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## The Constitutional Case for Chevron Deference

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# ESSAY

## The Constitutional Case for *Chevron* Deference

*Jonathan R. Siegel\**

*Prominent figures in the legal world have recently attacked the doctrine of Chevron deference, suggesting that Chevron is unconstitutional because it interferes with a court’s duty to exercise “independent judgment” when interpreting statutes. This Essay shows that Chevron’s critics are mistaken. Chevron deference, properly understood, does not prevent courts from interpreting statutes. An interpretation that concludes that a statute delegates power to an executive agency is still an interpretation. The power implicitly delegated to an agency by an ambiguous statute is not the power to interpret the statute, but the power to make a policy choice within the limits set by the possible meanings of the statute.*

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## INTRODUCTION

An icon of administrative law is under attack. Prominent figures in the legal world are attacking *Chevron*.<sup>1</sup> The critics could hardly have gone after a bigger target. *Chevron* is the most-cited administrative law case of all time.<sup>2</sup> Every law student who has taken a basic course in administrative law is familiar with the principle of “*Chevron* deference,” under which courts must defer to an executive agency’s reasonable

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

2. Peter M. Shane & Christopher J. Walker, *Foreword: Chevron at 30: Looking Back and Looking Forward*, 83 *FORDHAM L. REV.* 475, 475 (2014). According to Westlaw databases, federal courts of appeals have cited *Chevron* nearly five thousand times, as have federal district courts. Law review articles have cited the case more than eight thousand times. The Supreme Court itself has cited *Chevron* more than two hundred times. See also Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 *GEO. WASH. L. REV.* 2225, 2227 (1997) (calling *Chevron* “one of the most important constitutional decisions in history”).

interpretation of an ambiguous provision of a statute the agency administers.<sup>3</sup>

The current attack on *Chevron* does not merely suggest that courts should limit the case's application. It is true that the Supreme Court has recently limited *Chevron* in various ways—it has, for example, limited the kinds of agency pronouncements that are entitled to deference,<sup>4</sup> and it has declared that some matters are so momentous that *Chevron* does not apply to them.<sup>5</sup> But the latest attack goes far beyond that. The latest claim is that the very concept of *Chevron* deference is unconstitutional. Judges, legislators, and scholars have suggested that the Constitution imposes a duty on courts to exercise “independent judgment” when interpreting a statute.<sup>6</sup> This duty, *Chevron*'s critics say, derives from Article III's vesting of the “judicial Power” in the courts, and it forbids courts from deferring to an agency's interpretation.<sup>7</sup>

This argument has been advanced at the highest levels of the judiciary. Supreme Court Justice Clarence Thomas made the argument in two recent cases.<sup>8</sup> He asserted that the judicial power “requires a court to exercise its independent judgment in interpreting and expounding upon the laws,” and that “*Chevron* deference precludes judges from exercising that judgment.”<sup>9</sup> Justice Neil Gorsuch made the same argument during his time as a federal appellate judge. In a concurring opinion, then-Judge Gorsuch stated that “under *Chevron*, . . . courts are not fulfilling their duty to interpret the law.”<sup>10</sup> This duty, he asserted, is “likely compelled by the Constitution itself.”<sup>11</sup> Gorsuch was, of course, recently elevated to the Supreme Court,<sup>12</sup> so now there are *two* Supreme Court Justices who have suggested that *Chevron* is unconstitutional.

Members of Congress have made similar arguments. In the 114th Congress, the House of Representatives passed the “Separation

3. *Chevron*, 467 U.S. at 842–45.

4. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

5. *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

6. *See infra* notes 8–23 and accompanying text.

7. *See infra* notes 8–23 and accompanying text.

8. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217, 1219, 1224 (2015) (Thomas, J., concurring).

9. *Michigan*, 135 S. Ct. at 2712.

10. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring).

11. *Id.*

12. Julie Hirschfeld Davis, *Neil Gorsuch Is Sworn in as Supreme Court Justice*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/us/politics/neil-gorsuch-supreme-court.html> [<https://perma.cc/RQ9B-AEA4>].

of Powers Restoration Act” (“SOPRA”),<sup>13</sup> which, if enacted, would have overruled *Chevron* statutorily. SOPRA would have required courts reviewing agency actions to decide all questions of law de novo.<sup>14</sup> The House Report accompanying the bill suggested that *Chevron* is inconsistent with the principle of *Marbury v. Madison* that “[i]t is emphatically the province and duty of the Judicial Department to say what the law is.”<sup>15</sup> The Report also states that *Chevron* “is difficult, if not impossible, to square with the Framers’ intent in the Constitution to create a government of definite, limited, and separated powers.”<sup>16</sup> SOPRA did not become law in the 114th Congress, but it has been reintroduced in the 115th Congress,<sup>17</sup> and it has once again passed the House.<sup>18</sup>

Finally, scholars have also chimed in. Most notably, Professor Philip Hamburger of Columbia Law School has argued that *Chevron* deference is unconstitutional.<sup>19</sup> Like the other authorities cited above, Hamburger argues that *Chevron* unconstitutionally prevents judges from fulfilling their duty to exercise independent judgment when interpreting statutes.<sup>20</sup> He also asserts that *Chevron* deference violates the Constitution’s Due Process Clause by requiring judges to exercise

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13. H.R. 4768, 114th Cong. (2016).

14. *Id.* § 2(3).

15. H.R. REP. NO. 114-622, at 4 (2016).

16. *Id.* at 5.

17. H.R. 76, 115th Cong. (2017).

18. In the 115th Congress, SOPRA passed the House as Title II of the Regulatory Accountability Act of 2017. See H.R. 5, 115th Cong. (2017). There appears to have been no House committee report accompanying the bill in the 115th Congress.

19. Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016). Professor Hamburger’s work is the leading academic exposition of the current constitutional attack on *Chevron*. See also Charles J. Cooper, *The Flaws of Chevron Deference*, 21 TEX. REV. L. & POL’Y 307, 310–11 (2016) (“*Chevron* is an impermissible abdication of judicial duty.”); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative State*, 10 N.Y.U. J.L. & LIBERTY 475, 497–507 (2016) (attacking *Chevron* as contrary to the Administrative Procedure Act, asserting that an attempt by Congress to enact *Chevron* doctrine by statute would raise “a serious constitutional question,” and stating that *Chevron*’s “wholesale transfer of legal interpretation from courts to agencies” violates “the most basic notion of judicial review that it is the province of the courts to say what the law is”); cf. Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 823–24 (2011) (noting that *Chevron* deference is sometimes justified on the theory that ambiguous statutes represent a delegation of lawmaking power to agencies, but questioning whether this theory can justify judicial deference to executive interpretation of treaties and statutes in foreign relations law); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2131 (2002) (briefly suggesting that “*Chevron* may well be wrongly decided as a matter of constitutional law. Perhaps . . . de novo judicial review of federal questions is constitutionally required, so *Chevron* deference would be impermissible even if Congress explicitly enacted it”). For an analysis that puts the constitutional attack on *Chevron* in the context of the broader attack currently being made against the whole administrative state, see Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 24–28, 31–33, 39–42 (2017).

20. Hamburger, *supra* note 19, at 1209–10.

systematically biased judgment in favor of the government.<sup>21</sup> *Chevron*, Hamburger concludes, involves such “clear violations of Article III and the Fifth Amendment”<sup>22</sup> that judges who want to follow the decision should resign.<sup>23</sup>

Thus, powerful figures in the legal world have suggested that a fundamental principle of administrative law is not merely incorrect but in fact violates the Constitution. These suggestions demand a response. This Essay makes the case for the constitutionality of *Chevron* deference.

The first step of the argument was made long ago—indeed, before *Chevron* itself. In his classic article, *Marbury and the Administrative State*,<sup>24</sup> Professor Henry Monaghan made the key observation that ambiguity in a statute entrusted to an administrative agency for enforcement is best understood as a delegation of power to the agency.<sup>25</sup> A year later, *Chevron* endorsed this concept by holding that an ambiguous provision in an agency statute should be deemed to constitute an implicit delegation of power to the agency to fill the gap left by Congress.<sup>26</sup> Thus, the most basic reason why agencies should have the power to resolve ambiguities in provisions of statutes they administer is that Congress should be understood to have delegated this power to agencies.

This observation, however, does not end the debate. Fully aware of this argument, *Chevron*'s critics deny it. According to the critics, the Constitution vests courts with the power and duty “to say what the law is,” and no one, not even Congress, can transfer this power from the judiciary to the executive.<sup>27</sup> Thus, even if Congress were to enact *Chevron* as an express, statutorily mandated rule of statutory construction, it would, the critics say, be unconstitutional and ineffective.

This Essay argues that *Chevron*'s critics have misunderstood the limits of the judicial and legislative roles in the interpretation of statutes. Four points are key: First, even fully accepting the critics' suggestion that courts must exercise independent judgment when construing a statute, sometimes the best construction of a statute is

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21. *Id.* at 1211.

22. *Id.* at 1242.

23. *Id.* at 1248–49.

24. Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

25. *Id.* at 26; see *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–73 (2001) (noting that Congress may not delegate legislative power to an agency but may delegate “decisionmaking authority”).

26. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

27. *E.g.*, Hamburger, *supra* note 19, at 1235.

that the statute vests discretion in the executive. Under this view, when a court interprets an administrative statute, finds it to be ambiguous, and defers to an agency's reasonable construction of the statute, the court is fully exercising its power and duty to interpret the statute; it is simply doing so using a rule of statutory interpretation under which the correct interpretation of an ambiguity in an administrative statute is as an additional delegation of authority to the agency. In such a case, a court properly performs the judicial function by recognizing the discretion conferred by the statute. An interpretation that determines that a statute delegates power to the executive is still an interpretation.<sup>28</sup>

Second, the first point does require a conceptual shift in the understanding of the *kind* of discretion conferred on an administrative agency by an ambiguous statute. It is often said—perhaps even in *Chevron* itself—that courts must treat an ambiguous agency statute as an implicit delegation to the agency of the power to *interpret* the statute.<sup>29</sup> This understanding opens *Chevron* deference to the critique described above. To address the critique, courts must understand ambiguity in an agency statute a little differently. Courts should not infer that Congress has delegated the interpretive power to agencies. But where an agency statute is ambiguous, the court is to interpret the statute as creating a menu of permissible actions and delegating to the agency the power to choose among them.<sup>30</sup>

Third, a different route to the same conclusion as the first two points is to recognize that policymaking power conferred by statutory ambiguity is no different than policymaking power conferred by express statutory language, which even the critics accept as permissible insofar as Article III is concerned. Congress expressly vests policymaking discretion in agencies all the time.<sup>31</sup>

Finally, once these points are agreed, the only remaining difficulty is determining when a statute is best understood as conferring discretion on the executive. This is where the final point comes in: Congress may prescribe rules of interpretation for the statutes it passes. Like any giver of instructions, Congress may say how its instructions are to be understood. Congress could, therefore, provide that an ambiguous instruction to an agency is to be understood as

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28. See *infra* Section II.C.1.

