set up an avowed dictatorship.”<sup>152</sup> As he put it, “No one is above the law.”<sup>153</sup>

With Roosevelt’s veto message and Pound’s response in mind,<sup>154</sup> we can see that the debate over what became the APA posed a sharp conflict between New Deal enthusiasts, who were skeptical about procedural and judicial checks on the administrative state and who would have been content with no reforms at all, and New Deal skeptics, who were eager to impose such checks as a kind of second-best substitute for what they saw as defining constitutional principles.<sup>155</sup> It is not an overstatement to say that “the fight over the APA was a pitched political battle for the life of the New Deal.”<sup>156</sup>

Before vetoing the legislation, Roosevelt had directed Attorney General Robert H. Jackson to establish a Committee on Administrative Procedure.<sup>157</sup> With the veto, he asked Congress to await its recommendations.<sup>158</sup>

## 2. “[T]he Administrative Interpretation is to be Given Weight”<sup>159</sup>

In January of 1941, the Committee completed its report.<sup>160</sup> Because of the influence and prestige of the Committee, and its role in defining the debate that eventually led to the APA, that report deserves careful attention. It provides essential context and had a lot to say about the *Chevron* question.

With respect to that question, the Committee’s majority said that “sharp differentiation is made between questions of law and questions of fact,” and added that

151. *See id.* at 136–37.

152. *Id.* at 139.

153. *Id.* at 137.

154. *See also* Pound, *supra* note 16, at 219. Pound writes:

What makes these restrictions upon . . . effective judicial review especially serious is a tendency of administrative agencies to act on policies of their own devising rather than on those prescribed in the statutes, and to direct application of the statutory policies toward ultimate ideas beyond those of Congress . . . .

*Id.* He then links this point to a threat to liberty: “The general tendency has been to show a marked unfairness toward business and individual enterprise. More than one of these agencies has seemed to indicate a policy of pushing all business and industry and enterprise into the hands of the government and thus bringing about an economic revolution.” *Id.* at 221.

155. The best treatment of this debate is Shepherd, *supra* note 138, at 1558. An excellent background is DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014). A brisk, useful treatment of the APA itself is Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 *FORDHAM ENVTL. L. REV.* 207 (2016).

156. Shepherd, *supra* note 138, at 1560.

157. *See* 86 *CONG. REC.* 13,943–44 (1940).

158. *Id.*

159. *COMM. ON ADMIN. PROCEDURE, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE*, S. DOC. NO. 77-8, at 91 (1st. Sess. 1941).

160. *Id.*

the “former, it is uniformly said, are subject to full review.”<sup>161</sup> That statement seems important (at least if the legislative history is deemed relevant) and somewhat surprising. It appears to suggest that Roosevelt’s own Committee was fully committed to independent judicial review of legal questions. (So much, you might think, for *Chevron*!) If Roosevelt’s own Committee insisted on “full review,” then judicial deference to agency interpretations of law would seem out of bounds, at least if no organic statute called for such deference.

But a few pages later, the Committee wrote as follows:

Even on questions of law [independent judicial] judgment seems not to be compelled. The question of statutory interpretation might be approached by the court de novo and given the answer which the court thinks to be the “right interpretation.” Or the court might approach it, somewhat as a question of fact, to ascertain, not the “right interpretation,” but only whether the administrative interpretation has substantial support. Certain standards of interpretation guide in that direction. Thus, where the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body. Again, the administrative interpretation is to be given weight—not merely as the opinion of some men or even of a lower tribunal, but as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it. This may be particularly significant when the legislation deals with complex matters calling for expert knowledge and judgment.<sup>162</sup>

As the Committee majority had it, courts need not “always substitute their own interpretations for those of the administrative agencies. Their review may, in some instances at least, be limited to the inquiry whether the administrative construction is a permissible one.”<sup>163</sup> That sounds a lot like *Chevron*. It is powerful evidence that during the debate over administrative reform, influential and informed political actors favored judicial deference to agency interpretation.

The most important point here is that courts might not choose the “right interpretation” on their own, but might look instead at whether the agency’s interpretation “has substantial support.”<sup>164</sup> The Committee said this while also saying that everyone agreed that questions of law “are subject to full review.”<sup>165</sup> It saw no conflict there. The words “reasonably susceptible of more than one

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161. *Id.* at 88.

162. *Id.* at 90–91 (citation omitted).

163. *Id.* at 78.

164. *Id.* at 90. *But see* Bamzai, *supra* note 21, at 984 (suggesting that “the majority asserted its recommendation tentatively, thereby indicating that the authors of the report did not believe that their position fully reflected the state of the case law, but rather proposed a new and idealized rule of interpretation”). It is true that the statement is tentative, but I do not see evidence that the authors meant to propose a new and idealized rule of interpretation. (I draw in this section on some of the helpful compilation in Bamzai, *supra* note 21. *See also* Shepherd, *supra* note 138, for a general account of the background of the APA.)

165. S. Doc. No. 77-8, at 88.

interpretation”<sup>166</sup> plainly suggest that courts might accept the agency’s view *even if the judges believe that another interpretation is best*. The authors of the majority report did not think that “amazing.”<sup>167</sup>

Reasonably enough, the majority report observes that deference makes sense when legislation deals with “complex matters calling for expert knowledge and judgment,”<sup>168</sup> as in *Chevron* itself. Note in this regard that the *minority* draft, which called for more aggressive restrictions on agency authority, explicitly said that upon judicial “review due weight shall be accorded the experience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it.”<sup>169</sup> And indeed, the minority’s discussion of administrative reform placed no emphasis on the importance of independent judicial review of agency determinations of law. That issue did not appear to be a priority or very much on its viewscreen.

### 3. Modern Commentators and 1940s Courts

For multiple reasons, the majority report should hardly be taken as authoritative. It is a data point and no more. After all, the majority consisted of New Deal supporters; the APA did not by any means reflect its views.<sup>170</sup> In any case, the APA was not enacted until 1946.<sup>171</sup> As noted, the APA’s text can easily be read to contemplate independent judicial review of legal questions.<sup>172</sup> Professor Thomas W. Merrill, with whom it is always hazardous to disagree, writes that the APA’s text “suggests that Congress contemplated courts would always apply independent judgment on questions of law.”<sup>173</sup> Professor John F. Duffy agrees and adds, “[t]he legislative history of the APA leaves no doubt that Congress thought the meaning of this provision plain.”<sup>174</sup> Professor Jerry L. Mashaw sees things the same way.<sup>175</sup>

Justice Scalia, while celebrating *Chevron*, offers a puzzlingly ambiguous signal, concluding that the enacting Congress was laboring under “the quite mistaken assumption that questions of law would always be decided de novo by the courts.”<sup>176</sup> In the legislative history, it is not easy to find clear contextual evidence

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166. *Id.* at 90–91.

167. Kavanaugh, *supra* note 12, at 2151.

168. S. Doc. No. 77-8, at 91.

169. *Id.* at 246–47. Section 706 was modeled on the bill drafted by the minority, but it did not include this proviso. See Bamzai, *supra* note 21, at 986 (finding the omission telling). But we do not know why the omission occurred, and it would be hazardous to draw strong inferences from it.

170. See Bamzai, *supra* note 21, at 982 n.315, 986.

171. Administrative Procedure Act (APA), ch. 324, 60 stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706 (2012)).

172. See Farina, *supra* note 19, at 473 n.85; Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1086 (1997).

173. Merrill, *Judicial Deference*, *supra* note 19, at 995.

174. Duffy, *supra* note 21, at 193.

175. See Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 CARDOZO L. REV. 2241, 2243 (2011).

176. Scalia, *supra* note 56, at 514.

in support of the view that Congress was laboring under that assumption.<sup>177</sup> I confess that I am not sure what Justice Scalia had in mind, but if there were such evidence—if that were Congress’s assumption—does the APA not embed it, even if it was mistaken? If we are asking about the original public meaning of the text of the APA, Congress’s “assumptions” may or may not be decisive or even relevant. But it is plausible to think that if Congress assumed that judicial interpretation would be independent, then that may well have been the original public meaning.

Taken in its context, however, the text is hardly free from ambiguity. Dean John F. Manning reads section 706 as “a restatement of pre-APA standards,” which he takes to allow for judicial deference to agency interpretations of law.<sup>178</sup> Professor Adrian Vermeule finds the APA “generally indeterminate on the crucial question.”<sup>179</sup> As he puts it, courts should perhaps defer to agency interpretations of law, consistent with the APA, if and when “the meaning of the relevant law . . . is what agencies say that it is.”<sup>180</sup> He concludes that “Congress has not authoritatively required or forbidden the *Chevron* principle.”<sup>181</sup>

We can find some provisional support for Manning’s view, and Vermeule’s as well, in prominent Supreme Court opinions in the 1940s that preceded, and perhaps informed, the APA. In *Gray v. Powell*, decided in 1941, the Court wrote that Congress had “delegate[d] th[e] function [of interpreting the statutory term] to those whose experience in a particular field gave promise of a better informed, more equitable” judgment, and that “this delegation will be respected and the administrative conclusion left untouched.”<sup>182</sup> In *National Labor Relations Board v. Hearst Publications, Inc.*, decided in 1944, the Court explained that the agency’s “[e]veryday experience in the administration of the statute gives it familiarity” with the underlying problem,<sup>183</sup> and concluded that the agency’s interpretation “is to be accepted if it has ‘warrant in the record’ and a reasonable basis in law.”<sup>184</sup>

Several other decisions spoke in these terms, emphasizing that so long as the agency’s interpretation of law was reasonable, the Court would respect it.<sup>185</sup>

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177. The several statements to the effect that questions of law are “for courts,” see *infra* note 192 and accompanying text, are far less helpful than they might seem; courts might decide such questions and also defer to agencies in certain instances.

178. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 635 n.123, 637 (1996).

179. ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 207–08 (2006).

180. *Id.* at 208.

181. *Id.*

182. 314 U.S. 402, 412 (1941).

183. 322 U.S. 111, 130 (1944).

184. *Id.* at 131 (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 146 (1939)).

185. See, e.g., *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 477–78 (1947) (upholding as reasonable agency’s legal inference despite existence of potentially “more reasonable” inferences); *Unemployment Comp. Comm’n v. Aragon*, 329 U.S. 143, 153–54 (1946) (upholding the Commission’s interpretation as reasonable because it was not “irrational or without support in the record”); *Billings v. Truesdell*, 321 U.S. 542, 552–53 (1944) (upholding as reasonable Army’s interpretation of Selective



Enacted against the background of *Gray*, *Hearst*, and related holdings, the APA might be understood as codifying existing practice or as allowing courts to develop implementing principles, rather than as insisting on independent judicial review of legal questions. Alternatively, the language might be taken to reject precisely those holdings. How do we know?

#### 4. The Duck–Rabbit Illusion

Aditya Bamzai contends that the APA was meant to incorporate what he calls “the traditional interpretive methodology that had prevailed from the beginning of the Republic until the 1940s.”<sup>186</sup> Bamzai offers evidence to support his conclusion that under that methodology, an agency’s interpretation receives deference only if it “reflected a customary or contemporaneous practice under the statute.”<sup>187</sup> In his view, the APA encodes that methodology and repudiates the more *Chevron*-like decisions of the 1940s. But as we have seen, the text of section 706 does not compel that conclusion. It also does not forbid it. But in the 1940s, the contextual evidence on behalf of Bamzai’s claim is not strong. Actually, it is difficult to find, and that difficulty can be seen as a dog who did not bark in the night—a probative silence.<sup>188</sup>

As evidence, consider the Senate Judiciary Committee print, which announces, “[a] restatement of the scope of review . . . is obviously necessary lest the proposed statute be taken as limiting or unduly expanding judicial review.”<sup>189</sup> Oh. It adds that the goal of the section is “merely to restate the several categories of questions of law subject to judicial review.”<sup>190</sup> Oh again. The emphasis on “restatement of the scope of review” and “merely to restate” seems to suggest that no change was intended. The 1945 letter of the Attorney General, sent to both the Senate and the House and written shortly before enactment of the APA, had this to say about section 706: “This declares the existing law concerning the scope of judicial review.”<sup>191</sup> In the legislative history, the absence of *any*

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Training and Service Act); *Dobson v. Comm’r*, 320 U.S. 489, 502 (1943) (upholding as reasonable Tax Court’s decision to divide a single transaction into several steps). In many such cases, the Court seemed to speak of “mixed” questions of law and fact, as where the question requires knowledge of both facts and law. For example, *Hearst* involved the question of whether newsboys, as they were called, should be considered employees within the meaning of the National Labor Relations Act. *See* 322 U.S. at 120.