29. See *infra* notes 160–162 and accompanying text.

30. See *infra* Section II.C.2.

31. See *infra* Section II.E.

vesting discretion in the agency to choose among the reasonably permissible interpretations of the instruction.<sup>32</sup>

Part I of this Essay explains the *Chevron* deference principle and recounts the debate over it. Part II provides the response to *Chevron*'s critics.

## I. *CHEVRON* AND ITS CRITICS

*Chevron* is so familiar that only a brief recital of its key points is necessary. This Part provides this brief background and then explains the critiques of *Chevron* that important figures have recently advanced.

### A. *The Principle of Chevron Deference*

Courts reviewing actions by federal administrative agencies have long faced the question of what consideration to give to the agencies' own interpretations of the statutes they administer. By necessity, agencies must interpret these statutes.<sup>33</sup> The statutes tell the agencies what to do, so the agencies must interpret them to know what to do. Justiciability and administrative law principles normally ensure that a court will have an opportunity to encounter such a statute only after the agency has taken some action under it.<sup>34</sup> Thus, by the time a court has occasion to construe a statute administered by a federal agency, the agency itself will typically have given some construction to the statute.

For a long time, going back at least to the nineteenth century, federal courts gave "respectful consideration" or "great respect" to an agency's contemporaneous construction of a statute that the agency administered.<sup>35</sup> An agency's construction was, however, "not controlling."<sup>36</sup> Final interpretive power rested with the courts, because "the judicial department has imposed upon it by the constitution, the solemn duty to interpret the laws, in the last resort; and . . . where [a

32. See *infra* Section II.E.

33. Monaghan, *supra* note 24, at 5.

34. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (holding that federal courts cannot give advisory opinions); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938) ("[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.")

35. E.g., *Smythe v. Fiske*, 90 U.S. (23 Wall.) 374, 382 (1874); *United States v. Dickson*, 40 U.S. (15 Pet.) 141, 161 (1841). As early as 1827, the Supreme Court said, "In the construction of a doubtful and ambiguous law, the cotemporaneous 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," *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827), although that case concerned the construction of a *state* statute by commissioners appointed to administer it.

36. *Smythe*, 90 U.S. at 382.



court's] judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive [that duty]."<sup>37</sup> Thus, where a court's interpretation of a statute differed from that of the agency that administered the statute in the first instance, the court was empowered to enforce its own interpretation.

Over the course of the twentieth century, the question of the degree of respect to be given by courts to an agency's interpretation of a statute "produced a large number of statutory interpretation opinions that defy easy reconciliation."<sup>38</sup> Sometimes the Supreme Court stated that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong."<sup>39</sup> In other cases the Court said that the amount of deference a court should give to an agency's interpretation of a statute "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."<sup>40</sup> But as late as 1983—just a year before *Chevron*—the Court reiterated the view that an agency's interpretation, though entitled to respect, was not controlling.<sup>41</sup>

*Chevron* changed this rule. In *Chevron*, the Supreme Court held that when a court reviews a federal agency's interpretation of a statute administered by the agency, the court must follow a two-step process. First, in "*Chevron* Step One," the court must ask whether Congress has by statute clearly and directly addressed the precise question at issue. If so, both the court and the agency are bound by Congress's clear statutory instructions.<sup>42</sup> If, however, the governing statute is "silent or ambiguous" as to the specific question at issue, the court, applying "*Chevron* Step Two," asks only whether the agency's construction of the statute is "permissible."<sup>43</sup> In such a case, the reviewing court must uphold the agency's construction provided it is a reasonable

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37. *Dickson*, 40 U.S. at 162; *see also* *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840) ("If a suit should come before [this Court] which involved the construction of any of these laws . . . the Court certainly would not be bound to adopt the construction given by the head of a department.").

38. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453 (1989).

39. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 (1969).

40. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

41. *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers' Comp. Programs*, 461 U.S. 624, 635 (1983).

42. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). *Chevron* did not use the terms "Step One" and "Step Two." Those terms later became common through use by lower courts and commentators. *See, e.g.*, *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 441 (D.C. Cir. 1989).

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

interpretation of the statute, even if it is not what the court regards as the *best* interpretation.<sup>44</sup> The statutory ambiguity is to be regarded as an implicit delegation to the agency of the power to “elucidate” the statute.<sup>45</sup>

Thus was born the doctrine of “*Chevron* deference.” The doctrine has many nuances that the Supreme Court elaborated in subsequent cases. For example, the Court has considered (and sometimes changed its mind about) issues such as whether judicial deference varies depending on whether the agency has maintained a consistent interpretation or has changed its interpretation over time,<sup>46</sup> and how the deference principle operates when an agency’s interpretation of a statute differs from a prior judicial interpretation.<sup>47</sup> The Court has also determined that *Chevron* deference does not apply to *every* agency interpretation of a statute the agency administers. The structure of deference, the Court has held, varies depending on the process the agency used to come up with its interpretation.<sup>48</sup> In addition, the Court has determined that some matters are so momentous that the principle of *Chevron* deference does not apply to them, because the principle is grounded in the assumption that statutory ambiguity represents an implicit delegation of power to an agency, and some matters are so important that a court could not believe that Congress delegated them to an agency for decision.<sup>49</sup> These determinations that the structure of

44. *Id.* at 843 n.11, 844.

45. *Id.* at 844.

46. *Compare* Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (“Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.”), *with* Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993) (“[T]he consistency of an agency’s position is a factor in assessing the weight that position is due.”). *Cf.* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125–26 (2016) (declining to defer to an agency’s changed position because the agency had not adequately explained the reason for the change).

47. *Compare* *Brand X*, 545 U.S. at 982 (“A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”), *with* *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536–37 (1992) (“Once we have determined a statute’s clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency’s later interpretation of the statute against our prior determination of the statute’s meaning.” (quoting *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990))).

48. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (noting that *Chevron* deference applies only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority”).

49. *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Some scholars have understood decisions discussed in this paragraph as signaling a more general judicial concern about the administrative state. *E.g.*, Metzger, *supra* note 19, at 28 (stating that *King* and other decisions “contribute to the sense of a

*Chevron* deference does not always apply have given rise to what is sometimes called “*Chevron* Step Zero,” an initial step in which a court must determine whether the other two steps apply.<sup>50</sup>

*Chevron* has also spawned an enormous scholarly literature that has investigated innumerable aspects of the decision. Scholars have, for example, debated whether *Chevron* actually changed the way courts review agency statutory interpretation,<sup>51</sup> investigated the Step Zero question of when *Chevron* applies,<sup>52</sup> and studied *Chevron*’s impact empirically.<sup>53</sup>

But for purposes of this Essay, these many nuances and subsidiary issues are of no consequence. *Chevron*’s current critics do not challenge mere details of the doctrine. They challenge its fundamental essence. The critics assert that the very concept of *Chevron* deference is unconstitutional. They claim that where a court’s best understanding of a statute, based on the court’s independent judgment, differs from the construction placed on the statute by an administrative agency, the Constitution requires the court to enforce its own interpretation and prohibits it from deferring to the agency’s, even if the agency’s construction is a “permissible” or “reasonable” interpretation of the statute.

### B. *Chevron* Attacked

As noted in the Introduction, *Chevron*’s critics include extremely important figures in the legal world. Supreme Court Justices, members

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growing judicial resistance to administrative governance and judicial concern over the constitutional legitimacy of the administrative state”).

50. See, e.g., *Or. Rest. & Lodging Ass’n v. Perez*, 816 F.3d 1080, 1086 n.3 (9th Cir. 2016) (discussing “*Chevron* step zero”); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836 (2001) (introducing discussion of “*Chevron* step zero” doctrine); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

51. Compare Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT. L. REV. 1253, 1257–58 (1997) (“[E]xperience has not borne out the early predictions of a sea change in judicial deference. A strong revisionist view has emerged, interpreting *Chevron* as less deferential than many initially assumed.”), and Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 93 (2011) (“There is no empirical support for the widespread belief that choice of doctrine plays a major role in judicial review of agency actions.”), with Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 284 (1986) (“*Chevron* has quickly become a decision of great importance . . .”).

52. E.g., Merrill & Hickman, *supra* note 50.

53. E.g., Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010).

of Congress, and noted scholars have all joined in. For the purposes of this Essay, the members of this group will be dubbed “the critics.”

### 1. Justice Thomas

Justice Thomas laid the groundwork for his attack on *Chevron* in the case of *Perez v. Mortgage Bankers Ass’n*.<sup>54</sup> The case was not actually about *Chevron* deference; it concerned interpretation of agency rules, whereas *Chevron* is about interpretation of statutes.<sup>55</sup> Nonetheless, Justice Thomas’s lengthy concurring opinion, which expressed concern about “protecting the structure of the Constitution,”<sup>56</sup> explored some themes related to the *Chevron* debate. In particular, Justice Thomas noted that under the *Seminole Rock* doctrine, courts give deference to an agency’s interpretation of one of its own rules, provided the interpretation is not plainly erroneous or inconsistent with the rule it interprets.<sup>57</sup> Justice Thomas expressed concern about the way the Court’s “steady march toward deference” risked “compromising our constitutional structure.”<sup>58</sup>

The Framers, Justice Thomas explained, relied on separation of powers to secure liberty.<sup>59</sup> The Framers assigned the legislative, executive, and judicial powers to separate bodies designed to act as checks upon each other.<sup>60</sup> Judicial deference to an agency’s interpretation of the agency’s own regulations, Justice Thomas said, “amounts to an erosion of the judicial obligation to serve as a ‘check’ on the political branches.”<sup>61</sup>

54. 135 S. Ct. 1199, 1213–25 (2015) (Thomas, J., concurring in the judgment). The attack goes back earlier than that, but *Perez* brought it into the limelight.