Note, however, that mixed questions actually have pure legal components and pure factual components. Whenever a court defers to an agency’s answer, it is giving that agency interpretive authority with respect to purely legal questions. The notion of “mixed questions” is a confusion.

186. Bamzai, *supra* note 21, at 987.

187. *Id.*

188. The adage originated in A. CONAN DOYLE, *Silver Blaze*, in *MEMOIRS OF SHERLOCK HOLMES* 1, 22 (New York, A. L. Burt Co. 1894).

189. STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., REP. ON THE ADMIN. PROCEDURE ACT (Comm. Print 1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 39 (2d. Sess. 1946).

190. *Id.*

191. S. COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT, S. REP. NO. 79-752, at 44 (1945), *reprinted in* S. DOC. NO. 79-248, at 230; *see also* 92 CONG. REC. 2985 (1946), *reprinted in* S. DOC. NO. 79-248, at 414 (similarly describing the “existing law concerning the scope of judicial review”).

sustained discussion of the need for change with respect to judicial review of agency interpretations of law is instructive.

Bamzai points to a sentence in the House and Senate reports, stating that “questions of law are for courts rather than agencies to decide in the last analysis.”<sup>192</sup> But how much, really, does that tell us? The sentence is thin and cryptic, especially if we consider the words “in the last analysis.” If we give weight to committee reports, the declaration that “questions of law are for courts . . . in the last analysis” is entirely compatible with the recognition—as in *Chevron* itself—that it is for courts, rather than agencies, to decide when statutes are ambiguous.<sup>193</sup> It is also consistent with the view—again, in *Chevron* itself—that courts must invalidate unreasonable interpretations.<sup>194</sup>

These few sentences in the House and Senate reports are a marked and informative contrast with the brief, but far more instructive treatment of the term “whole record,” which pointedly notes, in an explicit repudiation of the previous practice by some judges, that “courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case.”<sup>195</sup> With respect to judicial review of agency interpretations of law, there is no evidence that section 706 was understood to repudiate previous practice; with respect to judicial review of agency determinations of fact, it is clear that section 706 was understood to repudiate previous practice. Recall as well that the Attorney General’s Committee emphasized that questions of law are subject to “full review” by courts—but also stated that courts might defer to “the opinion of the body especially familiar with the problems dealt with by the statute.”<sup>196</sup> The Committee did not think that it was contradicting itself.

The sentence in the House and Senate reports is also compatible with Vermeule’s suggestion that the proper resolution of questions of law might sometimes be that the statute means what the agency says it means. Other snippets in the legislative history are unclear—again, illuminatingly so.<sup>197</sup> Neither *Gray* nor *Hearst* was mentioned in the lengthy hearings that led to the APA; the legislative history, containing 458 pages, does not contain even a single reference to those cases. A lack of clarity on the point can be taken to suggest that section 706 may not have been meant to insist, or understood to mean, that judges must review legal questions independently.<sup>198</sup> The relative silence on the particular question is surprising and even deafening.

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192. Bamzai, *supra* note 21, at 988; *see also* S. REP. NO. 79-752, at 28, *reprinted in* S. DOC. NO. 79-248, at 214.

193. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837, 843 (1984).

194. *Id.* at 843–44.

195. S. REP. NO. 79-752, at 28, *reprinted in* S. DOC. NO. 79-248, at 214.

196. COMM. ON ADMIN. PROCEDURE, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 91 (1st. Sess. 1941).

197. *See, e.g.,* 92 CONG. REC. 5657 (1946), *reprinted in* S. DOC. NO. 79-248, at 377–78 (exploring the extent of judicial review of agency action in a vague and general way).

198. *See* Bamzai, *supra* note 21, at 990 (arguing that although “it is important to acknowledge the lack of clarity” in its legislative history, section 706 should be interpreted to incorporate the “prevailing

In this light, section 706 has something in common with the duck–rabbit illusion, a famous drawing that from a certain point of view looks like a duck, and from another like a rabbit.<sup>199</sup> For some readers, the text plainly contemplates independent review. After all, courts are instructed to decide “*all* relevant questions of law.”<sup>200</sup> What could be clearer? It’s a duck! But from another point of view, the text is hopelessly uninformative, because courts might decide that the right answer to the relevant question of law depends on the agency’s interpretation. It’s a rabbit! By itself, the text does not resolve the question.

It is tempting to point out that the APA was enacted against a background of distrust of administrative institutions, and was designed to strengthen judicial scrutiny of agency decisions.<sup>201</sup> In light of the background, we might want to ask: is it not obvious that Congress sought independent judicial review of legal questions, and that the original meaning of the APA called for that independence?<sup>202</sup> But that is not so obvious. The APA was a compromise,<sup>203</sup> and the general idea of distrust of administrative institutions is too abstract to resolve the particular issue here. It would be entirely possible to distrust agencies, to some significant degree, while also agreeing that when statutes are ambiguous, agencies should be entitled to interpret them, so long as their interpretations are reasonable. Recall too the absence of evidence that the APA was meant or understood to overrule *Gray* and *Hearst*. To those who see the APA as a firm declaration that courts should not defer to agency interpretations of law, that is a real problem. If Congress meant to ensure against such deference, or if that was the original public meaning of section 706 of the APA, wouldn’t there be more evidence to that effect?

### C. CRICKETS

If the post-1946 practice was unambiguous, we might know more about that original meaning. But it is not, and that is also revealing. Consistent with Manning’s view, the Attorney General’s Manual on the Administrative Procedure Act stated that section 706 was made to “restate[] the present law as to the scope of judicial review” and should be taken as a codification “of the principles of judicial review embodied in many statutes and judicial decisions.”<sup>204</sup> But

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standard” of judicial review: the “independent-judgment rule, tempered by the application of the traditional canons of construction”).

199. See *Duck-Rabbit*, ILLUSIONS INDEX, <https://www.illusionsindex.org/i/duck-rabbit> [https://perma.cc/R2LV-QEPK] (last visited April 11, 2019).

200. 5 U.S.C. § 706 (2012) (emphasis added).

201. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489–90 (1951) (describing the APA’s legislative history as partially a “response to pressures for stricter and more uniform practices, not a reflection of approval of all existing practices”); see generally Shepherd, *supra* note 138 (examining the political climate preceding the APA’s passage).

202. Sunstein, *supra* note 18, at 465–69, goes in this direction, though that article speaks of congressional “intent” rather than original meaning.

203. See Shepherd, *supra* note 138, at 1649–75 (describing in great detail the compromises involved in the APA’s creation).

204. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, at 93, 108 (1947). However, the Attorney General’s Manual might not be counted as an authoritative (or neutral) understanding of the meaning of the APA.

frustratingly, the Manual did not say what those principles were.<sup>205</sup> For their part, commentators were not unanimous. Notably, there was no consensus that judicial deference to agency interpretation was foreclosed after the enactment of the APA.<sup>206</sup> Professor Kenneth Culp Davis, writing in 1951, explicitly and pointedly declared that “the doctrine of *Gray v. Powell* has survived the APA.”<sup>207</sup>

There is another non-barking dog, and it is important—in my view, exceedingly important, even for those who believe that legislative history is not relevant. The Supreme Court certainly did not take section 706 of the APA as a signal that *Gray* and *Hearst* had been repudiated. That is a revealing fact, suggestive of the original public meaning of the section, especially when taken together with the fact that the APA was clearly understood as a signal (or, better, a mandate) of reform in other areas. The most prominent example is the great *Universal Camera Corp. v. National Labor Relations Board* case, decided in 1951, in which the Court took section 706 to call for a significant change with respect to judicial review of *factual* judgments under the substantial evidence test.<sup>208</sup> As the Court

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205. See Bamzai, *supra* note 21, at 991 (“What exactly was section 706 “restating” . . . ? The manual offered no analysis—none at all—on that critical question.”).

206. *Id.* at 991–92. Importantly, however, John Dickinson came down hard in favor of the view that section 706 called for independent judicial review of legal determinations. *See id.* at 993–94; *see also* John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434, 516–17 (1947). Dickinson’s essay is an important data point that deserves respectful attention. It is an unambiguous, contemporaneous statement—in the *American Bar Association Journal*, no less—that because of section 706, judges must independently assess legal questions, even if they have technical components, and that section 706 therefore rejected a prominent previous practice of deference:

The Courts have begun to draw a distinction between two kinds of questions of law: Those which involve what are sometimes spoken of as general law or legal principles, and others which involve the construction of technical terms and the application of knowledge thought to be expert and specialized. Where the legal question involved in a review proceeding is of the latter character, the Courts have indicated an inclination in many cases not to review it, but to permit the administrative construction of law to stand.

. . . .

It is submitted that such a position on the part of the Courts will henceforth be hard to square with the specific language of [section 706], if that sentence is given the effect which an objective reading of its words seems to require. . . .

The explicitness of this additional language . . . would seem henceforth to require the Court in a review proceeding to look for itself at even those technical questions . . . .

*Id.* at 516–17. Notably, however, Dickinson does not muster contextual evidence on behalf of his submission—a sharp contrast with what he is able to do for questions of fact. *See id.* at 518. I have been unable to find any clear statement, in any of the key places in the legislative history, along Dickinson’s lines. And as far as I am aware, Dickinson was the only prominent contemporaneous voice on behalf of the specific view that section 706 had changed the law with respect to judicial review of agency judgments of law. By contrast, Louis L. Jaffe was supportive of *Gray v. Powell* and offered no indication that the APA had repudiated it. *See* Louis L. Jaffe, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 575–76 (Abridged Student ed., 1965).

207. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW* 885 (1951). Of course, Davis might have been speaking for his own preferences. *But see* *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 45, 49 (2d Cir. 1976) (Friendly, J.) (famously discussing the two lines of Supreme Court decisions and Davis’s work).

208. 340 U.S. 474, 487–88 (1951).

saw it, Congress “expressed a mood”—one that required courts to “assume more responsibility for the reasonableness and fairness” of agency’s factual judgments “than some courts ha[d] shown in the past.”<sup>209</sup> But there is no *Universal Camera* for judicial review of agency interpretations of law.

In the defining case of *Wong Yang Sung v. McGrath*, decided in 1950, the Court described the APA as “a new, basic and comprehensive regulation of procedures in many agencies,” and noted that it “represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.”<sup>210</sup> The Court noted that the APA inaugurated a new era with respect to the separation of functions, and held that it prohibited “the practice of embodying in one person or agency the duties of prosecutor and judge.”<sup>211</sup> But there is no *Wong Yang Sung* for judicial review of agency determinations of law. Instead of a barking dog, we have crickets.

In the relevant period, the Court *never* signaled that *Gray* or *Hearst* had been repudiated, or that with respect to agency interpretations of law, section 706 expressed a “mood” or laid down new clarity. In fact, no member of the Court ever said that. From 1946 to 1960, the Court never indicated that section 706 rejected the idea that courts might defer to agency interpretations of law. On the contrary, several decisions explicitly embraced that idea. In 1946—almost exactly six months after the enactment of the APA—the Court said in *Unemployment Compensation Commission v. Aragon*:

Here, as in [*National Labor Relations Board*] v. *Hearst Publications, Inc.*, the question presented “is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially.” To sustain the Commission’s application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The “reviewing court’s function is limited.” All that is needed to support the Commission’s interpretation is that it has “warrant in the record” and a “reasonable basis in law.”<sup>212</sup>

A year later, the Court said the same thing, emphasizing that even if an agency’s judgment “[was] considered more legal than factual in nature, the reviewing court’s function is exhausted when it becomes evident that the Deputy Commissioner’s choice has substantial roots in the evidence and is not forbidden by the law.”<sup>213</sup> Also in 1947, the Court upheld a NLRB decision, citing *Hearst* and allowing the Board to have latitude in defining the term “employee.”<sup>214</sup> The

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209. *Id.* at 487, 490.