55. The main point of *Perez* was the “*Paralyzed Veterans* doctrine,” a creation of the United States Court of Appeals for the District of Columbia Circuit. See *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 583 (D.C. Cir. 1997) (“This case involves just the proper interpretation of the regulation.”). Under this doctrine, an agency desiring to interpret one of its own legislative rules could issue an initial “interpretive” rule without using notice-and-comment rulemaking, but once the agency had done so, it had to use notice and comment to issue any subsequent interpretive rule changing its initial interpretation. *Id.* at 586; see also *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1033–34 (D.C. Cir. 1999) (citing the *Paralyzed Veterans* doctrine with approval). In *Perez*, the Supreme Court rejected the *Paralyzed Veterans* doctrine. It held that the doctrine was incompatible with the Administrative Procedure Act’s exemption of interpretive rules from the notice-and-comment process. *Perez*, 135 S. Ct. at 1206–07.

56. *Perez*, 135 S. Ct. at 1215 (Thomas, J., concurring in the judgment).

57. *Id.* at 1213; see *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417 (1945) (relying on agency’s interpretation of its regulation).

58. *Perez*, 135 S. Ct. at 1214–15.

59. *Id.* at 1216.

60. *Id.*

61. *Id.* at 1217.

The Constitution's assignment of the judicial power to the courts, Justice Thomas argued, "requires a court to exercise its *independent judgment* in interpreting and expounding upon the laws."<sup>62</sup> The Framers knew that laws would often be ambiguous, and "[t]he judicial power was understood to include the power to resolve these ambiguities over time."<sup>63</sup> The Constitution insulates judges from pressures that might bias them so as to protect the courts' ability to exercise independent judgment.<sup>64</sup> The judiciary, Justice Thomas concluded, "is duty bound to exercise independent judgment in applying the law."<sup>65</sup>

For these reasons, Justice Thomas criticized *Seminole Rock* deference.<sup>66</sup> Such deference, he argued, "amounts to a transfer of the judge's exercise of interpretive judgment to the agency."<sup>67</sup> Deference also "undermines the judicial 'check' on the political branches."<sup>68</sup> Not even Congress, Justice Thomas asserted, could empower agencies to interpret their own regulations and require courts to defer to their interpretations, because the Constitution assigns the power to issue judicially binding interpretations of law to the courts, not to Congress. "Lacking the power itself, [Congress] cannot delegate that power to an agency."<sup>69</sup>

Justice Thomas had no occasion in *Perez* to consider the appropriateness of *Chevron* deference, as opposed to *Seminole Rock* deference. But the occasion soon arose. Three months after *Perez*, the Supreme Court decided *Michigan v. EPA*,<sup>70</sup> in which the Court applied *Chevron* in the course of striking down an EPA rule.<sup>71</sup> Justice Thomas again wrote a concurring opinion. Applying the principles he had laid out in *Perez*, he questioned the constitutionality of *Chevron* deference.<sup>72</sup>

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62. *Id.* (emphasis added).

63. *Id.*

64. *Id.* at 1217–19.

65. *Id.* at 1219.

66. *Id.* at 1217–25.

67. *Id.* at 1219.

68. *Id.* at 1220.

69. *Id.* at 1224.

70. 135 S. Ct. 2699 (2015).

71. *Michigan* concerned the EPA's interpretation of a statutory requirement that it regulate certain emissions from power plants only if doing so was "appropriate and necessary." *Id.* at 2704. The EPA decided that it could determine whether regulating the emissions was "appropriate and necessary" without considering regulatory costs. *Id.* at 2705–06. The Supreme Court rejected the EPA's interpretation of "appropriate and necessary." *Id.* at 2711–12. The Court held that, even applying the principle of *Chevron* deference, the agency's decision was not "within the bounds of reasonable interpretation." *Id.* at 2706–07, 2712 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014)).

72. *Id.* at 2712 (Thomas, J., concurring).

He reiterated that the Constitution’s assignment of the judicial power to the courts requires courts to exercise “independent judgment” when interpreting the laws.<sup>73</sup> *Chevron* deference, he noted, precludes courts from doing so. Therefore, *Chevron* deference transfers the judicial power to “say what the law is” from the judiciary to the executive—a transfer that, Justice Thomas argued, is “in tension with” the Vesting Clause of Article III.<sup>74</sup>

Justice Thomas acknowledged that the Article III problem might be ameliorated by regarding an agency’s act of interpreting a statute it administers as “formulation of policy” rather than as “interpretation.”<sup>75</sup> However, Justice Thomas argued, conceiving the agency’s action that way merely trades one constitutional problem for another. Although it might solve the Article III problem, it creates an Article I problem, for Article I vests Congress, not the executive, with the legislative power.<sup>76</sup> Either way, Justice Thomas concluded, the Court has strayed “further and further from the Constitution.”<sup>77</sup>

Thus, Justice Thomas has strongly criticized *Chevron* deference, suggesting that the doctrine is not merely erroneous but unconstitutional. Justice Thomas’s views regarding *Chevron* are in keeping with his role as the Justice most willing to question whether fundamental, long-standing doctrines are in keeping with originalist constitutional principles.<sup>78</sup> Moreover, with regard to *Chevron*, Justice Thomas has important allies, starting with his newest colleague, Justice Gorsuch.

73. *Id.*

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

75. *Id.* at 2712–13.

76. *Id.* at 2713.

77. *Id.* at 2714.

78. For example, in a landmark case about the meaning of the Constitution’s Commerce Clause, Justice Thomas wrote a solo concurrence expressing interest in reviving the purported original understanding of the distinction between “commerce” and manufacturing, mining, and agriculture. *United States v. Lopez*, 514 U.S. 549, 584–88, 598 (1995) (Thomas, J., concurring). Justice Thomas stated that the Court should reconsider the Commerce Clause “without totally rejecting our more recent Commerce Clause jurisprudence,” thus making unclear how far he would go in this direction. *Id.* at 585. However, his suggestion, if adopted, could call into question the constitutionality of an enormous portion of the federal government’s business. Similarly, he has long been the Justice most willing to suggest the need for significantly strengthening the nondelegation doctrine. *E.g.*, *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (solo concurrence) (“On a future day . . . I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.”). Again, this view, if adopted, could have enormous impact on the constitutionality of much of the federal government’s operations.

## 2. Justice Gorsuch

Justice Gorsuch expressed his views on *Chevron* when he was a judge on the U.S. Court of Appeals for the Tenth Circuit, in the case of *Gutierrez-Brizuela v. Lynch*.<sup>79</sup> The case concerned an immigration law issue, the precise details of which are unimportant here, and the administrative law principle of *Brand X*, which allows an agency to “overrule” a judicial opinion by issuing a new, reasonable interpretation of a statute it administers, even if that interpretation differs from a prior judicial interpretation.<sup>80</sup> Justice Gorsuch’s opinion for the court addressed the *Brand X* issues raised by the case.<sup>81</sup>

Justice Gorsuch then took the unusual step of writing a concurrence to his own opinion.<sup>82</sup> Like Justice Thomas’s opinions in *Perez* and *Michigan*, Justice Gorsuch’s concurrence raised larger questions about the impact of deference doctrines on the separation of powers. *Chevron* and *Brand X*, Justice Gorsuch complained, “permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”<sup>83</sup> Reaching back to the foundational case of *Marbury v. Madison*, Justice Gorsuch pointed out that under that case, resolution of questions of private legal rights is a *judicial* function.<sup>84</sup> *Chevron*, he said, “seems no less than a judge-made doctrine for the abdication of the judicial duty.”<sup>85</sup>

Justice Gorsuch did not quote *Marbury*’s famous statement that “[i]t is emphatically the province and duty of the judicial department to say what the law is,”<sup>86</sup> but he alluded to it implicitly. Under *Chevron*, he observed, courts decide whether an agency statute is ambiguous and whether the agency’s interpretation is reasonable.<sup>87</sup> But, he plaintively

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79. 834 F.3d 1142 (10th Cir. 2016). For simplicity, and to avoid constant repetition of the awkward phrase “then-Judge Gorsuch,” Justice Gorsuch is referred to as “Justice Gorsuch” in the description of this case, even though he was an appellate judge at the time.

80. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 982–84 (2005).

81. *Gutierrez-Brizuela* asked whether, when an agency issues a new interpretation of a statute that contradicts a prior judicial interpretation, the agency may apply its new interpretation retroactively to transactions that occurred when the contrary judicial interpretation apparently controlled. 834 F.3d at 1143–44. Justice Gorsuch, writing for the court, expressed some distaste for *Brand X*, *see id.* at 1143 (suggesting that the doctrine is out of step with “our constitutional history”), but determined that even accepting it, retroactive application of the new agency interpretation was not permitted. *Id.* at 1148.

82. *Id.* at 1149–58 (Gorsuch, J., concurring).

83. *Id.* at 1149.

84. *Id.* at 1151 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 167 (1803)).

85. *Id.* at 1152.

86. *Marbury*, 5 U.S. at 177.

87. *Gutierrez-Brizuela*, 834 F.3d at 1152.

asked, “where in all this does a court *interpret* the law and say what it *is*?”<sup>88</sup>

Thus, like Justice Thomas, Justice Gorsuch regarded *Chevron* deference as incompatible with the Article III duty of courts to interpret the law. Also like Justice Thomas, Justice Gorsuch argued that although the Article III problem might be ameliorated by positing that when an agency gives content to an ambiguous statute, it is not “interpreting” the statute but rather exercising delegated power to make policy, such a solution raises a delegation problem. So regarded, *Chevron* might not violate Article III, but it would likely violate Article I.<sup>89</sup>

Justice Gorsuch’s views were already of some interest when he expressed them as a Tenth Circuit judge. But now that he is a Supreme Court Justice, that interest is greatly increased. *Two* Supreme Court Justices have now questioned one of the cornerstones of administrative law.

### 3. Congress

The attacks on *Chevron* are not coming solely from the judiciary. Some members of Congress share the view that *Chevron* deference is illegitimate. These members are trying to overturn *Chevron* statutorily by passing SOPRA, the Separation of Powers Restoration Act. This bill, which passed the House of Representatives in both the 114th and 115th Congresses,<sup>90</sup> would amend § 706 of the Administrative Procedure Act. Currently, that section simply provides that a reviewing court “shall decide all relevant questions of law [and] interpret constitutional and statutory provisions.” Under the proposed amendment, the section would more elaborately provide:

The reviewing court shall . . . decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies. If the reviewing court determines that a statutory or regulatory provision relevant to its

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88. *Id.*

89. *Id.* at 1152–56.