210. 339 U.S. 33, 36, 40 (1950).

211. *Id.* at 41.

212. 329 U.S. 143, 153–54 (1946) (citing *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 131 (1944)).

213. *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 478–79 (1947).

214. *NLRB v. E. C. Atkins & Co.*, 331 U.S. 398, 403 (1947) (citing *Hearst*, 322 U.S. at 111).



Court pointed to the fact that “the Board, in performing its delegated function of defining and applying these terms, must bring to its task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this statute.”<sup>215</sup> As the Court put it, “a determination by the Board based in whole or in part upon those considerations is entitled to great respect by a reviewing court, due to the Board’s familiarity with the problems and its experience in the administration of the Act.”<sup>216</sup> The word “employee” in the National Labor Relations Act is similar to the word “source” in the Clean Air Act, in the sense that it could bear several different interpretations; in 1947, the Court sounded quite a bit like the *Chevron* Court did in 1984.<sup>217</sup>

Nor was there a movement, in the several years after the enactment of section 706, toward the view that courts should not defer to agency interpretations of law. Of course, agencies often lost during this period, but they lost because of what the Court took to be the statute’s meaning, not because of a sea change or reform supposedly introduced by section 706.<sup>218</sup> Consider an explicit statement in *Mitchell v. Budd*, decided in 1956, where the Court upheld an agency’s interpretation, writing:

No definition of “area of production” could produce complete equality, for the variables are too numerous. The Administrator fulfills his role when he makes a reasoned definition. On no phase of this problem can we say that the Administrator proceeded capriciously or by the use of inadmissible standards. Experts might disagree over the desirability of one formula rather than another. It is enough for us that the expert stayed within the allowable limits. We think he did here and that the definition of “area of production” . . . is a valid one.<sup>219</sup>

Again, that sounds a lot like *Chevron*.<sup>220</sup> It is true that in several dissenting opinions, members of the Court accused the majority of abandoning *Gray*.<sup>221</sup> But even there, what is noteworthy is that *neither the majority nor the dissent invoked*

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215. *Id.*

216. *Id.* at 403–04.

217. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984) (“Our review of the EPA’s varying interpretations of the word ‘source’—both before and after the 1977 Amendments—convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly . . . in the context of implementing policy decisions in a technical and complex arena.”).

218. See, e.g., *Brannan v. Stark*, 342 U.S. 451, 464–65 (1952) (“Without support in the words of the statute the challenged provisions must fall, for neither legislative history nor administrative construction offers any cogent reasons for a contrary result.”).

219. 350 U.S. 473, 480 (1956) (citing *Gray v. Powell*, 314 U.S. 402, 411 (1941)).

220. A similar approach can be found in *NLRB v. Coca-Cola Bottling Co.*, 350 U.S. 264, 269 (1956) (citing *Hearst*, 322 U.S. at 130), where the Court said that, with respect to interpretation of a statutory term, “of course the Board’s expertness comes into play. We should affirm its definition if that definition does not appear too farfetched.”

221. See, e.g., *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 689 (1954) (Douglas, J., dissenting); *Stark*, 342 U.S. at 484 (Douglas, J., dissenting). Justice Douglas evidently was quite fond of *Gray v. Powell*.

*section 706 of the APA as a requirement of independent judicial judgment on questions of law.*

In the decade after the APA's enactment, the words "decide all relevant questions of law" were used only four times in Supreme Court opinions, and in none of them did the Court suggest that those words prohibited deference to agency interpretations.<sup>222</sup> If the original public meaning of section 706 was that courts may not defer to such interpretations, wouldn't at least one Justice, at some point in the decade after its enactment, point that out? If the original public meaning were as some people now understand it, would we not see a significant amount of evidence that people so understood it then?<sup>223</sup>

#### D. A CAUTIOUS VERDICT

My conclusion is that the text of section 706, understood in its context, did not have a clear public meaning. Reasonable readers did not have a clear conviction that it required independent judicial judgments on questions of law.<sup>224</sup> If the Court had said—in, say, 1950—that the APA repudiated *Gray v. Powell*, it is not clear that it would have violated the text as originally understood; but the text, so understood, did not compel such a holding. *Mitchell v. Budd* did not engage with the text of the APA, but if it had, it could have said, plausibly, that its approach was consistent with the text, taken in its context. Here is one way to put it. *It*

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222. See *Fed. Power Comm'n v. Colo. Interstate Gas Co.*, 348 U.S. 492, 499 n.5 (1955); *Heikkila v. Barber*, 345 U.S. 229, 231 n.3 (1953); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 482 n.15 (1951); *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 138 n.13 (1947).

223. George Shepherd offered a crisp, passionate defense of a contrary view at a House of Representatives subcommittee hearing in 2016. See *The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 44 (2016) (written testimony of George Shepherd, Professor of Law, Emory University School of Law) ("The provisions' clear language, their legislative history, and court decisions following 1946 make clear that the provisions were intended to codify the existing common law . . . [that] instructed courts to give no deference to agency decisions of law."). In my view, much of the evidence cited by Shepherd, who is one of the nation's great experts on the period, does not amount to much on the particular question. Consider, for example, the House and Senate Committee Reports, see *supra* notes 195–96 and accompanying text, and a great deal of that evidence supports the view that section 706 was understood as a restatement of existing law. That is one reason that the question is so close.

There is a background question about how to think about the original public meaning in this context. Are we asking about the meaning to the public in 1946? It is not clear that section 706 had any such meaning, with respect to the dispute at hand. A reasonable member of the public would probably ask a host of questions before committing herself to any particular conclusion. Are we asking about the meaning to informed observers of administrative law in 1946? It is not clear what that meaning would be. I assume that we are not asking about the meaning to the enacting Congress, but if we are, we also end up with plenty of question marks.

224. These words, directed at the APA in general, are relevant: "Ambiguity was essential to reaching agreement. Without it, no agreement could have occurred. The parties could not reach agreement on specific, clear provisions that would resolve several issues." Shepherd, *supra* note 138, at 1665.

To borrow from some important claims in constitutional theory: it is possible that with respect to judicial review of agency interpretations of law, courts are in a "construction zone"—that is, they have nothing to interpret, and so must engage in a form of construction. See Solum, *supra* note 54, at 469–72. On that view, courts have been engaged in construction since 1946, and legitimately so. For a relevant discussion, see generally Solum & Sunstein, *supra* note 49.

would be singularly odd to offer a confident announcement, in the twenty-first century, that section 706 requires independent judicial judgments about questions of law when not even one member of the Court was willing to say that in the lengthy period between 1946 and 1956.

It would also be odd to say that the *Chevron* framework, as of 1984 or now, “falls out” of section 706. Rulemaking in its modern form was only on the horizon when Congress passed the APA, and there was hardly a consensus on the broad proposition that the grant of adjudicative authority explicitly carries with it the power to interpret ambiguous terms. But (again) the text of section 706 is not inconsistent with that conclusion. To put it very cautiously: something like *Gray* or *Hearst*—or Justice Breyer’s approach, taken up immediately below—cannot be said to be inconsistent with the original meaning of section 706.

As I have noted, the APA is hardly the only relevant source of law. Organic statutes confer authority on agencies; some of those statutes expressly grant interpretive authority, while others grant rulemaking or adjudicative authority. Whatever the meaning of section 706, perhaps some or many such grants confer interpretive authority as well.<sup>225</sup> We might think that section 706 calls for independent judicial interpretation of questions of law, but that organic statutes are best taken to confer a degree of interpretation authority on agencies. And indeed, that proposition has become the current rationale for *Chevron*—a point to which I now turn.

## V. CONTEMPORARY UNDERSTANDINGS AND DEBATES

Since *Chevron*, the Court has struggled both to specify the foundations of the decision and to limit its reach. My goal in this Part is to explore those struggles, with an emphasis on the current consensus, which is that *Chevron* rests on an implied delegation of interpretive authority. I begin with early discussions by Justices Stephen Breyer and Antonin Scalia, which presaged that consensus, even though it did not emerge until many years later. I also show the dramatically shifting political appeal of *Chevron*, with an emphasis on the current attack from the right—an attack that above all stems from large-scale skepticism about the administrative state, rooted in constitutional concerns, but also from the emergence of textualism.

### A. JUSTICE BREYER VS. JUSTICE SCALIA

We can obtain some clarity on *Chevron* by exploring the early and nearly contemporaneous views of Justices Stephen Breyer and Antonin Scalia, both of

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225. See Duffy, *supra* note 21, at 200, 202 (“Like the EPA, almost all modern administrative agencies have blanket authorizations to promulgate rules, and when courts focus on these provisions, they interpret them in a way that provides a rigorous, statutorily-based alternative to the common-law *Chevron* doctrine. . . . This view not only provides a statutory home for *Chevron* but also reconciles the doctrine with the APA: A reviewing court does decide all questions of law (as required by Section 706), but it may find that the statute confers on the agency a lawmaking power. The *Chevron* principle is then just a corollary of the delegated lawmaking theory. . . .”).

whom specialized in administrative law before they were appointed to the federal bench. Notably, the two Justices tried to build a bridge between *Chevron*'s pragmatic arguments and positive law. And for all their differences, the two bridges ended up looking quite similar.

### 1. Imputed Congressional Intent

In the mid-1980s, then-Judge Breyer emphasized that the question of whether courts should defer to agency interpretations of law depended largely on Congress (there is the bridge).<sup>226</sup> He suggested that it was necessary to attend to "Congress'[s] intent that courts give an agency[']s legal interpretations special weight, an intent that (where Congress is silent) courts may impute on the basis of various 'practical' circumstances."<sup>227</sup> Without parsing the APA's language or the context of its enactment, he urged that courts would have to defer if (1) Congress explicitly said so or (2) it is reasonable, in the circumstances, to impute that intention to Congress.<sup>228</sup> But when would that imputation be reasonable? Judge Breyer's answer, which he has also given in the succeeding decades, was intensely pragmatic:

The less important the question of law, the more interstitial its character, the more closely related to the everyday administration of the statute and to the agency's (rather than the court's) administrative or substantive expertise, the less likely it is that Congress (would have) "wished" or "expected" the courts to remain indifferent to the agency's views. Conversely, the larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the courts to decide the question themselves.<sup>229</sup>

It should be no surprise that Judge Breyer was skeptical about *Chevron*. Noting its "attractive simplicity," he found it inferior to his own, admittedly more complex approach.<sup>230</sup> In his view, *Chevron* was far too crude a rendering of Congress's implicit instructions. As he put it, "there are too many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures in which cases arrive, to allow 'proper' judicial attitudes about questions of law to be reduced to any single simple verbal formula."<sup>231</sup> Any "blanket rule" would turn out to be "seriously overbroad, counterproductive and sometimes senseless," which, he predicted, means that courts will end up "following more varied approaches, sometimes deferring to agency interpretations, sometimes not,

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226. Breyer, *supra* note 98, at 370–72.

227. *Id.* at 372.

228. *Id.* at 369–70.

229. *Mayburg v. Sec'y of Health & Human Servs.*, 740 F.2d 100, 106 (1st Cir. 1984) (Breyer, J.) (citations omitted). For his later views, tracking what he said in 1986, see, for example, *Barnhart v. Walton*, 535 U.S. 212, 225 (2002). As John F. Manning notes, Justice Breyer's approach to *Chevron* can be closely linked with the Legal Process school. See Manning, *supra* note 178, at 624 n.65.