90. *See supra* notes 13–18 and accompanying text. SOPRA passed the House on votes that ran almost completely along party lines. *See* 162 CONG. REC. H4694–95 (daily ed. July 12, 2016); *Final Vote Results for Roll Call 416*, HOUSE CLERK (vote recorded July 12, 2016, 4:30 PM), <http://clerk.house.gov/evs/2016/roll416.xml> [<https://perma.cc/BRR4-G8R8>] (showing that SOPRA passed the House in the 114th Congress with 239 Republican and 1 Democratic vote in favor, and 171 Democratic votes against); 163 CONG. REC. H371–72 (daily ed. Jan. 11, 2017); *Final Vote Results for Roll Call 45*, HOUSE CLERK (vote recorded Jan. 11, 2017, 6:46 PM), <http://clerk.house.gov/evs/2017/roll045.xml> [<https://perma.cc/9TC7-YN7E>] (showing that the bill of which SOPRA was a part passed the House in the 115th Congress with 233 Republican and 5 Democratic votes in favor, and 183 Democratic votes against). This suggests that SOPRA has not become law because it lacks the votes to overcome a Democratic filibuster in the Senate.



decision contains a gap or ambiguity, the court shall not interpret that gap or ambiguity as an implicit delegation to the agency of legislative rule making authority and shall not rely on such gap or ambiguity as a justification either for interpreting agency authority expansively or for deferring to the agency's interpretation on the question of law.<sup>91</sup>

Thus, under the proposed amendment, § 706 would make clear that a reviewing court must interpret statutes de novo and must not give deference to agency interpretations.

The stated motivation behind SOPRA echoes the opinions of Justices Thomas and Gorsuch described above. The House Report on SOPRA in the 114th Congress suggested that *Chevron* deference is inconsistent with the judicial duty, declared in *Marbury v. Madison*, to “say what the law is.”<sup>92</sup> The idea that an ambiguity in an agency statute represents an implicit delegation to the agency of power to determine what the ambiguous terms mean is, the report said, “difficult, if not impossible, to square with” the separation of powers,<sup>93</sup> for if the Constitution assigns the interpretive power to the judicial branch, then Congress cannot reassign that power to the executive branch.<sup>94</sup>

#### 4. Scholars

Finally, scholars have weighed in on the debate over *Chevron*'s constitutionality.<sup>95</sup> Most notably, Professor Philip Hamburger of Columbia recently published an article strongly attacking *Chevron*.<sup>96</sup> Hamburger's administrative law work is central to the debate and, indeed, was a precursor to the judicial criticisms of *Chevron* discussed above. Both Justice Thomas and Justice Gorsuch relied on Hamburger's earlier work in their opinions questioning *Chevron* deference.<sup>97</sup>

Hamburger asserts that *Chevron* deference is unconstitutional for two reasons. First, like the Justices discussed above, Hamburger argues that *Chevron* deference is incompatible with the judicial duty, imposed by Article III of the Constitution, to exercise independent judgment when addressing questions of law.<sup>98</sup> Hamburger relies heavily on the view that judges hold an “office,” specifically, “an office

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91. H.R. 5, 115th Cong. § 202 (2017) (engrossed in House, Jan. 11, 2017).

92. H.R. REP. NO. 114-622, at 4 (2016).

93. *Id.* at 4–5.

94. *Id.* at 5.

95. See *supra* note 19 and accompanying text.

96. Hamburger, *supra* note 19.

97. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1218 (2015) (Thomas, J., concurring) (citing PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 507, 508 (2008)); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (citing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 287–91 (2014)). The opinions cited Professor Hamburger's books, not the more recent article discussed here.

98. Hamburger, *supra* note 19, at 1206–1210.

of judgment, in which they must exercise their own independent judgment.”<sup>99</sup> According to Hamburger, “the office or duty of a judge to exercise his independent judgment was the very identity of a judge,” and a judge “therefore cannot defer to the judgment of an administrative agency without abandoning his office as a judge.”<sup>100</sup> The conventional notion that Congress delegates interpretive authority to administrative agencies is, Hamburger asserts, irrelevant. Even if Congress has delegated such authority to agencies, the delegation is ineffective, because Congress cannot displace a judge’s constitutional duty to exercise independent judgment.<sup>101</sup>

Hamburger’s other argument is that *Chevron*’s requirement that courts defer to agency interpretations of statutes they administer necessarily produces “systematically biased judgment.”<sup>102</sup> Agencies are often (though not always) parties in cases in which their interpretations are judicially reviewed, and in such cases *Chevron* requires courts to defer to the views of a party to the case before them.<sup>103</sup> We would, Hamburger observes, ordinarily regard judicial deference to a party as outrageous.<sup>104</sup> The bias produced by *Chevron* is no different, Hamburger argues, and it constitutes a “brazen violation” of the Fifth Amendment’s Due Process Clause.<sup>105</sup>

For these reasons, Hamburger argues that *Chevron* deference is unconstitutional. Hamburger, indeed, concludes that *Chevron* deference is “one of the most dramatic departures from the ideals of judicial office and due process in the history of the common law,”<sup>106</sup> and that if judges “do not want to exercise their own independent judgment, but instead want to exercise systematic bias, they should resign.”<sup>107</sup> This prescription would likely require a very substantial number of inferior federal judges to resign, but in Hamburger’s view the “most basic requirements” of judging include “avoid[ing] systematic bias” and “exercis[ing] . . . independent judgment,” and judges “unwilling to

99. *Id.* at 1206.

100. *Id.* at 1209.

101. *See id.* at 1213; *cf.* Ginsburg & Menashi, *supra* note 19, at 499, 507 (recognizing that a statute mandating a court to accede to the interpretation of an agency rather than its own independent judgment “would be controversial, to say the least”); Rosenkranz, *supra* note 19, at 2131 (contemplating that “perhaps de novo judicial review of federal questions is constitutionally required, so *Chevron* deference would be impermissible even if Congress explicitly enacted it”).

102. Hamburger, *supra* note 19, at 1211.

103. *Id.* at 1211–12.

104. *Id.* at 1212.

105. *Id.* at 1212–13.

106. *Id.* at 1247.

107. *Id.* at 1248.

adhere” to these requirements “have no business pretending to be judges and should get off the bench.”<sup>108</sup>

Among academics, the other leading challenge to *Chevron*'s constitutionality is a much earlier work by Professor Cynthia Farina of Cornell.<sup>109</sup> Unlike the current critics, Farina does not see *Chevron* deference as a violation of Article III. She suggests instead that *Chevron* threatens to violate the nondelegation doctrine, although her point is somewhat different from that of the current critics. The essence of Farina's argument is that in *Chevron* the Supreme Court failed to consider whether the assumption that every ambiguity in an agency statute constitutes an implicit delegation of power to the agency would contribute to the ever-increasing accumulation of power in the president in a way that threatens the balance of powers among the three branches of government. Farina observes that the nondelegation doctrine was originally understood to prohibit any delegation of the legislative power. In early cases, apparent delegations were approved on the basis that they delegated “nonlegislative” power such as the power to find the facts from which statutory consequences flowed.<sup>110</sup> Over time, however, the Supreme Court began to approve delegations on the different basis that delegation of legislative power is permitted provided Congress lays down the “intelligible principle” by which the power is to be exercised,<sup>111</sup> and ultimately the test became whether the statutory standards were sufficiently precise that a court could say whether they were being obeyed.<sup>112</sup>

Thus, Farina says, the Court permitted legislative power to be statutorily delegated so long as it would be adequately controlled, and a “crucial aspect” of such control “was judicial policing of the terms of the statute.”<sup>113</sup> As Farina sees it, nondelegation cases reached a “constitutional accommodation,” and that accommodation “implied that principal power to say what the statute means must rest *outside* the agency, in the courts.”<sup>114</sup> *Chevron*, Farina suggests, is “fundamentally incongruous” with this constitutional accommodation that approved delegations of so much power to agencies.<sup>115</sup>

Moreover, Farina suggests, *Chevron*'s deference principle must be evaluated in the context of the overall balance of powers. The

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108. *Id.* at 1249.

109. Farina, *supra* note 38.

110. *Id.* at 480–82.

111. *Id.* at 483–84.

112. *Id.* at 485.

113. *Id.* at 487.

114. *Id.*

115. *Id.* at 487–88, 497–98.

Constitution's Framers, fearful of legislative tyranny, imposed stringent controls on the exercise of legislative power,<sup>116</sup> but they created less constraint on the executive power, so that the executive could act with necessary "dispatch, coordination, initiative, and consistency."<sup>117</sup> As a result, while Congress enjoys "legislative supremacy" and theoretically has power to control and reverse almost any agency decision, the president has far more practical power to control agencies.<sup>118</sup> *Chevron* deference therefore contributes to a dangerous accumulation of power in a single branch, namely, the executive.<sup>119</sup>

Farina's critique of *Chevron* is sufficiently distinct from those of the others discussed above that when this Essay refers to *Chevron*'s "critics" without qualification, she is not included. Her arguments will be addressed separately.<sup>120</sup> The "critics" are Justices Thomas and Gorsuch, Professor Hamburger, and the members of Congress supporting SOPRA.

## II. *CHEVRON* DEFENDED

*Chevron*'s critics are demanding nothing less than a revolution in administrative law. *Chevron* has been a mainstay of the field for over thirty years.<sup>121</sup> The critics do not wish to alter the details of *Chevron* doctrine. They propose no subtle refinement of *Chevron*'s Step One or Step Two or Step Zero. They want the very concept of *Chevron* deference declared unconstitutional.

Of course, a determination that *Chevron* is unconstitutional would be somewhat surprising, because it would have to come from the very body that adopted *Chevron* in the first place, the Supreme Court itself.<sup>122</sup> And *Chevron* was unanimous, too.<sup>123</sup> But it would not be the

116. *Id.* at 508.

117. *Id.* at 507.

118. *Id.* at 510.

119. *Id.* at 525–28.

120. *See infra* Section II.F.4.

121. *See supra* note 2 and accompanying text.