230. Breyer, *supra* note 98, at 373.

231. *Id.*

depending upon the statute, the question, the context, and what ‘makes sense’ in the particular litigation, in light of the basic statute and its purposes.”<sup>232</sup>

Let us put this objection to one side and notice Justice Breyer’s understanding of the foundations of any answer to the question whether courts should defer to agency interpretations of law: *explicit congressional instructions or, in their absence, imputed congressional intentions*. It is true that many people believe that what matters is the public meaning of what Congress said in authoritative texts, not what it intended.<sup>233</sup> And if courts are imputing an intention “on the basis of ‘practical’ circumstances,”<sup>234</sup> some people will wonder if they are not making practical judgments entirely on their own—and giving themselves authority over anything that Congress has actually or ever said.

But it would be entirely possible to accept Justice Breyer’s conclusion without speaking about legislative intentions. We could read section 706 of the APA as a restatement of judge-made law, authorizing courts to continue to build out deference principles on the basis of judgments about comparative competence. Or we could read section 706 to give general guidance, with the particulars coming from organic statutes, which may implicitly mean that the answer to the relevant question of law sometimes depends on what an agency says it is. That, of course, is very close to Justice Breyer’s suggestion. We could understand his approach to be a more refined version of *Gray* and *Hearst*—comparable with what was done there, but with a corresponding insistence on independent judicial interpretations in identifiable cases.

## 2. What Congress Wants

In 1989, Justice Scalia similarly argued that *Chevron* must stand or fall on the basis of Congress’s instructions.<sup>235</sup> On that crucial point, he and Justice Breyer were in essential agreement. But from that foundation, he went in an emphatically pro-*Chevron* direction. He began by noting:

An ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency. When the former is the case, what we have is genuinely a question of law, properly to be resolved by the courts. When the latter is the case, what we have is the conferral of discretion upon the agency, and the only question of law presented to the courts is

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232. *Id.* at 373, 381. There is a good argument that his prediction has been vindicated. *See, e.g.,* *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 333–34 (2014) (finding it beyond the EPA’s statutory authority to treat greenhouse gases as a pollutant under specific Clean Air Act provisions); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26, 161 (2000) (finding it beyond the FDA’s statutory authority to regulate tobacco products).

233. *See, e.g.,* Scalia, *supra* note 72, at 22–25.

234. Breyer, *supra* note 98, at 372.

235. *See generally* Scalia, *supra* note 56.



whether the agency has acted within the scope of its discretion—i.e., whether its resolution of the ambiguity is reasonable.<sup>236</sup>

Before *Chevron*, he continued, courts “sought to choose between (1) and (2) on a statute-by-statute basis,”<sup>237</sup> which led to an approach like Justice Breyer’s, emphasizing “the degree of the agency’s expertise, the complexity of the question at issue, and the existence of rulemaking authority within the agency.”<sup>238</sup> *Chevron* rejected this troublingly ad hoc approach in favor of “an across-the-board presumption that, in the case of ambiguity, agency discretion is meant.”<sup>239</sup> Justice Scalia enthusiastically embraced that presumption:

If the *Chevron* rule is not a 100% accurate estimation of modern congressional intent, the prior case-by-case evaluation was not so either—and was becoming less and less so, as the sheer volume of modern dockets made it less and less possible for the Supreme Court to police diverse application of an ineffable rule. And to tell the truth, the quest for the “genuine” legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn’t think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.<sup>240</sup>

On that ground, Justice Scalia urged, “*Chevron* is unquestionably better than what preceded it,” not least because it gives clarity to Congress, which now knows that agencies will have a measure of interpretive authority.<sup>241</sup> Notwithstanding that celebration in 1989, Justice Scalia appeared to be haunted by *Chevron*’s uncertain statutory pedigree. One reason may be that Justice Scalia spoke in terms of congressional *intent* in 1989, but not long after, he came to insist on the primacy of the objective meaning of the statutory *text*.<sup>242</sup> In 2001, he attempted to fill the gap in his 1989 essay, worrying over the APA’s text:

There is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite. But it was in accord with the origins of federal-court judicial review. Judicial control of federal executive officers was principally exercised through the prerogative writ of mandamus. That writ generally would not issue unless the executive officer was acting plainly beyond the scope of his authority. . . .

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236. *Id.* at 516.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 517 (emphasis in original).

241. *Id.*

242. See Scalia, *supra* note 72, at 22–25.

Statutory ambiguities, in other words, were left to reasonable resolution by the Executive.<sup>243</sup>

But on Justice Scalia's own premises, this is not an entirely satisfactory account (as he likely would have acknowledged). Simply as a matter of history, it is not clear that the account is correct.<sup>244</sup> And even if it is, what pedigree would it have, if the text of the APA decreed otherwise? It would remain to answer the key question, which is whether the APA was meant or understood to codify or to repudiate the practice undertaken in mandamus actions. In 2013, Justice Scalia did not speak of mandamus or the APA at all, and instead put it this way: "The theory of *Chevron* (take it or leave it) is that when Congress gives an agency authority to administer a statute, including authority to issue interpretive regulations, it implicitly accords the agency a degree of discretion, which the courts must respect, regarding the meaning of the statute."<sup>245</sup> The words "take it or leave it" show a degree of ambivalence about *Chevron*'s fidelity to what Congress actually did.<sup>246</sup> The important point is that Justice Scalia, like Justice Breyer, was emphasizing congressional primacy—and he did that in all of his work on *Chevron*.

To recapitulate: the two Justices, both specialists in administrative law, were divided on what congressional primacy entailed. For Justice Breyer, it called for a case-by-case inquiry into what Congress would have sought in light of considerations of institutional competence. For Justice Scalia, it called for a bright-line rule of deference in the face of ambiguity. A third view—rejected by both Justices—would insist that the APA is quite clear, and that nothing in its context, or in any other statute, suggests reason for uncertainty. On that view, questions of law are for courts—period. Everyone should agree that Henry P. Monaghan,<sup>247</sup> Justice Breyer, and Justice Scalia are right to say that if Congress instructed courts to defer to agency interpretations of (ambiguous) law, that is what courts would have to do. But to some readers, the APA says otherwise. If an organic statute grants law-interpreting power to an agency, it would be authoritative. But agencies would need such a grant.

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243. *United States v. Mead Corp.*, 533 U.S. 218, 241–43 (2001) (Scalia, J., dissenting) (citation and footnote omitted).

244. *See* Bamzai, *supra* note 21, at 947–62 (rejecting the idea that mandamus review was a precursor to modern doctrines of deference).

245. *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 619 (2013) (Scalia, J., concurring in part and dissenting in part) (citing *Smiley v. Citibank (S.D.)*, N. A., 517 U.S. 735, 740–41 (1996)).

246. In widely reported remarks, Justice Alito reported that, "Before his death, Nino was also rethinking the whole question of *Chevron* deference," adding that "agencies were exploiting *Chevron* to usurp Congress'[s] lawmaking authority." *See* Robin Bravender, *Alito Snubs Chevron, Obama EPA's 'Eraser'*, E&E NEWS (Nov. 17, 2016), <https://www.eenews.net/stories/1060045952> [<https://perma.cc/DA4N-LG9N>].

247. *See supra* notes 114–16 and accompanying text.

## B. WHERE WE ARE NOW

There has been, of course, a great deal of relevant law since the 1980s.<sup>248</sup> Most important, the Court has converged on the central judgment that Breyer and Scalia shared: whether courts should defer to agency interpretations of law depends on congressional instructions. As we have seen, that judgment does not tell us whether *Chevron* was right, or what it means. As the Court has come to understand *Chevron*, it is not rooted in the APA at all. It is rooted instead in the judgment that a grant of rulemaking or adjudicative authority implicitly carries with it the power to interpret ambiguities, so long as the interpretation is reasonable.<sup>249</sup> The apparent idea is that while courts decide relevant questions of law, the answer to those questions may depend, by congressional direction, on what the agency has said, at least if (1) the agency has rulemaking or adjudicative authority, (2) the statute is ambiguous, and (3) the agency's interpretation is reasonable. As the Court explained in 2001:

Since 1984, we have identified a category of interpretive choices distinguished by an additional reason for judicial deference. This Court in *Chevron* recognized that Congress not only engages in express delegation of specific interpretive authority, but that “[s]ometimes the legislative delegation to an agency on a particular question is implicit.” Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which “Congress did not actually have an intent” as to a particular result.<sup>250</sup>

In the key passage, the Court added:

We have recognized a very good indicator of delegation meriting *Chevron* treatment [is] express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed. It is fair to assume generally that Congress contemplates

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248. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (invalidating the agency's interpretation as unreasonable); *City of Arlington v. FCC*, 569 U.S. 290 (2013) (stating that jurisdictional decisions receive deference); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009) (upholding decision to use cost-benefit balancing); *United States v. Mead Corp.*, 533 U.S. 218 (2001) (clarifying domain of agency deference under *Chevron*); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (striking down an agency's decision because there was no congressional delegation and “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration”).

249. See *Mead Corp.*, 533 U.S. at 229. This proposition does not mean that agency interpretations will be denied *Chevron* deference when agencies are not exercising rulemaking or adjudicative power. In such cases, we are in a kind of gray zone, for which the leading decision is *Barnhart v. Walton*, 535 U.S. 212 (2002) (stating a balancing test for cases that fall within that gray zone).

250. *Mead Corp.*, 533 U.S. at 229 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984)).

administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.<sup>251</sup>

There is some pragmatic logic in this pronouncement. We might think that when an agency has proceeded in a procedurally thick way—as is unquestionably true for adjudication and almost unquestionably true for rulemaking<sup>252</sup>—we have a guarantee, or a near-guarantee, of a degree of fairness and deliberation, superior to what we have in cases of purely informal action, in which agencies simply announce what they think. It would not be foolish to adopt a rule of “pay me now or pay me later”: agencies receive deference if they use relatively formal processes (and pay now), but they will not receive deference if they do not use such processes (and so will pay later).<sup>253</sup>

But all of this is embarrassingly intuitive. On plausible assumptions about comparative competence: if pragmatic values are what matter, we might insist that agencies should be subject to independent judicial scrutiny of their legal judgments, even if they have used formal processes, because legal judgments are for courts. And on different but also plausible assumptions about comparative competence: if pragmatic values are what matter, we might insist that even if agencies have *not* used formal processes, they should nonetheless be entitled to judicial deference with respect to such judgments, because agencies are in a better position to make the policy judgments that are commonly at stake when some decisionmaker has to sort out an ambiguity.

But for the Court’s current approach, the far more fundamental question lies elsewhere. Why is it right to assume that when agencies have exercised rulemaking or adjudicatory authority, Congress has instructed courts to defer to agency interpretations of law? There is no clear or direct evidence that Congress wanted that.<sup>254</sup> We must be speaking of some kind of legal fiction. For example, the grant of rulemaking power to the EPA is not, in terms, a grant of authority to interpret ambiguous statutory provisions.

One answer is Justice Scalia’s: we are indeed speaking of a legal fiction, but there is no alternative to that. (Recall that Justice Breyer agreed with him on that

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251. *Id.* at 229–30 (citations omitted).

252. *See* 5 U.S.C. § 553 (2012) (providing notice-and-comment rulemaking procedures, which are usually quite elaborate in practice). Note, however, that agencies are allowed to dispense with those procedures for “good cause,” *see id.* at § 553(b), and the Court has never said that when they do, they lose the benefit of *Chevron* deference.

253. *Cf.* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491 (1992) (exploring a similar “pay me now or pay me later” dynamic in another domain).

254. There is another issue. Suppose we agree that Congress has the authority to give agencies law-interpreting power, but we think that any such grant is constitutionally troublesome. We might adopt a clear statement principle: unless the grant is unambiguous, it will not be presumed. If so, *Chevron* is clearly wrong. Whatever the best interpretation of the APA and grants of rulemaking authority, it does not unambiguously grant interpretive power to agencies. But this conclusion depends on the proposition that a grant of law-interpreting power to agencies would be constitutionally troublesome. For reasons discussed in the text, it should not be so regarded.

point.) We do not know what Congress wanted, and we cannot discern congressional instructions, and in the absence of knowledge, we might want to create a bright-line rule, one that is no less accurate than any alternative, and that at least has the virtue of providing a degree of clarity for everyone in the system, including Congress. Another answer is rooted in the APA: section 706 is most plausibly taken as a codification of preexisting law, which allowed courts to defer to agency interpretations of law—sometimes. *Chevron* is a reasonable rendering of the meaning of “sometimes,” fairly close to what the Supreme Court was doing in the decade before the APA was enacted. In my view, both of these answers are plausible. All things considered, it is hard to see that a negative answer, forbidding judicial deference to agency interpretations of law, would be better.

### C. SOME REALISM ABOUT *CHEVRON* SKEPTICISM

In recent years, *Chevron* has been under assault, largely from the right.<sup>255</sup> Its political valence has flipped. This is somewhat mysterious. How has a decision originally celebrated—mostly by the right—for its insistence on judicial humility come to be seen as a kind of abdication or capitulation? From 1984 to the present, what on Earth happened?

#### 1. The Administrative State

I have signaled the most obvious answer, which points to deep skepticism about the administrative state, associated with the idea of a “lost Constitution” or the “Constitution-in-exile.”<sup>256</sup> That skepticism, with clear roots in the 1930s and 1940s,<sup>257</sup> often takes the form of a concern that agencies have undue power, consolidating traditionally separated functions and threatening core constitutional values, including both accountability and liberty.<sup>258</sup> For some, agency authority to interpret ambiguities is a cruel irony; it aggravates the central problem. *Marbury* itself rests on the judgment that foxes should not guard henhouses, or in

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255. See *supra* Section I.A; see also, e.g., PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* (2017) (exploring how administrative power raises questions of constitutionality).

256. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 354–57 (2004); Douglas H. Ginsburg, *Delegation Running Riot*, 18 *REGULATION* 79, 84 (1995) (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993)) (using the phrase “the Constitution-in-exile” in reference to constitutional provisions “banished for standing in opposition to unlimited government”). There is a confluence between the structural concerns I am discussing here and the rise of textualism. But I think that the confluence is contingent, and that the real driver here is mostly structural and only secondarily textual. For reasons discussed above, the APA’s and Constitution’s texts do not forbid *Chevron*. And a judge who does not embrace textualism, and who thinks that the APA should be interpreted purposively, could end up rejecting *Chevron*. As we shall see below, however, textualist judges might well have a problem with *Chevron* on the ground that judges are in a uniquely good position to say what texts mean.

257. See Metzger, *supra* note 15, at 51–52.

258. See DeMuth, *supra* note 16, at 172–74. For a vigorous statement of that concern, see generally DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993). For responses to administrative state skepticism, see, for example, JERRY L. MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* (2018) and Posner & Vermeule, *supra* note 16, at 1748–49.



other words, in an understanding that those who are limited by law should not be authorized to decide on the scope.<sup>259</sup> *Chevron* seems to defy that understanding.

For critics, the problem is even worse because constitutionally questionable entities, and a constitutionally questionable apparatus, are allowed to operate with power that they essentially grant to themselves (through interpretation).<sup>260</sup> That is a recipe for a kind of authoritarianism—an objection that again revives some of the concerns in the 1930s and 1940s, voiced by opponents of the New Deal.<sup>261</sup> Recall Justice Kennedy’s suggestion that “reflexive deference” to agency interpretations “is troubling,” and that “when deference is applied to other questions of statutory interpretation, such as an agency’s interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still.”<sup>262</sup> The word “authoritarianism” might seem a bit excessive, but imagine a situation in which agencies would be entitled to seize on any imaginable ambiguity to push statutes in their preferred directions. Dean Pound’s concerns,<sup>263</sup> invoking the term “absolutism,” are hardly irrelevant; they seem to resonate today.

These are points about the role of administrative agencies and the diminished power of law as such. But if we are speaking in narrowly partisan terms, evaluation of *Chevron* would seem to depend on who occupies the White House. If the president is a Democrat, *Chevron* might seem to be an ally, other things being equal, of greater regulation. If the president is a Republican, *Chevron* might seem to put less enthusiastic regulators, or deregulators, in a stronger position. Crudely speaking, we might expect positions about *Chevron* to flip accordingly. And indeed, there is some evidence of precisely that within the federal courts.<sup>264</sup>

In this light, it is tempting to suggest that after the two-term presidency of Barack Obama, conservative skepticism about *Chevron* is no accident. And there might be a broader institutional hunch, to the effect that in the long run, *Chevron* is more likely to promote the expansion than the contraction of agency power. But it is important to emphasize that current concerns about *Chevron* do not focus

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259. 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.”); see also Pound, *The Place of the Judiciary*, *supra* note 15, at 137 (“Because the ultimate power of a people to choose such polity as it pleases and arrange the details of that polity as it pleases has no limit, it does not follow that limits may not be set to the powers reposed in public officials and checks may not be imposed upon the exercise of those powers. . . . In a federally organized constitutional democracy, the only kind, I submit, which may rule a domain of continental extent, every one, every official as well as every private person, acts under and subject to the scrutiny of the law to see to it that he keeps within the limits of his authority or his liberty.”).

260. This argument depends on the assumption that Congress has not itself called for *Chevron* or something like it.

261. POUND, ADMINISTRATIVE LAW, *supra* note 15, at 7–14. See generally Metzger, *supra* note 15 (providing a discussion and overview of the time period).

262. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (citation omitted).

263. See POUND, ADMINISTRATIVE LAW, *supra* note 15, at 132 (“We must bear in mind that the theories of disappearance of law go along with, have developed side by side with, absolute theories in politics. . . . The real foe of absolutism is law.”).

264. See Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 65, 86–109 (1994) (offering data suggesting that judicial review of agency actions varies in intensity depending on administrative agencies’ partisan orientation).

directly on that point. They focus not on the magnitude of regulation but on the risk that *Chevron* will give agencies the authority to subordinate law to politics.

Without suggesting that *Chevron* violates the Constitution, Justice Kavanaugh is concrete about that risk: "From my more than five years of experience at the White House, I can confidently say that *Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."<sup>265</sup> He adds:

Presidents run for office on policy agendas and it is often difficult to get those agendas through Congress. So it is no surprise that Presidents and agencies often will do whatever they can within existing statutes. And with *Chevron* in the mix, that inherent aggressiveness is amped up significantly. I think some academics fail to fully grasp the reality of how this works. We must recognize how much *Chevron* invites an extremely aggressive executive branch philosophy of pushing the legal envelope (a philosophy that, I should note, seems present in the administrations of both political parties). . . . Executive branch agencies often think they can take a particular action unless it is *clearly forbidden*.<sup>266</sup>

If the picture is accurate, it does seem alarming, and Justice Kavanaugh's testimony must be counted as evidence.<sup>267</sup> Perhaps *Chevron* essentially unleashes political officials from law—not entirely, of course, but to some extent. ("Amazing."<sup>268</sup>) From that standpoint, *Chevron* is hardly a salutary recognition of judicial humility. On the contrary, it is a grant of authority to people who want to push the boundaries of law. *Chevron*'s emphasis on the politically accountable nature of the administrative apparatus has things exactly backwards. What we have to fear, in short, is willful agencies, not willful judges.

In the 1980s, some of *Chevron*'s critics spoke in exactly these terms. (I was one of them, and I certainly did.<sup>269</sup>) Suppose that agencies have an interest in expanding their own authority; suppose that the problem is an overreaching, overzealous regulatory state, endangering liberty. Or suppose that agencies are insufficiently enthusiastic about their statutory responsibilities, endangering legislative enactments. Or suppose, with Justice Kavanaugh, that the problem is the intensity of political agendas on the part of the president, overwhelming the idea of fidelity to law. In any of these cases, *Chevron* might seem to be a clear and present danger.

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265. See Kavanaugh, *supra* note 12, at 2150.

266. *Id.* at 2151 (emphasis in original).

267. I am aware that some people might offer a different evaluation. So long as the Executive Branch is politically accountable or technically expert, and not actually violating any statute, the phenomenon that Justice Kavanaugh deplores might be seen as desirable rather than alarming.

268. Kavanaugh, *supra* note 12, at 2151.

269. See *supra* note 18.

For what it is worth, my own experience in the Executive Branch was not consistent with Justice Kavanaugh's. I would be very cautious about generalizing from that experience, but I would put what I saw this way: in nearly four years of experience at the White House, I found little evidence that *Chevron* encourages the Executive Branch to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints. The full story would take many pages,<sup>270</sup> and of course the Executive Branch works hard to find ways to promote its policy goals. But in general, my own experience was wildly inconsistent with Justice Kavanaugh's. On the contrary, Executive Branch lawyers played an extremely aggressive role in counteracting the efforts of policy officials to squeeze their policy goals into ill-fitting statutory authorization and restraints—*notwithstanding Chevron*.

Purely as an empirical matter, I think that some of *Chevron*'s contemporary critics are in the grip of a picture.<sup>271</sup> According to that picture, agencies are constantly seeking to expand the reach of their own power, and *Chevron* licenses them to do exactly that. It is a green light to lawlessness, which agencies welcome. But for an understanding of what often happens, consider the problem in *Chevron* itself, in which the EPA was not seeking to expand its own authority, but instead to maximize private flexibility, and, in a sense, to minimize its regulatory footprint. As in *Chevron*, agencies are frequently seeking, reasonably and within the boundaries of the law (and under both Democratic and Republican presidents), to increase private sector flexibility, to deregulate, to disclaim the intention to use what they might see as their authority, and to provide greater certainty.<sup>272</sup> The picture of an out-of-control bureaucracy, indifferent to statutory limitations and seizing on *Chevron*, is at best a cartoon.

Nonetheless, I have said that Justice Kavanaugh's testimony counts as evidence, and under some administrations some of the time, *Chevron* may well promote less fidelity to law. Nothing I have said demonstrates that those who are

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270. Some of it is told in CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT (2013).

271. See the famous passage in LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 115 (G. E. M. Anscombe trans., 5th prtg. 1961): "A picture held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably."

272. See, e.g., *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218, 226 (2009) (upholding on the authority of *Chevron* the agency's insistence on cost-benefit balancing); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225–26, 228–31 (1994) (rejecting the broad definition of "modify," which was deregulatory, in the face of an attempted defense based on *Chevron*); *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 980–81 (1986) (upholding on the authority of *Chevron* an agency's decision not to act). Notably, the more natural reading of the statutory provision in both *Entergy Corp.* and *Young* would mandate regulation, as the dissenting opinions convincingly argued. See 556 U.S. 236–46 (Stevens, Souter, Ginsburg, J., dissenting); 476 U.S. at 984–99 (Stevens, J., dissenting).

A similar point can be made about the controversial ruling in *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997) (upholding an agency's interpretation of its own regulation). It is tempting to think that *Auer* ensures that agencies will expand the scope of their authority, but it is often (and I think usually) used for exactly the opposite purpose. One of the reasons for the misleading picture is the dynamics of litigation, which presents courts with a small, highly selective subset of the cases in which doctrines come into play in the real world of agency practice. Under *Auer*, agencies often respond to private sector requests for clarification and inform the public that they understand their regulations in a restrained way.

skeptical of *Chevron* are wrong to object that it increases the ability of political officials to point to arguable or apparent legal ambiguities in order to move statutes in their preferred directions.<sup>273</sup> On the contrary, and whatever the actual practice within different administrations, I think that they are right. For better or for worse, agencies have often won in court precisely because *Chevron* allowed them to interpret ambiguities as they thought best.<sup>274</sup>

## 2. Textualism

A separate ground for skepticism about *Chevron*, not partisan in any way, comes from a conviction (now pressed mostly, but only contingently, on the right), that texts usually or often have preferred meanings, accessible to lawyers and judges, even when it is possible to point to ambiguities. Some *Chevron* skeptics are actually indeterminacy skeptics.<sup>275</sup> Because they believe that statutes are usually clear, they are concerned that *Chevron* gives agencies the authority to distort them, to press them in their preferred directions, or to expand their own power or authority.<sup>276</sup> In the face of those risks, it might seem simplest and best to insist that courts, and not agencies, should be allowed to sort out ambiguities.