122. Congress could certainly overturn *Chevron* statutorily, by passing SOPRA. The Supreme Court has never suggested that the principle of *Chevron* is constitutionally compelled. Rather, the Court has justified *Chevron* as an understanding of Congress's intent in passing an ambiguous agency statute. *E.g.*, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Therefore, Congress could overturn *Chevron* by statutorily negating its supposed intent, which is what SOPRA would do. *Cf. Rosenkranz, supra* note 19, at 2129 (agreeing that Congress could overturn *Chevron* by statute). But Congress could not hold *Chevron* unconstitutional—only the Supreme Court could do that.

123. *See* 467 U.S. at 839. Only six of the nine Justices participated in *Chevron*, *see id.*, but all the participating Justices joined in the opinion, and the other three subsequently joined opinions

first time the Supreme Court struck down one of its own doctrines as unconstitutional. In *Erie R.R. v. Tompkins*,<sup>124</sup> the Supreme Court said that it was overruling the prior doctrine of *Swift v. Tyson*<sup>125</sup> because “the *unconstitutionality* of [that doctrine] has now been made clear.”<sup>126</sup> So a confession of constitutional error from the Court is possible.

It is therefore vitally important to respond to the critique of *Chevron* deference. The key insight is that even when a court interprets a legal directive de novo, the court may discover that the best construction of the directive is that it vests decisionmaking power in some other body. In such a case, the court fulfills its judicial duty by accepting the determination of the other body, provided that determination is within the power vested in that body. The court in such a case does not shirk its duty to construe the legal directive de novo; rather, the court, having fulfilled its duty, finds that the governing law requires it to accept the other body’s exercise of the discretion vested in it.<sup>127</sup>

### A. Clearing Away the Underbrush

Before turning to the main argument, it is important to clarify two points. One is a point of potential confusion about terminology. The other sets the terms of the debate.

#### 1. The Meaning of “Interpret”

When asking where the Constitution vests the power to interpret statutes, one must distinguish between two possible meanings of the term “interpret.” On the one hand, the usual meaning of “interpret” is “to explain or tell the meaning of.”<sup>128</sup> In this sense, an agency interprets a statute whenever it reads the statute and determines what the statute means so that it may apply the statute. This Essay will refer to this sense of “interpret” as the “simple sense” of the word.

On the other hand, in discussions of *Chevron* deference, “interpret” is also used in a more technical sense, which might be

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applying the *Chevron* deference principle. *E.g.*, *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 980 (1986).

124. 304 U.S. 64 (1938).

125. 41 U.S. (16 Pet.) 1 (1842).

126. *Erie*, 304 U.S. at 77–78.

127. *See infra* Sections II.B–C.

128. This is the first definition of “interpret” given by Merriam-Webster. *See Interpret*, MERRIAM-WEBSTER ONLINE DICTIONARY, [www.merriam-webster.com/dictionary/interpret](http://www.merriam-webster.com/dictionary/interpret) (last visited Jan. 28, 2018) [<https://perma.cc/T2RT-2PFE>].

rendered as “to give *definitive* or *controlling* meaning to.” In this sense, asking whether Congress has given an agency the power to interpret a statute is asking whether Congress has authorized the agency to *definitively* resolve ambiguities in the statute, with the consequence that a court must uphold the agency’s interpretation even if it does not match the interpretation the court would give to the statute on its own.<sup>129</sup> This Essay will refer to this meaning of “interpret” as the “strong sense” of the word.

There can be no question that executive agencies are authorized to interpret statutes they administer in the simple sense of determining what the statutes mean. Indeed, agencies are *obliged* to do so. After all, statutes tell agencies what to do. An agency must interpret the statutes it administers so that it can know how to act under them.<sup>130</sup> Even when the meaning of a statute is perfectly clear, an agency is still interpreting the statute when it looks at the ink marks that make up the statutory text, understands those ink marks as letters, the letters as words, and the words as having meaning. Every act of reading a statute and applying it is necessarily an act of interpretation.

Moreover, where the statute is ambiguous, it is still incumbent upon the agency to interpret the statute in the simple sense of making a determination of the statute’s meaning. Again, the agency must determine the meaning of the statute in order to know what to do as it applies the statute. It would not be practical for an agency to run to a court every time it needed to resolve an ambiguity in a statute it administered, and besides, even if the agency wanted to do so, principles of justiciability would prevent the court from providing advice to the agency about the statute’s meaning outside the context of a particular case.<sup>131</sup>

Thus, there can be no doubt that agencies can, and indeed must, interpret the statutes they administer, in the simple sense of the word “interpret.” This point is not controversial. Even *Chevron’s* critics recognize that “other branches of Government have the authority and obligation to interpret the law.”<sup>132</sup>

129. *Cf.* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.11 (1984). Of course, even under *Chevron*, the agency cannot give the statute a meaning that contradicts what a court determines to be the *clear* meaning of the statute; nor can it give the statute a meaning that a court determines to be unreasonable. But *Chevron* does empower agencies to resolve ambiguities in statutes in reasonable ways that a court must accept even if the court regards another interpretation as better. This is the power to interpret in the “strong sense.”

130. Monaghan, *supra* note 24, at 5.

131. *See supra* note 34 and accompanying text.

132. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring); *see also* Hamburger, *supra* note 19, at 1196 (“[A]gencies must interpret to figure out how to act without violating the law.”).

So what is the argument about? When the critics debate who may interpret the law, they are using the word “interpret” in the strong sense. Thus, for example, Hamburger in many places discusses what he perceives as the irrelevance of “whether Congress authorizes agencies to interpret.”<sup>133</sup> But he cannot be discussing whether Congress has authorized agencies to interpret statutes in the simple sense, because agencies always, necessarily, have that power. He is discussing whether Congress has authorized an agency to give a definitive interpretation to statutes it administers.

The real question, therefore, is this: When an agency and a court have both undertaken to interpret a statute, in the simple sense, but the interpretations are different, whose interpretation controls?<sup>134</sup> Under *Chevron*, if the statute is ambiguous and the agency’s interpretation is reasonable, a reviewing court must uphold it even if the court believes it is not the *best* interpretation.<sup>135</sup> *Chevron*’s critics, however, believe that a court reviewing an agency’s interpretation of a statute must apply independent judgment and must enforce what the court believes to be the best interpretation of the statute.<sup>136</sup> The critics sometimes express this point by saying that the question is whether the agency should have power to interpret a statute,<sup>137</sup> but when they do, “interpret” must be understood in its strong sense. Everyone agrees that agencies have power to interpret statutes they administer in the simple sense.

## 2. The Implication of the Critics’ Constitutional Claim

It is also important to note an implication of the fact that the critics are claiming that *Chevron* is not merely incorrect, but unconstitutional. The critics do not merely claim that Congress *has not* created a regime of *Chevron* deference, but that Congress *could not* create a regime of *Chevron* deference.<sup>138</sup> To be sure, some of the critics also make the former point—they question whether *Chevron* was correct as a matter of statutory interpretation.<sup>139</sup> But this Essay primarily addresses the critics’ claim that *Chevron* is unconstitutional.

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133. *E.g.*, Hamburger, *supra* note 19, at 1197.

134. *See* Monaghan, *supra* note 24, at 5 (noting that this is the “precise problem” (emphasis removed)).

135. *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.11 (1984).

136. *E.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); Hamburger, *supra* note 19, at 1205–10.

137. *E.g.*, Hamburger, *supra* note 19, at 1222.

138. *E.g.*, *id.* at 1197.

139. *E.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring); Farina, *supra* note 38, at 468–76. For the response, see *infra* Section II.F.2.

To refute the critics on this point, one need not show that *Chevron* is a correct understanding of actual congressional desires, but only that Congress could, if it wanted to, make *Chevron* the law. That is, in responding to the critics, one is entitled to hypothesize that Congress passes a statute expressly mandating a regime of *Chevron* deference.

Imagine, therefore, that Congress does just that. Suppose that Congress passes a statute—call it the “*Chevron* Implementation Act” or “CIA” (it always helps if a statute has a memorable acronym)—expressly mandating that courts apply the principles of *Chevron* deference when reviewing agency action.<sup>140</sup> Precise language for the CIA will be suggested below—for reasons that will become clear, the statute needs to be worded a particular way.<sup>141</sup> For now, just think of the statute as mandating *Chevron*. The critics say that such a statute would be unconstitutional.<sup>142</sup> To refute the critics, therefore, one need only show that the statute would be constitutional.

### B. *The Essence of the Argument*

In responding to *Chevron*’s critics, this Essay begins by conceding some of the key assertions in their arguments. Let it be assumed that the critics are correct that there is a judicial duty to exercise “independent judgment.” Assume that this duty is constitutionally based and cannot be displaced even by Congress. Assume also that this duty requires judges to conduct de novo review of interpretations given to legal instruments by the other branches of government. One might challenge these assumptions—other scholars have suggested that the judicial power, as originally understood, did not invariably require courts to enforce their own, de novo understanding of the meaning of legal texts<sup>143</sup>—but the point of this

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140. Cf. Monaghan, *supra* note 24, at 5. Monaghan hypothesizes that Congress enacts a “reverse Bumpers amendment.” *Id.* The “Bumpers amendment,” which was never enacted, was the SOPRA of its day. *See id.* at 2.

141. *See infra* Section II.E.

142. *E.g.*, Hamburger, *supra* note 19, at 1197.

143. Monaghan, for example, devotes a section to examining Thayer’s famous suggestion that courts should strike a statute down as unconstitutional only when the statute *clearly* violates the Constitution. Monaghan, *supra* note 24, at 7–11 (citing James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893)). Courts, Thayer suggested, should not interpret the Constitution de novo. *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). Rather than simply enforcing “their own judgment” on constitutionality, courts should also consider “what judgment is permissible to another department which the constitution has charged with the duty of making it.” *Id.* In other words, Thayer suggested that courts should give deference to Congress’s interpretation of the Constitution in close cases. Monaghan says that the existence of judicial review “demands nothing with respect to the *scope* of judicial review” and that “the judicial duty



Essay is to demonstrate that the Article III critique of *Chevron* deference is mistaken *even if* one cedes these points to the critics.

The first step in the response to the critics is simple and not new. Monaghan published the core insight in 1983, before *Chevron* was decided, and it was not new even then. As Monaghan acknowledged, others had expressed the same idea in works going back as early as 1944.<sup>144</sup>

The core insight, as Monaghan expresses it, is that “[j]udicial deference to agency ‘interpretation’ of law is simply one way of recognizing a delegation of law-making authority to an agency.”<sup>145</sup> That is, an ambiguous agency statute is simply another way of doing something that Congress does all the time—namely, authorize an agency to make a policy choice. Innumerable statutes expressly authorize agencies to make decisions and prescribe rules that have the force and effect of law,<sup>146</sup> and such authorization is routinely approved as constitutional.<sup>147</sup>

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‘to say what the law is’ does not demand an independent judgment rule; it is in fact quite consistent with a clear-mistake standard.” Monaghan, *supra* note 24, at 9. Gillian Metzger similarly suggests that there are “substantial arguments” that Article III does not “compel independent judicial judgment for all questions of statutory interpretation.” Metzger, *supra* note 19, at 41.

Aditya Bamzai suggests that early decisions employed a kind of “deference” principle, but one different from modern *Chevron* deference: he suggests that early decisions reflect a practice of giving judicial respect to a *contemporaneous* or *customary* construction of a legal text, which is not necessarily the same as the *executive branch* construction. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 941, 944, 987 (2017). Under this practice, Bamzai suggests, “a court would ‘respect’—or, to use modern parlance, ‘defer to’—an agency’s interpretation of a statute if and only if that interpretation reflected a customary or contemporaneous practice under the statute.” *Id.* at 987.

Thus, some might suggest that the critics are mistaken in their assertion that judges must exercise independent judgment. The critics would of course respond; Hamburger, for example, suggests that what Thayer regarded as a principle of deference is better understood as the substantive measure of whether a law contradicted a higher law. Hamburger, *supra* note 19, at 1218–19. Therefore, Hamburger suggests, a judge who employed Thayer’s practice of failing to strike down a law unless the law were *manifestly* contrary to the Constitution would not be “deferring” to the legislative judgment that the law is constitutional, and hence the Thayerian view cannot justify judicial deference to administrative interpretation. *Id.*

In any event, this Essay does not engage this debate. It simply cedes this point to the critics.

144. See Monaghan, *supra* note 24, at 27.

145. *Id.* at 26 (emphasis in original). Lest anyone miss the significance of this point, Monaghan put the whole sentence in italics. See *id.*

146. For just one out of an enormous possible number of examples, see 15 U.S.C. § 78j(b) (2012) (making it unlawful “[t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe . . .” (emphasis added)).

147. See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473–74 (2001) (approving statutory command that the EPA choose “ambient air quality standards” that are “requisite to protect the public health” and noting that the Court has only ever struck down two statutes on nondelegation doctrine grounds).

If Congress can delegate power to administrative agencies to make policy decisions, the precise form that the delegation takes should be of little importance. What should matter is the power delegated, not the form of the delegation. Therefore, delegating power to an administrative agency by allowing it to resolve statutory ambiguity should be valid whenever it would be valid for Congress to *expressly* delegate the power to choose among the potential reasonable interpretations of the statutory language.

This insight was not only articulated by Monaghan in 1983; it was adopted by the Supreme Court in 1984 in *Chevron*. While *Chevron* articulated several possible explanations for *Chevron* deference,<sup>148</sup> the theory most prominently expounded was the one just given. The Court explicitly analogized giving *Chevron* deference to agency interpretations of ambiguous statutes to respecting the exercise of powers expressly delegated to an agency. In the critical paragraph, the Court said:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.<sup>149</sup>

That is, the Court adopted the notion that ambiguity in an agency statute is to be considered an “implicit” delegation of power to the agency, and this power should be analogized to the “express delegations” of power to agencies that occur all the time.

Thus, the basic response to the critics is simple, already established in the scholarly literature, and already unanimously approved by the Supreme Court. *Chevron* deference is constitutionally permissible because it is merely a way of conceiving of what Congress is doing when it gives an agency ambiguous instructions. Permitting an agency to resolve such ambiguity is “simply one way of recognizing a delegation of law-making authority.”<sup>150</sup>

So is the debate over? Not at all.

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148. In addition to the main “delegation” theory discussed in the text, *Chevron* also hinted that courts should defer to agency interpretations of statutes they administer because of agencies’ superior expertise and because agencies are more politically accountable than courts. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

149. *Id.* at 843–44 (footnote omitted).

150. Monaghan, *supra* note 24, at 26 (emphasis omitted).

*C. Responding to the Critics' Rejoinder*

The critics are, of course, aware of the core insight discussed in the previous Section. They deny that it shows *Chevron* deference to be constitutional. Fine, the critics say, let it be assumed that Congress intends every ambiguous statutory instruction it gives to a federal agency to constitute a delegation of power to the agency to resolve the ambiguity. That wouldn't matter. Congress, the critics say, cannot displace the courts' duty to exercise independent judgment in construing statutes. That duty derives from the Constitution and cannot be changed by statute. Hamburger, for example, says that it "makes no difference whether Congress authorizes agencies to interpret. . . . [N]o amount of statutory authority for agencies can ever relieve judges of their constitutional duty."<sup>151</sup>

Thus, to refute the critics, one needs more than simply the core idea previously articulated by Monaghan and embraced by the Supreme Court. One must also respond to the critics' rejoinder to the core idea.<sup>152</sup>

## 1. What Constitutes an "Interpretation"?

The key response to the critics' rejoinder is that *Chevron* deference, properly understood, does not prevent a court from interpreting statutes. An interpretation of a statute that determines that the statute delegates authority to an administrative agency is still an interpretation. Even if one accepts the critics' understanding of the judicial duty of interpreting a statute—even assuming it to require a court to exercise "independent judgment"—the result of exercising that duty might still be the conclusion that Congress has vested the agency with the power to make a policy choice.

Certainly there can be no Article III rule against a court's interpreting a statute to delegate power to an agency. Courts do that all the time, because statutes delegate power to agencies all the time. The Communications Act of 1934, for example, authorizes the FCC to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter."<sup>153</sup> Even before *Chevron* the Supreme Court interpreted this section to authorize the Commission to make

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151. Hamburger, *supra* note 19, at 1197.

152. As will be noted below, Monaghan also anticipated some of the critics' rejoinder to his core idea. But he could not fully respond to arguments that had not yet been made at the time he wrote his article, such as the argument that Congress cannot take the interpretive power from courts and give it to agencies. Given that powerful critics are currently attacking *Chevron*, it is vital to respond fully to their arguments.

153. 47 U.S.C. § 303(r) (2012).

important decisions about communications policy, for example, to adopt the “fairness doctrine.”<sup>154</sup> It would be absurd to say that the Court, in so holding, was abdicating its judicial duty to interpret the statute. The Court interpreted the statute—it interpreted the statute to authorize the agency to decide to impose the fairness doctrine.

Of course, that statute contained an express delegation of authority. The question of what constitutes an “interpretation” is, however, independent of the degree of clarity of the statute. A court that holds that an ambiguous statute constitutes a delegation of power to the agency is interpreting the statute—it is interpreting the statute to authorize the agency to make a decision. The interpretation may be right or wrong, but it is certainly an interpretation.<sup>155</sup>

This insight addresses the critics’ complaints about *Chevron*. For example, as noted above,<sup>156</sup> Justice Gorsuch expresses the critics’ point by asking “where in [the *Chevron* two-step process] does a court *interpret* the law and say what it *is*?”<sup>157</sup> The answer is that the court *interprets* the law when it determines that the law delegates power to an administrative agency. The court says what the law *is* when it says that the law *is* that an agency is vested with the power to make a certain decision. An interpretation is no less an interpretation because it determines that an agency has the power to make a choice.<sup>158</sup>

The proper exercise of the judicial duty does not have to answer every question. As the Supreme Court once remarked, the “judicial duty is not less fitly performed” when the result of exercising that duty is a determination that the court lacks jurisdiction.<sup>159</sup> Similarly, the judicial duty is not less fitly performed when the result of exercising that duty is a determination that Congress has vested power in an administrative agency.

## 2. The Nature of the Power Conferred on the Agency

This conception of *Chevron* deference does require a subtle but important shift in the conception of what kind of power Congress implicitly delegates to an agency when it gives an agency an ambiguous statutory instruction. It is often said that under *Chevron* an ambiguity

154. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380 (1969).

155. See Monaghan, *supra* note 24, at 27 (“To be sure, the court must interpret the statute; it must decide what has been committed to the agency.”).

156. See *supra* notes 86–89 and accompanying text.

157. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

158. See Monaghan, *supra* note 24, at 27.

159. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

in an agency-administered statute constitutes an implicit delegation of power to the agency to *interpret* the statute.<sup>160</sup> Indeed, the Supreme Court may have said this in *Chevron* itself. In the critical passages from *Chevron*, the Court said:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to *elucidate* a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own *construction* of a statutory provision for a reasonable *interpretation* made by the administrator of an agency.<sup>161</sup>

The Court's use of the terms "elucidate," "construction," and "interpretation" suggest, even if they do not compel, the view that an ambiguous term in an agency statute is to be taken as an implicit delegation of authority to the agency to *interpret* the statute. The Court also, however, referred to "an agency to which Congress has delegated *policymaking* responsibilities,"<sup>162</sup> so the opinion was not perfectly clear as to what kind of power an ambiguous statute implicitly delegates to an agency. In any event, whether *Chevron* said it or not, the notion that under *Chevron* ambiguous agency statutes are deemed to be delegations of interpretive power has become common.<sup>163</sup> Moreover, in this conception of *Chevron*, the term "interpret" is being used in the strong sense explained earlier—necessarily so, as the agency always has the power to interpret statutes in the simple sense.

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160. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("We most often describe Congress' supposed choice to leave matters to agency discretion as an allocation of interpretive authority."); *City of Arlington v. FCC*, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting) ("[A]gencies enjoy broad power to construe statutory provisions over which they have been given interpretive authority."); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) ("[W]hether Congress has delegated to an agency the authority to *interpret* a statute does not depend on the order in which the judicial and administrative constructions occur." (emphasis added)); *Barnhart v. Walton*, 535 U.S. 212, 215 (2002) ("[B]oth [interpretations] fall within the Agency's lawful *interpretive authority*." (emphasis added)); *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) ("*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.'" (emphasis added) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984))); *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1320 (11th Cir. 2011) ("We apply *Chevron* deference when an agency properly exercises its authority, expressly or implicitly delegated by Congress, to interpret an ambiguous statute . . ."); *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1360 (Fed. Cir. 2007) (explaining what follows "if Congress expressly or implicitly delegated authority to an agency to interpret a statute"); *Lujan-Armendariz v. INS*, 222 F.3d 728, 749 (9th Cir. 2000) ("*Chevron* deference is predicated on the assumption that a statute's ambiguity constitutes an 'implicit delegation' to the agency to interpret the statute."); *Bower v. Fed. Express Corp.*, 96 F.3d 200, 208 (6th Cir. 1996) (referring to "[t]he delegated authority to interpret an ambiguous term").