With that point in mind, textualists could go in two different directions. They might reject *Chevron* altogether. Alternatively, they might insist on a firm Step One for that reason. There is no question that in some quarters, skepticism about *Chevron* is fueled by insistence on the primacy of the text.

## VI. WHAT IS TO BE DONE?

If the APA is taken as a “flexible restatement of evolving judge-made law”<sup>277</sup> or as a delegation of authority to federal courts,<sup>278</sup> *Chevron* is not illegitimate, and the only question is whether it makes sense. If the APA is taken as an authoritative statute, not subject to judicial tinkering, there is still a reasonable argument that *Chevron* fits well enough with it. Suppose, however, that we conclude that *Chevron* was wrong, because it was a form of invention, inconsistent with the original meaning of the APA. Suppose that we think that something must be done. What then? There are two principal possibilities. The first is to overrule it. The second is to domesticate it. I shall be defending the second approach, with an emphasis on limiting principles—old and new—that deserve contemporary entrenchment and fortification.

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273. See Elliott, *supra* note 42, at 3–13 (explaining how *Chevron* changed the role of the Executive Branch and courts in interpreting statutes).

274. See, e.g., *Entergy Corp.*, 556 U.S. at 218, 226; *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703 (1995); *Young*, 476 U.S. at 980–81.

275. See, e.g., Kavanaugh, *supra* note 12, at 2152–54.

276. See *id.* at 2150–52.

277. Stewart, *supra* note 94, at 1815.

278. See generally Davis, *supra* note 94 (contending that the APA does not prohibit lower courts from “making common law about rulemaking procedure”); Stewart, *supra* note 94 (arguing that the APA does not “preclud[e] continuing judicial innovation”).

A. OVERRULING *CHEVRON*

If *Chevron* really was wrong, the argument for overruling it would not be difficult to sketch.<sup>279</sup> First, the Court has recently emphasized that “the quality of [a decision’s] reasoning” is a key factor in deciding whether to overrule a precedent.<sup>280</sup> As we have seen, the quality of the reasoning in *Chevron* was not high. For those who think that it is inconsistent with the APA and unsupported by other sources of law, overruling it should be on the table.<sup>281</sup>

Second, there is the question of workability.<sup>282</sup> *Chevron* is now accompanied by a series of complexities and epicycles. There is *Chevron* Step Zero, which determines whether the framework is applicable at all.<sup>283</sup> There is the *Mead* question, a subset of *Chevron* Step Zero, which determines whether agencies receive deference for interpretations that do not come from rulemaking or adjudication.<sup>284</sup> There is the “major question” exception, a kind of *Chevron* carve-out for issues of great social and economic importance.<sup>285</sup> There is even “*Chevron* avoidance,” which means that when the applicability of *Chevron* is difficult to resolve, courts endeavor to avoid that question altogether.<sup>286</sup> (Amazing.) The question of workability is real.

For some, it might be tempting to start afresh, beginning with a simple announcement that courts must independently review agency interpretations of law. From the standpoint of history, nothing would be exotic about that announcement; before *Chevron*, courts sometimes did exactly that.<sup>287</sup> We might think that such an announcement would introduce simplicity and clarity where there is now mess, even chaos. Perhaps that announcement could be accompanied

279. See *supra* note 23.

280. See *Janus v. Am. Fed’n of State, Cty., & Mun. Emps.*, Council 31, 138 S. Ct. 2448, 2479 (2018).

281. See *id.* at 2479–81 (finding a precedent’s poor quality of reasoning to be a factor justifying it being overruled).

282. See *id.* at 2481. Note, however, that the Court believes there is a stronger argument for overruling a *constitutional* holding, which Congress cannot change, than for overruling a *statutory* holding, which Congress can change. See *id.* at 2478 (citing *Agostini v. Felton*, 521 U.S. 203, 235 (1997)). And, as noted, bills have (unsuccessfully) been introduced to overrule *Chevron*. See *supra* note 103.

283. See generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

284. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 348–49 (2003).

285. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 323–24 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–61 (2000). This concept is explored further *infra* Section VI.B.3.

286. See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1464–69 (2005); see also Sunstein, *supra* note 283, at 229 & n.184.

287. See, e.g., *Office Emps. Int’l Union, Local No. 11, AFL-CIO v. NLRB*, 353 U.S. 313, 318–20 (1957); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 149–50 (1944). Indeed, the Court said the same thing *after Chevron*, in what appears to have been a failed effort to restore the status quo ante. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 448 (1987) (“The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide. . . . The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts.”).



with a recognition that when a statute uses some open-ended term, such as “reasonable” or “feasible,” the *Chevron* framework, or something like it, would apply.<sup>288</sup> Such a term might be best read as a delegation of policymaking authority. But whenever Congress has used a specific term, such as “diagnosis” or “pollutant” or “source,” purely legal questions would be resolved by judges.<sup>289</sup>

The question is whether the balance of considerations justifies overruling *Chevron*. For those who think that *Chevron* was right or close to it, the answer is no. But even for those who think that *Chevron* was not close to right, the argument for overruling it is not terribly strong. The simplest reason is that the benefits of doing so would not justify the costs.

With respect to the costs: overruling *Chevron* would create an upheaval—a large shock to the legal system, producing confusion, more conflicts in the courts of appeals, and far greater politicization of administrative law. It might seem simple to announce that legal questions must be resolved by courts, without deference to agency interpretations. But that announcement immediately raises a host of hard questions. For example:

- Would the overruling of *Chevron* be prospective only? What would that even mean? What would happen to the countless regulations that have been upheld under the *Chevron* framework?
- How would *Chevron* itself, or the many cases like it, be decided?<sup>290</sup> What if agency expertise really is relevant? Would something like Justice Breyer’s framework rematerialize, explicitly or implicitly? Might something like *Chevron* turn out to be inevitable?<sup>291</sup> If courts are dealing with a relatively minor question, and it is highly technical, might courts defer to the agency’s view?

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288. See Kavanaugh, *supra* note 12, at 2153–54. It is worth underlining this suggestion. As Justice Kavanaugh notes, an ambiguity is not by itself a delegation. See *id.* at 2152. But as he also notes, a broad and open-ended phrase might reasonably be taken as exactly that. *Id.* No one would think that if a statute uses the word “unreasonable” in the context of a grant of rulemaking authority to an agency, it is meant to give courts the authority to decide what that word means. To be sure, courts are entitled to police the boundaries of the term. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (ruling that an agency’s interpretation “strayed far beyond [the] bounds” of reasonable interpretation).

289. See Kavanaugh, *supra* note 12, at 2154.

290. That is a more difficult and more interesting question than it might seem. In *Chevron* itself, it is not obvious how to assess the plantwide definition of “source”—or, for that matter, the Carter Administration’s version of the Clean Air Act—without something like the *Chevron* framework. The only statutory definition of “source” did not apply to the program at issue, and it was hardly pellucid. For anyone with textualist leanings, the best approach probably would be to say that nothing in the Clean Air Act (or its predecessor) prohibited the plantwide definition, which is to say that the EPA could choose either. That approach would not, of course, be very different from what the Court actually did in *Chevron*. Indeed, a post-*Chevron* administrative law would probably end up requiring courts to do something like that in many cases, and whether or not such an approach is worse than *Chevron*, it is not a lot better.

291. See generally Bednar & Hickman, *supra* note 19 (arguing that the necessities of the modern administrative state make the existence of *Chevron*-style deference inevitable).

- What about *Skidmore*?<sup>292</sup> In a post-*Chevron* era, should courts give agency interpretations the kind of respectful attention that *Skidmore* counsels?<sup>293</sup> If so, what exactly would be the difference between *Chevron* (by hypothesis abandoned) and *Skidmore* (by hypothesis affirmed)? Are angels dancing on the head of a pin?
- What if courts really are in equipoise, or close to it?<sup>294</sup> In such cases, wouldn't interpretive principles have to be brought to bear? Might some of them be covert?

In any case, conflicts among the courts of appeals would proliferate.<sup>295</sup> In this regard, a potential defense of *Chevron* is that it reduces the effect of policy preferences on the part of *judges*. Suppose that judicial judgments about the meaning of statutes are affected by such preferences; if so, the argument for *Chevron* would be strengthened. Recall these words from the decision itself: “While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices. . . .”<sup>296</sup>

The most recent data suggest that *Chevron* is indeed reducing the effects of judicial policy preferences. In a comprehensive study, Kent Barnett, Christina L. Boyd, and Christopher J. Walker found that *Chevron* “significantly curbs” demonstrably partisan rulings.<sup>297</sup> When the most liberal judicial panels review conservative agency interpretations, they strike them down eighty-two percent of the time when they do not use *Chevron*, but just forty-nine percent of the time when they do.<sup>298</sup> When the most conservative judges review liberal agency interpretations, they strike them down eighty-two percent of the time when they do not use *Chevron*, but just thirty-four percent of the time when they do.<sup>299</sup>

Unsurprisingly, liberal panels are more likely than conservative panels to agree with liberal agency interpretations, and conservative panels are more likely than liberal panels to agree with conservative agency interpretations.<sup>300</sup> But in *Chevron* cases, the difference between the two is greatly compressed.<sup>301</sup> In these

292. See generally *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

293. See *id.* at 139–40 (explaining that, although the agency conclusion in question was not entitled to “decisive weight,” the agency’s expertise and “informed judgment” was such that courts and litigants should look to the agency for guidance).

294. Recall the possibility that in some cases, including *Chevron*, courts are in a “construction zone,” because they do not have materials to interpret. See Solum, *supra* note 54, at 469–72. This idea depends on the old distinction between interpretation and construction, which is no longer familiar within the legal culture, but which might prove useful in this as well as other contexts. See generally Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

295. See Strauss, *One Hundred Fifty Cases Per Year*, *supra* note 19, at 1105–07.

296. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

297. Barnett et al., *supra* note 60, at 1468.

298. See *id.*

299. See *id.*

300. See *id.*

301. See *id.*

circumstances, a predictable effect of overruling *Chevron* would be to ensure a far greater role for judicial policy preferences in statutory interpretation and far more common splits along ideological lines.<sup>302</sup>

There is also the question of reliance interests, where the analysis is a bit tricky. We do not have a great deal of concrete private reliance on *Chevron*, as can be found when private actors have arranged their affairs around a judicial precedent. But for decades, Congress has legislated against the background set by *Chevron*, and the resulting statutes reflect an understanding that the Court's framework will apply. Careful empirical analysis shows that legislative drafters have been quite aware of *Chevron*.<sup>303</sup> A decision to overrule *Chevron* could well be seen as an undoing of a background assumption of real importance to the national Legislature. To these points it might be added that agencies have long acted with *Chevron* in the background, and private parties have assumed the existence of *Chevron* as well.

To *Chevron*'s critics, these various problems might not be decisive if there were no other means of responding to their objections. But *Chevron* might be domesticated without being overruled. Indeed, the Court has been taking significant steps toward domesticating it; the process is well underway.<sup>304</sup> The only question is whether existing steps should be formalized and entrenched in some way, perhaps in response to objections from Justice Kennedy and others, with greater clarity from the Court about the limits on judicial deference to agency interpretations of law.<sup>305</sup>

## B. DOMESTICATING *CHEVRON*

### 1. Step One

The most important way to domesticate *Chevron* is to ensure that Step One is taken seriously—that is, that judges proceed to Step Two only if the statutory provision is genuinely ambiguous. Textualists will enthusiastically embrace this idea, and it should appeal to non-textualists as well. Recall Justice Kennedy's

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302. On the continuing role of political disagreements, see generally Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006).

303. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 993–97 (2013) (finding that eighty-two percent of congressional staffers surveyed were familiar with *Chevron*). It might be responded that *Chevron* itself altered the interpretive status quo, by substituting a new framework for another (which was admittedly murky). If *Chevron* did that, why should a decision to overrule it not do the same? The best answer is that no predecessor decision established a clear framework against which Congress did its work.

304. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015) (explaining that *Chevron* does not allow an agency to “keep[] parts of statutory context it likes while throwing away parts it does not”); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (noting the “major questions” exception and emphasizing that *Chevron* does not permit an agency suddenly to discover new economically and politically significant power in a long-existing statute).