161. *Chevron*, 467 U.S. at 843–44 (emphasis added).

162. *Id.* at 865 (emphasis added).

163. See *supra* note 160.

In light of the critics' Article III argument, this conception of *Chevron*, however accurate as a practical description of how *Chevron* works, must be shifted. Congress, it should be recognized, does not give agencies power to *interpret* ambiguous statutes that they administer, in the strong sense of "interpret." As the critics observe, that power—the power to definitively determine the meaning of statutes—belongs to the courts. Agencies may (and indeed must) interpret statutes in the simple sense, but only the courts can give them definitive meaning in a judicial proceeding.

As explained above, however, when a court exercises the power to interpret statutes, the court may determine that a statute's best interpretation is that the statute confers power on the agency. The power thus conferred should not be regarded as interpretive power, but as the power to make a policy choice.<sup>164</sup> Specifically, it is the power to choose to implement any of the reasonable interpretations of the statute. An interpretation of an ambiguous statute as vesting such power in the agency is an interpretation, and giving such an interpretation to a statute may fulfill the judicial duty to exercise independent judgment.

#### *D. Some Examples*

Some examples may help drive home the points made in the previous Section. This Section considers examples of cases in which a court determined that the best interpretation of an ambiguous legal text was that it conferred power on another body to make a choice, and yet no one would claim that the court shirked its duty to interpret the legal text.

The examples are drawn from the Constitution. Of course the *Chevron* debate concerns interpretation of statutes, but constitutional examples provide useful illustrations of why the critics are wrong regarding the implications of the judicial duty to apply independent judgment. Constitutional examples are, in fact, especially useful, because they should *particularly favor* the judicial role in interpretation. The courts have long declared that giving the Constitution definitive meaning is a peculiarly judicial function.<sup>165</sup> Congress often provides directives about how courts should interpret

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164. See Monaghan, *supra* note 24, at 6 ("A statement that judicial deference is mandated to an administrative 'interpretation' of a statute is more appropriately understood as a judicial conclusion that some *substantive law-making authority* has been conferred upon the agency." (emphasis added)).

165. *E.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . .").

statutes,<sup>166</sup> but Congress cannot tell the courts how to interpret the Constitution, and the Court's interpretation of the Constitution trumps any interpretation given to it by Congress.<sup>167</sup> Therefore, if giving determinate meaning to ambiguous language in a legal directive were an inescapable part of the judicial duty to "say what the law is," then one would expect to see this principle reflected *most strongly* in constitutional interpretation. Contrariwise, if in interpreting the Constitution courts may find that ambiguous language should be understood as an implicit delegation of power to other branches of government, it should follow a fortiori that the same is true in statutory interpretation.

In fact, with regard to the legal directives contained in the Constitution, the courts sometimes determine that the best construction of ambiguous language is that it confers power on some other body. Two excellent examples of courts doing so come from cases involving the Constitution's Apportionment Clause and the closely related Census Clause. These clauses provide:

Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.<sup>168</sup>

These clauses seem reasonably clear at first glance—they instruct the government to take a decennial census of the nation's population and to apportion the House of Representative based on the census. However, both clauses have subtleties that require elaboration, and the Supreme Court has faced numerous important questions regarding their meaning.<sup>169</sup> In answering these questions, the Supreme Court did not always fully resolve the ambiguities in the clauses. In some cases, the Court determined that the clauses vest discretion in Congress to resolve ambiguities regarding what they mean.

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166. See, e.g., Dictionary Act, 1 U.S.C. §§ 1–8 (2012); see also *infra* Section II.E.

167. E.g., *City of Boerne v. Flores*, 521 U.S. 507, 519, 524 (1997) ("The design of the [Fourteenth] Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. . . . The power to interpret the Constitution in a case or controversy remains in the Judiciary.").

168. U.S. CONST. art. I, § 2, cl. 3, amended by U.S. CONST. amend. XIV, § 2. This Essay uses the term "Apportionment Clause" to refer to the first sentence quoted above and "Census Clause" to refer to the second sentence. The term "Census Clause" is sometimes used to cover both sentences. See, e.g., *Utah v. Evans*, 536 U.S. 452, 473 (2002).

169. In addition to the cases discussed in the text below, see, for example, *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999), which addresses the use of statistical sampling techniques in conducting the census; and *Franklin v. Massachusetts*, 505 U.S. 788 (1992), which addresses the allocation of military service members stationed overseas for apportionment purposes.

In *Utah v. Evans*,<sup>170</sup> for example, the Court considered the Census Bureau’s practice of using “imputation” to count the number of inhabitants at addresses from which the Bureau’s census questionnaire is not returned. Under this practice, the Bureau assumes that such an address has the same number of inhabitants as a nearby, similar address.<sup>171</sup> Utah, which lost a representative as a result of the Bureau’s use of imputation in the 2000 census, brought suit. It noted that the Census Clause requires the government to conduct an “actual Enumeration” of the nation’s population. It argued that this term, both textually and historically, means that the government must conduct the census as an actual count of individuals; the term, Utah asserted, forbids the use of estimation.<sup>172</sup>

The suit presented a classic question of interpretation, namely, the meaning of the phrase “actual Enumeration” in the Constitution. If *Chevron*’s critics were right, it was the duty of the Supreme Court to exercise its independent judgment in fixing the meaning of that phrase. But while the Court exercised its independent judgment in interpreting the phrase “actual Enumeration,” the result was an interpretation that left the question at issue for resolution by Congress. The Court held:

[T]he text uses a general word, “enumeration,” that refers to a counting process without describing the count’s methodological details. . . . The final part of the sentence says that the “actual Enumeration” shall take place “in such Manner as” Congress itself “shall by Law direct,” thereby suggesting the breadth of congressional methodological authority, rather than its limitation.<sup>173</sup>

The Court did not shirk its duty to construe the Census Clause. It applied all of the usual interpretive techniques: it considered the text of the clause,<sup>174</sup> its drafting history,<sup>175</sup> and its purposes.<sup>176</sup> The result of that interpretive exercise, however, was the conclusion that “the Framers . . . did not write detailed census methodology into the

170. 536 U.S. 452.

171. The Census Bureau attempts to count the nation’s inhabitants by sending a questionnaire to every address and following up with multiple personal visits to addresses from which the questionnaire is not returned. Sometimes, however, despite the Bureau’s best efforts, it is unable to determine how many people live at a given address. Under the imputation practice, the Bureau assumes that a problematic address has the same “occupancy characteristics” (including the same number of inhabitants) as the nearest similar neighbor that also did not return the Bureau’s questionnaire, but whose characteristics were successfully determined through follow-up visits. *See id.* at 458.

172. *See* Brief of Appellants at 17–18, *Evans*, 536 U.S. 452 (No. 01-714).

173. *Evans*, 536 U.S. at 474.

174. *See id.* at 475–76 (considering contemporary dictionary definitions of “enumeration”).

175. *See id.* at 474–75 (considering the changes made to the clause at the Constitutional Convention).

176. *See id.* at 477–79.



Constitution.”<sup>177</sup> The Court’s role was therefore enforcing only such limits as the clause imposed, while respecting the choices made by Congress within those limits, in the exercise of the power that the clause conferred on Congress. As the Court concluded: “[W]e need not decide here the precise methodological limits foreseen by the Census Clause. We need say only that in this instance . . . those limits are not exceeded.”<sup>178</sup>

*Utah v. Evans* shows that the result of a court’s independent interpretation of a controlling, ambiguous legal text may be the conclusion that the text confers discretion on some other decisionmaker. Even Justice Thomas, who dissented, did so only because he disagreed with the Court’s construction of the phrase “actual Enumeration”; he thought that the text and history of that phrase indicated that it demanded an actual, individualized count of persons and prohibited the use of imputation or other estimating techniques.<sup>179</sup> He did not suggest that the Court was obliged to give a definitive construction to the phrase, or that the Court’s determination that the phrase allowed Congress to choose whether to use estimating techniques amounted to an abdication of the judicial function.

Of course, *Utah v. Evans* implicated the Census Clause’s provision that the census would be conducted “in such Manner as [Congress] shall by Law direct.” This phrase expressly delegates some discretion to Congress. But another constitutional case shows that even without such express delegation, the best interpretation of an ambiguous, controlling legal text may be that it implicitly delegates discretion.

*United States Department of Commerce v. Montana*<sup>180</sup> concerned the Constitution’s Apportionment Clause, which provides that “Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers.”<sup>181</sup> This clause contains a clear command but also has a hidden ambiguity. On the one hand, it clearly requires state representation in the House of Representatives to be apportioned according to population, unlike in the Senate, where each state has equal representation.<sup>182</sup> On the other hand, in implementing this constitutional command, one inevitably runs into an ambiguity caused by the problem of fractions. When parceling out representatives to the states according to population, there are always fractions left

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177. *Id.* at 479.

178. *Id.*

179. *Id.* at 489 (Thomas, J., dissenting).

180. 503 U.S. 442 (1992).

181. U.S. CONST. art. I, § 2, cl. 3, amended by U.S. CONST. amend. XIV, § 2.

182. *Id.* art. I, § 3, amended by U.S. CONST. amend. XVII.

over,<sup>183</sup> yet each state's number of representatives must be an integer.<sup>184</sup> So what is to be done about the fractions?