305. State practice is illuminating here, if only because it shows a variety of approaches. Notably, most state courts have not embraced the *Chevron* approach, though many have. See Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 558–60 (2014).

concern that deference is sometimes “reflexive,” which means that lower courts proceed to Step Two whenever a statute is susceptible to more than one interpretation, even if one candidate is clearly superior.<sup>306</sup> Recall that Justice Kavanaugh’s spirited word—“amazing”—was reserved for deference to an agency’s interpretation even though all judges agreed that a different interpretation was best.<sup>307</sup>

We could easily imagine a vigorous pronouncement from the Court, emphasizing the primacy of the Judiciary in statutory interpretation, and insisting that deference to agency interpretations is justified only in the face of either an open-ended term (“reasonable” or “feasible”)<sup>308</sup> or something fairly close to equipoise (which plausibly helps account for *Chevron* itself). Such a pronouncement might also emphasize that deference is most appropriate in cases in which resolution of a statutory ambiguity calls for application of technical expertise (as was so, more than plausibly, in *Chevron* itself).

Such a pronouncement could express the equivalent of a “mood,”<sup>309</sup> cautioning lower courts against seizing on potentially ambiguous terms to justify deference in cases in which one interpretation really is superior. It is true that if it is written incautiously, any such pronouncement could effectively undo *Chevron* altogether, which would not be a good idea. In some cases, purely legal competence is not enough to require a single interpretation, and the agency should be permitted to choose. The only point is that some ambiguities are real and others are merely apparent. They disappear on reflection.

## 2. Step Two

The second way to domesticate *Chevron* is to emphasize the immense importance of Step Two. As noted, the basic idea is that agency interpretations must not be unreasonable or arbitrary.<sup>310</sup> This idea is different from general arbitrariness review under the APA, which calls for invalidation of arbitrariness in fact-finding or pure policymaking.<sup>311</sup> For example, it would be arbitrary to declare a chemical to be carcinogenic when essentially all of the science says otherwise; it would also be arbitrary to eliminate a regulation that is preventing hundreds of premature deaths in order to save \$500. In the leading decision on arbitrariness review, there was no dispute about the meaning of the organic statute. The only question was whether the agency had made reasonable judgments of fact and policy.<sup>312</sup>

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306. See *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

307. See Kavanaugh, *supra* note 12, at 2151.

308. *Id.* at 2153.

309. *Cf. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951).

310. For valuable discussion of the foundations of this idea, see Mashaw, *supra* note 175, at 2243–44.

311. See *Motor Vehicles Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 41, 43 (1983).

312. See *id.* at 51–52.

Under Step Two of *Chevron*, by contrast, the question is whether an agency has chosen *an unreasonable interpretation of a statutory term*. One example, on which the Court was unanimous, is an agency's decision to interpret a provision of law so as to make costs irrelevant.<sup>313</sup> That decision is simply unreasonable. To be sure, reasonable people can differ about how to value costs or how to weigh them against benefits. But it is hard to defend the proposition that in deciding what to do, agencies should not consider costs *at all*. It is unreasonable to interpret a statute so as to foreclose consideration of costs.

The example is merely illustrative. Suppose that an agency chooses a narrow interpretation of various provisions of the Endangered Species Act; suppose too the statute is ambiguous under Step One. Under Step Two, it is necessary for the agency to explain why its narrow interpretation is reasonable. If the interpretation would put members of endangered species at risk without significantly reducing burdens and costs, it would be difficult to defend. The broader point is that arbitrary decisionmaking is unlawful, and that principle is explicitly recognized in Step Two.<sup>314</sup> Courts should be willing to enforce it.

### 3. Canons of Construction, Including Nondelegation Canons

The third way to domesticate *Chevron* involves canons of construction. The semantic canons are designed to elicit meaning, and although some of them are not particularly reliable, others have an important place.<sup>315</sup> For present purposes, substantive canons are of particular interest. Some of them operate as a kind of Step One brake on agency interpretations, though they may have nothing to do with legislative instructions. They are effectively *nondelegation canons*, designed to forbid agency action unless it is explicitly authorized by the national Legislature.<sup>316</sup> Consider, for example, the presumption against retroactivity. The basic idea is that if agencies are to apply their rules retroactively, it must be because Congress has expressly permitted them to do exactly that.<sup>317</sup> Or consider the presumption against extraterritoriality, which means that agencies may not apply statutes outside of the territorial boundaries of the United States without clear congressional authorization.<sup>318</sup>

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313. See *Michigan v. EPA*, 135 S. Ct. 2699, 2707–08 (2015). The justices sharply disagreed on the decisive issue in the case, but all agreed that if an agency ignores costs when it has the authority to consider them, it is violating Step Two. See *id.* at 2714 (Kagan, Ginsburg, Breyer, Sotomayor, J., dissenting).

314. See MASHAW, *supra* note 258, at 116–21.

315. A valuable treatment is Kavanaugh, *supra* note 12, at 2159–62 (arguing that judges should not often use the *ejusdem generis* canon, that the anti-redundancy canon should be invoked sparingly, and that judges should be cautious in using the consistent usage canon).

316. See generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

317. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have a retroactive effect unless their language requires this result.”).

318. See, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is ‘the affirmative intention of the Congress clearly expressed,’ we must presume it ‘is primarily concerned with domestic conditions.’” (citations omitted)).



The most important nondelegation canon, for present purposes, is the avoidance canon, which means that statutes will be construed so as to stay away from the terrain of constitutional doubt. In the modern history of administrative law, the exemplary case is *Kent v. Dulles*, in which the Court invoked the avoidance canon to forbid the Secretary of State from using an apparently open-ended grant of authority to deny a passport to a member of the Communist Party.<sup>319</sup> As the Court put it, “we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. . . . Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens’ right of free movement.”<sup>320</sup> The idea has general importance. It suggests that the Executive Branch may not interpret an ambiguous provision in such a way as to raise serious constitutional problems. Congress must expressly authorize that. By requiring that authorization, the avoidance canon is directly responsive to some of the concerns of early and current critics of the administrative state.<sup>321</sup>

A more recent canon, also with unmistakable roots in nondelegation principles, comes from the “major questions” doctrine, which is designed to deny agencies the benefit of *Chevron* deference when interpretation of statutory terms raises questions of great social or economic importance.<sup>322</sup> Within the Court, the doctrine has been understood in two different ways. The first suggests a kind of “carve out” from *Chevron* deference when a major question is involved. On this view, courts, not agencies, will interpret ambiguous provisions where resolution of the ambiguity raises an issue of sufficient importance.<sup>323</sup> The second understanding of the doctrine is stronger. It suggests that courts will not allow agencies to seize on ambiguous provisions to assert large-scale authority.<sup>324</sup> On the first understanding, then, the major question doctrine means that *courts will decide whether agencies can act*. On the second understanding, it means that *agencies cannot act*.

With respect to the first understanding, recall that in Justice Breyer’s view, the theory of *Chevron* is least contentious when an agency is resolving a legal question that appears interstitial, or that cannot be answered without applying the kinds of technical expertise that agencies develop over time.<sup>325</sup> But when an agency is interpreting a major question (the theory goes), it is hazardous to infer any such authority.<sup>326</sup> In such cases, the best inference is that Congress wants courts to decide issues of law independently. The *Chevron* carve-out theory of

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319. See 357 U.S. 116, 128–29 (1958).

320. *Id.* at 130.

321. See, e.g., Pound, *The Place of the Judiciary*, *supra* note 15, at 139 (discussing the problem of “administrative absolutism”).

322. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (holding that the major questions doctrine prevented deference to the IRS’s interpretation of the Affordable Care Act).

323. See, e.g., *id.*

324. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160–61 (2000).

325. See Breyer, *supra* note 98, at 370–71.

326. See, e.g., *King*, 135 S. Ct. at 2488–89.

the major questions doctrine is supported by several decisions, of which the most conspicuous involves tax subsidies under the Affordable Care Act.<sup>327</sup>

It is important to see that the carve-out theory does not necessarily mean that the agency will lose; it means only that the question of law will be resolved independently by courts.<sup>328</sup> Even so, the carve-out theory can be seen as a kind of non-delegation canon: courts will not lightly take a statutory grant of rulemaking power to be a grant of authority to resolve major questions. So understood, the doctrine is a “soft” nondelegation canon. It does not say that agencies cannot produce certain substantive outcomes. Instead, it says that whether agencies can produce certain substantive outcomes will be decided by courts, not agencies.

With respect to the second understanding, *Brown & Williamson* can be taken as the leading statement. In that case, the FDA interpreted its governing statute to allow it to exercise authority over tobacco products.<sup>329</sup> The relevant provision—defining “drugs” as “articles (other than food) intended to affect the structure or any function of the body”<sup>330</sup>—seemed to support the FDA’s view or, at worst, to be ambiguous. Under *Chevron*, the FDA’s interpretation appeared to be lawful.

The Court struggled mightily to explain why it was not.<sup>331</sup> In a key passage, it moved back from the particulars:

This is hardly an ordinary case. Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy. In fact, the FDA contends that, were it to determine that tobacco products provide no “reasonable assurance of safety,” it would have the authority to ban cigarettes and smokeless tobacco entirely. Owing to its unique place in American history and society, tobacco has its own unique political history.

. . . .

Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.<sup>332</sup>

The passage is not without ambiguity, but it can be read to suggest that whenever an agency asserts authority to regulate “a significant portion of the American

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327. See *id.* (“‘In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.’ This is one of those cases. The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep ‘economic and political significance’ that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. This is not a case for the IRS.” (citations omitted)).

328. The carve-out theory does not come from anything explicit in the APA. It must be taken as a reading of implicit congressional instructions—of what a reasonable Congress would want courts to do.

329. See 529 U.S. at 125.

330. *Id.* at 126 (citing 21 U.S.C. § 321(g)(1)(c)).

331. See *id.* at 133–59.

332. *Id.* at 159, 160 (citations omitted).

economy,” it will run into trouble unless it can identify a clear, rather than “cryptic,” grant of authority from Congress. The key words are “a decision of such economic and political significance,” understood in the context of the “significant portion of the American economy” language. When a decision of that kind is involved, clear congressional authorization is mandatory. This, then, is a different and harder nondelegation canon. It does not say that courts, rather than agencies, will interpret ambiguous terms. Instead, it announces that ambiguous language cannot be invoked to allow an agency to exercise its authority in a sufficiently major and transformative way.

The Court concretized this understanding of the major questions doctrine in *Utility Air Regulatory Group v. EPA*.<sup>333</sup> The issue was the legality of the EPA’s decision to include greenhouse gases under certain permitting provisions of the Clean Air Act.<sup>334</sup> As in *Brown & Williamson*, the text of the statute seemed to favor the EPA’s interpretation, or at the very least to make it plausible enough to deserve *Chevron* deference.<sup>335</sup> But the Court nonetheless invalidated that interpretation.<sup>336</sup> It did not merely deny the agency deference. In the key passage, it said that the EPA’s interpretation was “unreasonable because it would bring about an enormous and transformative expansion in [the] EPA’s regulatory authority without clear congressional authorization.”<sup>337</sup> Speaking more broadly, it added:

When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast “economic and political significance.”<sup>338</sup>

This idea raises many questions. The line between major and nonmajor questions is not exactly clear and crisp. If the major questions doctrine is limited to cases of “vast economic and political significance,” it will not come into play very often. My point is not to offer a final evaluation of the doctrine, but simply to note that the Court is developing an interpretive canon, one that falls into the same category as several others that limit *Chevron*’s reach, and that is directly responsive to those who are concerned about excessive administrative power and discretion.

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In this Part, I have covered a great deal of ground. Let us not lose the forest for the trees. For those who are concerned about *Chevron*, a degree of domestication makes a great deal of sense. The task is to counteract the risk that agencies will be

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333. 573 U.S. 302 (2014).

334. *See id.* at 307.

335. *See id.* at 331.

336. *See id.* at 333–34.

337. *Id.* at 324.

338. *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

unleashed to move statutes in their preferred directions. Building on existing doctrines, I have emphasized the importance of a firm Step One, a serious barrier to unreasonableness under Step Two, and use of canons of construction of multiple sorts. Limitations of this kind will—and should—remain a work in progress. What is true and best in this year may not be what is true and best ten years hence. But the general goal is clear: to ensure the primacy of congressional instructions, to forbid arbitrariness, and to use time-honored principles—along with some new ones—to cabin the exercise of agency discretion.

#### CONCLUSION

In authoritarian systems, Executive Branch officials can do whatever they like, unconstrained by an independent Judiciary.<sup>339</sup> Whenever courts are unavailable to ensure fidelity to law, the specter of authoritarianism raises its ugly head. For that reason, the continuing debate over *Chevron*'s validity and meaning should be welcomed. The debate is a sign of healthy skepticism about the idea that those who are limited by law are entitled to decide on the meaning of the limitation. As Roscoe Pound wrote long ago, "the exercise of administrative powers" should be "subjected to the law of the land," and officials should not be allowed to exercise their powers "unreasonably and arbitrarily."<sup>340</sup>

*Chevron* is now under serious pressure, above all from those who believe that it amounts to an unjustified transfer of authority from courts to the Executive Branch, in violation of separation-of-powers principles. But if Congress wants agencies to interpret ambiguous statutes, it can grant them that authority (so long as that, and no more, is what it is granting).<sup>341</sup> If Congress wants to deny agencies interpretive authority and require an independent judicial role, it can do that as well. Constitutional objections to the *Chevron* framework are unconvincing. Answers to questions about the lawfulness of that framework depend above all on statutory interpretation. It is emphatically the province of the judicial department to say what the law is, but if Congress so directs, what the law is may depend on what agencies say it is.

In its current form, *Chevron* is based on an understanding that the grant of rule-making or adjudicatory authority implicitly confers the power to interpret ambiguities. That understanding is a legal fiction. At first glance, it appears to be in tension with the text of section 706 of the APA, which seems to contemplate an independent judicial role. But in its context, section 706 leaves uncertainty. To be sure, it would be possible to read the text of section 706 to call for independent

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339. On the relevance of this point to administrative law and *Chevron*, see generally the impassioned discussion in Pound, *The Place of the Judiciary*, *supra* note 15. Consider these words in particular: "But where the statute . . . goes so far as not merely to leave it to the executive to designate the recipient but also to leave interpretation of the provisions and directions of the law to the executive, we certainly have definitely entered upon the path leading to a *lex regia*." *Id.* at 137.

340. See POUND, *ADMINISTRATIVE LAW*, *supra* note 15, at 9.

341. Harder questions would be posed if Congress foreclosed judicial review of agency interpretations of law altogether, or said that agencies, and not courts, are entitled to decide whether there is ambiguity.

judicial interpretation. But as history reveals, it would also be possible to understand the provision to codify preexisting understandings or to authorize courts to develop principles of deference, at least if agencies are held within clear textual bounds. There is also a question about how to handle organic statutes, which might be taken to confer interpretive authority, certainly with respect to questions that call for technical expertise.

Whether or not *Chevron* was right when it was originally decided, the arguments for overruling it are weak. If it were overruled, there would be a degree of chaos, at least in the short run, and an increase in the role of judicial policy preferences, even in the long run. So long as *Chevron* is understood as a response to congressional instructions, it does not offend anything in the Constitution. At the same time, it is both correct and important to insist that it is for judges, not agencies, to decide whether statutes contain ambiguities, and whether they delegate law-interpreting power. Under Step One, courts should continue to insist on their own primacy. Under Step Two, unreasonable interpretations are out of bounds, even if they depend on the policy choices of politically accountable officials. By requiring explicit legislative authorization for certain decisions, some canons of interpretation serve nondelegation functions, and can be taken to reduce the risks fairly emphasized by *Chevron*'s fiercest critics.



APPENDIX: PRESIDENT FRANKLIN DELANO ROOSEVELT'S VETO MESSAGE<sup>342</sup>

To the House of Representatives:

I herewith return, but without my approval, the bill (H.R. 6324) entitled "An Act to Provide for the Expeditious Settlement of Disputes with the United States and for Other Purposes."

The objective of the bill is professedly the assurance of fairness in administrative proceedings. With that objective there will be universal agreement. The promotion of expeditious, orderly, and sensible procedure in the conduct of public affairs is a purpose which commends itself not only to the Congress and the courts, but to the executive departments and administrative agencies themselves.

Cites Improvement

Despite the tremendous growth in the business of administration in recent years, I have observed that there has been a substantial improvement in the standards of administrative action. That does not mean that further improvement is not needed.

I am convinced, however, that in reality the effect of this bill would be to reverse and, to a large extent, cancel one of the most significant and useful trends of the 20th century in legal administration.

That movement has its origin in the recognition even by courts themselves that the conventional processes of the courts are not adapted to handling controversies in the mass. Court procedure is adapted to the intensive investigation of individual controversies. But it is impossible to subject the daily routine of fact-finding in many of our agencies to court procedure. Litigation has become costly beyond the ability of the average person to bear. Its technical rules of procedure are often traps for the unwary and technical rules of evidence often prevent common sense determinations on information which would be regarded as adequate for any business decision. The increasing cost of competent legal advice and the necessity of relying upon lawyers to conduct court proceedings have made all laymen and most lawyers recognize the inappropriateness of entrusting routine processes of government to the outcome of never-ending lawsuits.

Eliminates Legalism

The administrative tribunal or agency has been evolved in order to handle controversies arising under particular statutes. It is characteristic of these tribunals that simple and non-technical hearings take the place of court trials, and informal proceedings supersede rigid and formal pleadings and processes. A common-sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence, and an informed and expert tribunal renders its decisions with an eye that looks forward to results rather than backwards to precedent and to the leading case.

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342. See *Logan-Walter Bill Fails*, 27 A.B.A. J. 52, 52-53 (1941) (providing the full text of Roosevelt's veto message).

Substantial justice remains a higher aim for our civilization than technical legalism.

The administrative tribunal is not a recent innovation. The Interstate Commerce Commission, one of the first of the kind, was created as long ago as 1886. The administrative process and the administrative tribunal were firmly recognized by the courts many years ago. Before the commencement of this administration the Supreme Court, speaking through the present Chief Justice, definitely recognized the usefulness and constitutionality of the administrative tribunal and, speaking of a statute to create such a tribunal, referred to "the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."

Forward-looking judges, experienced administrators, and many progressive and public-spirited lawyers have recognized that American jurisprudence must advance along two lines:

First, the cheapening, expediting, and amplifying of the judicial process itself. This cause has been greatly advanced through the adoption by the Supreme Court of simplified rules governing civil proceedings under an authorization made upon my recommendation. Revision of the rules of criminal practice has now also been authorized, upon my recommendation.

Secondly, the reservation of the judicial process for cases appropriate to its exercise and protection of the courts from being overwhelmed with masses of controversies, growing out of regulatory and remedial statutes. For this purpose the judicial process requires to be supplemented by the administrative tribunal wherever there is a necessity for deciding issues on a quantity production basis.

Notwithstanding recognition of this necessity by many lawyers, jurists, educators, administrators, and the more progressive bar associations, a large part of the legal profession has never reconciled itself to the existence of the administrative tribunal. Many of them prefer the stately ritual of the courts, in which lawyers play all the speaking parts, to the simple procedure of administrative hearings which a client can understand and even participate in. Many of the lawyers prefer that decision be influenced by a shrewd play upon technical rules of evidence in which the lawyers are the only experts, although they always disagree. Many of the lawyers still prefer to distinguish precedent and to juggle leading cases rather than to get down to the merits of the efforts in which their clients are engaged. For years, such lawyers have led a persistent fight against the administrative tribunal.

#### "Interests" Oppose Reform

In addition to the lawyers who see the administrative tribunal encroaching upon their exclusive prerogatives there are powerful interests which are opposed to reforms that can only be made effective through the use of the administrative tribunal. Wherever a continuing series of controversies exist between a powerful

and concentrated interest on one side and a diversified mass of individuals, each of whose separate interests may be small, on the other side, the only means of obtaining equality before the law has been to place the controversy in an administrative tribunal.

Individual shippers could not cope in the courts with great railroad corporations over excessive charges that were small in single cases but important in the aggregate. So the Interstate Commerce Commission was created. Power consumers could not deal with electric light rates, nor could individual security holders pit their strength against the concentrated power of brokerage interests, nor could individual laborers bargain on equality with the concentrated power of employers. The very heart of modern reform administration is the administrative tribunal. A "truth in securities" act without an administrative tribunal to enforce it, or a labor relations act without an administrative tribunal to administer it, or rate regulation without a commission to supervise rates would be sterile and useless. Great interests, therefore, which desire to escape regulation rightly see that if they can strike at the heart of modern reform by sterilizing the administrative tribunal which administers them, they will have effectively destroyed the reform itself.

The bill that is now before me is one of the repeated efforts by a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulations. The effort was made in the recent New York constitutional convention by this same combination of influences to deprive state tribunals of their authority. That effort was wisely rejected by the people at the polls. The effort was continued on a national scale to destroy the administrative tribunals which enforce the nation's important laws. It is from this background that this bill has emerged.

While I could not conscientiously approve any bill which would turn the clock backwards and place the entire functioning of the government at the mercy of never-ending lawsuits and subject all administrative acts and processes to the control of the judiciary, I am of course not unaware that improvement in the administrative process is as much the duty of those concerned with it as the improvement of court procedure ought to be a duty of the legal profession.

Recognizing this, more than a year ago I directed the attorney general to select a committee of eminent lawyers, jurists, scholars, and administrators to review the entire administrative process in the various departments of the executive government and to recommend improvements, including the suggestion of any needed legislation.

#### Awaits Report

For over a year such a committee has been taking up in detail each of the several typical administrative agencies and has been holding prolonged sessions, hearings, inquiries, and discussions. Its task has proved unexpectedly complex. The objective of this committee, however, is not to hamper administrative tribunals but to suggest improvements to make the process more workable and more just and to avoid confusions and uncertainties and litigations. I should desire to

await their report and recommendations before approving any measure in this complicated field. In this thought I believe most Americans will agree. The report and recommendations will be transmitted to the Congress in a few weeks.

Meanwhile, without substantial congressional hearings to consider the problems of the executive departments affected, this bill has been passed and sent to me. This bill has been unanimously condemned by the committee on administrative law and by the committee on federal legislation of one of the oldest and most respected bar associations of America, the Association of the Bar of the City of New York, which, while recognizing the need of improvement in the administrative process, have said:

“Nevertheless, we think that the present bill, under the guise of reform, would force administrative and departmental agencies having a wide variety of functions into a single mold which is so rigid, so needlessly interfering, as to bring about a widespread crippling of the administrative process.”

#### Points Out Delays

Agencies affected, including many whose activities have an important collateral effect on the defense program, have pointed out serious delays and uncertainties which would be caused by the present bill, if enacted.

It appears from the text of the bill that the Congress considered the procedures and delays incident to the procedures provided by the act inappropriate to agencies engaged in national defense functions. It is doubtless due to oversight that important functions performed by the maritime commission, the department of commerce, and the treasury are affected by the bill. Functions as important to our economic defense as foreign funds control in the treasury, where general regulations must be made with utmost promptness, would be subjected to delay for hearing and notice of hearing in advance.

Quite apart from the general philosophy of this bill, its unintentional inclusion of defense functions would require my disapproval at this time.

At my request an analysis of the bill has been prepared by the attorney general and is submitted herewith for the information of the Congress. Apart from a disagreement with the general philosophy of legal rigidity manifest in some provisions of the bill, I am convinced that it would produce the utmost chaos and paralysis in the administration of the government at this critical time. I am convinced that it is an invitation to endless and innumerable controversies at a moment when we can least afford to spend either governmental or private effort in the luxury of litigation.

Today, in sustaining American ideals of justice, an ounce of action is worth more than a pound of argument.

For these reasons I return the bill without my approval.

FRANKLIN D. ROOSEVELT,

The White House,

Dec. 18, 1940.