After trying different methods over the decades,<sup>185</sup> Congress, following the 1940 census, finally settled on a method known as “the method of equal proportions,”<sup>186</sup> which apportions representatives in a way that minimizes the relative (i.e., percentage) difference between the sizes of congressional districts in different states.<sup>187</sup> Montana, which would have gained a representative in the 1990 apportionment if the apportionment had instead minimized the *absolute* difference between the sizes of congressional districts,<sup>188</sup> brought suit and claimed that the method used violated the Apportionment Clause.<sup>189</sup>

As with *Utah v. Evans*, the case presented a classic question of interpretation: What is the meaning of the constitutional command that representatives be apportioned to the states “according to their respective Numbers”?<sup>190</sup> Does it require that an apportionment minimize relative population differences, absolute population

183. The total number of representatives is not specified in the Constitution but was statutorily fixed at 435 in 1911, see Apportionment Act of 1911, Pub. L. No. 62-5, § 2, 37 Stat. 13, and is today maintained at that figure by 2 U.S.C. § 2a(a) (2012), which requires a decennial reapportionment of “the then existing number of Representatives.” With the total number specified, it might seem that the Apportionment Clause could be implemented in two simple steps: First, determine the size of the average “ideal” congressional district by dividing the national population by the number of representatives. Second, determine the number of representatives to which each state is entitled by dividing each state’s population by the size of the ideal district. The problem is that when one performs the latter divisions, there are fractions left over. Today, for example, the ideal congressional district contains about 711,000 people. See Kristin D. Burnett, *Congressional Apportionment: 2010 Census Briefs*, U.S. CENSUS BUREAU 1 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf> [https://perma.cc/HLN5-ZPUV] (showing a national population of 309,183,463, which, divided by 435, yields an ideal congressional district of 710,767 people). How many districts, therefore, should be apportioned to a state with a population of, say, one million? If such a state received two congressional districts, it would be overrepresented in Congress; if only one, it would be underrepresented.

184. See *Montana*, 503 U.S. at 448 (“Because each State must be represented by a whole number of legislators, it was necessary either to disregard fractional remainders entirely or to treat some or all of them as equal to a whole Representative.”).

185. Congress has sometimes provided that after dividing each state’s population by the size of an ideal district, fractions must simply be ignored (that is, each state’s representation must be “rounded down” to the nearest whole number). *Id.* at 449. At other times Congress has provided for an extra representative to be given to those states for which the fraction is greater than one-half. See *id.* at 450. Congress has used other methods as well. See *id.* at 448–51.

186. Congress settled on the method of equal proportions based on advice received from an expert committee appointed by the National Academy of Sciences. The method was codified in 1941 and has remained in place ever since. *Id.* at 451–52, 452 n.25, 464 n.42, 465.

187. *Id.* at 454–55.

188. *Id.* at 445.

189. *Id.* at 446; see U.S. CONST. art. I, § 2, cl. 3, amended by U.S. CONST. amend. XIV, § 2.

190. U.S. CONST. art. I, § 2, cl. 3, amended by U.S. CONST. amend. XIV, § 2.

differences, or something else?<sup>191</sup> The key point is that the Supreme Court did not choose any of these possible constructions for the clause. Instead, the Court unanimously interpreted the clause to delegate power to Congress to choose among alternative reasonable methods of solving the fractions problem inherent in apportionment.<sup>192</sup> The Court said:

What is the better measure of inequality—absolute difference in district size, absolute difference in share of a Representative, or relative difference in district size or share? Neither mathematical analysis nor constitutional interpretation provides a conclusive answer. . . . The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course. . . . The constitutional framework that generated the need for compromise in the apportionment process must also *delegate to Congress* a measure of discretion.<sup>193</sup>

Did the Court abdicate its judicial duty? Did it fail to say what the meaning of the Apportionment Clause *is*? Of course not. The Court interpreted the Apportionment Clause. The interpretation was that the clause—like many constitutional clauses<sup>194</sup>—delegates power to Congress. The power delegated by the clause is limited. Congress must make a choice that can reasonably be said to apportion representatives to the states according to their respective numbers.<sup>195</sup> But the Court's

191. Montana asserted that the clause required that the apportionment “achieve the greatest possible equality in the number of individuals per representative.” *Montana*, 503 U.S. at 446. Montana observed that if it received one more representative, and the state of Washington one fewer, the total deviation of all districts from the ideal size would go down, and it argued that the statutory apportionment was therefore unconstitutional. *Id.* at 461. The Court, however, observed that while Montana's proposed apportionment would reduce the total *absolute* difference between the size of the actual districts and the size of an ideal district, it would increase the total *relative* difference. *Id.* at 461–62. Under Montana's proposed apportionment, if one took the difference between the population of each of Washington's districts and the population of an ideal district, and did the same for each of Montana's districts and added up all the differences, the total sum would be 209,165, whereas the sum of the differences in the actual, statutory apportionment was 260,550. *Id.* Thus, Montana's proposed apportionment would have reduced the overall *absolute* difference in population between actual and ideal districts. However, in Montana's proposed apportionment, the size of Montana's districts would have differed from those of ideal districts by 42.5 percent and Washington's by 6.7 percent, whereas in the actual apportionment those differences were only 40.4 percent and 5.4 percent. *Id.* at 462 n.40. Thus, Montana's proposed apportionment would have increased the *relative* difference in population between actual and ideal districts.

192. *Id.* at 464.

193. *Id.* at 463–64 (emphasis added).

194. *E.g.*, U.S. CONST. art. I, § 8.

195. Surely, for example, Congress could not use any method of apportionment that caused any state to receive fewer representatives than a state with a *smaller* population. It also seems safe to say that, even if that condition were satisfied, an apportionment would not comply with the clause if the relationship between population and representation were not at least close to linear. For example, an apportionment that varied representation with the square root of population would satisfy the requirement that bigger states got more representatives than smaller states, but would surely be unconstitutional. (Under such an apportionment, a state with a population of ten million would receive more representatives than a state with a population of one million, but only about 3.2 times more, rather than ten times more.)

interpretation of the clause was that the clause, while setting the requirement of apportioning the House of Representatives by population, delegated to Congress the power to choose among reasonable methods of resolving the fractions problem that such apportionment inevitably entails.

Of course, the Supreme Court's interpretation of the Apportionment Clause might be right and it might be wrong. Perhaps the best understanding of the clause is that it fixes forever a precise method of dealing with the fractions problem; perhaps the best understanding is (as the Court held) that the clause delegates power to Congress to resolve the problem and even allows Congress to vary its resolution over time. The key point, however, is that the latter interpretation, whether right or wrong, is surely an *interpretation*. The Court said what the meaning of the Apportionment Clause is; the meaning is that the clause vests power, within limits, in Congress.<sup>196</sup> Whether the Court's interpretation is right or wrong, the Court fulfilled its judicial duty, exercised independent judgment, and interpreted the Apportionment Clause, even though the result of that interpretation was the determination that the clause leaves certain choices up to Congress.

Thus, these examples show that even in the field of constitutional interpretation, where the judicial role in giving meaning to legal language is at its zenith, sometimes the best interpretation of ambiguous language is that it vests decisionmaking power in a body other than the courts. A court may reach such a conclusion without violating its duty to exercise independent judgment regarding the meaning of the legal texts it is called upon to enforce.<sup>197</sup>

Once this point is understood, the Article III objection to *Chevron* is defeated. The analogy between the constitutional examples and *Chevron* deference is surely clear, but to spell it out: the Census

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196. Actually, the Apportionment Clause does not specify *who* shall make the apportionment; it simply states in the passive voice that representatives “*shall be apportioned* among the several States . . . according to their respective Numbers.” U.S. CONST. art. I, § 2, cl. 3 (emphasis added). The power of Congress to make the apportionment follows from the Necessary and Proper Clause, which authorizes Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” *Id.* art. I, § 8. Thus, it is really the two clauses together that vest Congress with implicit authority to resolve the fractions problem. See *Montana*, 503 U.S. at 464 (citing the Necessary and Proper Clause).

197. Of course, given that the critics are willing to challenge the unanimous decision in *Chevron*, they might not accept the Supreme Court's unanimous decision in *Department of Commerce v. Montana* either. But it seems impossible that anyone could claim that the Court abdicated its judicial duty in that case. The Court interpreted the Constitution to delegate resolution of the fractions problem to Congress. One might disagree with that interpretation, but it seems impossible that anyone could claim that Article III forbids it.

Clause and the Apportionment Clause are like ambiguous agency statutes. They clearly delegate some power to Congress, just as an agency statute delegates power to an agency. But they are ambiguous regarding important details as to how the delegated power is to be exercised. The Court interpreted the instrument delegating the power as *implicitly* delegating, to the entity receiving the power, the power to choose among the reasonable possible resolutions of the ambiguity. Whether that interpretation is right or wrong, it is surely an interpretation. The Court may have erred, but it did not violate Article III. Similarly, when a court determines that an ambiguous agency statute is best understood as delegating to the agency the power to choose among the possible reasonable interpretations of the statute, the court is *interpreting* the statute. Its interpretation may be right or wrong, but it is still an interpretation.

#### *E. The Analogy to Express Statutory Delegation*

The previous sections established that a court's interpretation of an ambiguous legal text may determine that the text confers authority on some decisionmaker other than the court. Another route to the same conclusion is to recognize that once an ambiguous statute is understood as an instruction to an agency to choose among the possible reasonable interpretations of the statute, the authority it confers is no different from the authority that statutes confer on agencies all the time, with no possible Article III objection.

Even the critics recognize that Article III poses no intrinsic barrier to Congress's conferring discretion on an agency. Hamburger, for example, says that nothing in his article "questions the ability of judges to uphold an agency rule, unless they uphold it out of *Chevron* deference to the rule's interpretation of a statute."<sup>198</sup> Thus, even the critics accept that as far as Article III is concerned, Congress could *expressly* confer on an agency the authority to make any decision that *Chevron* deference allows it to make.<sup>199</sup> But *Chevron* deference is just another way to confer the same authority.

Consider, for example, the decision made by the EPA in *Chevron* itself. *Chevron* concerned the EPA's decision about the meaning of the term "stationary source" in the Clean Air Act, which imposed stringent permits requirements on "new or modified major stationary sources" of

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198. Hamburger, *supra* note 19, at 1200.

199. Some critics might still object to the delegation of such power on other grounds, particularly the nondelegation doctrine. See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 11, 378-79 (2014).

pollution.<sup>200</sup> The EPA initially interpreted the term “stationary source” to apply to each piece of pollution-emitting equipment,<sup>201</sup> so that in regions covered by the statute the permit requirements applied whenever pollution emissions increased from any single piece of equipment. Subsequently, however, following a change in administrations, the EPA implemented a scheme known as the “bubble concept.”<sup>202</sup> It reinterpreted the term “stationary source” to mean an entire covered plant, with the result that a plant owner, without the need for a permit, could increase emissions from one part of its plant, provided there were offsetting decreases elsewhere in the same plant.<sup>203</sup> The Supreme Court, after articulating the rules of *Chevron* deference, upheld the agency’s new definition on the ground that it was a reasonable interpretation of the term “stationary source” in the Clean Air Act.<sup>204</sup>

Even the critics accept that, insofar as Article III is concerned, Congress could have expressly authorized the EPA to make the decision it made. Suppose that the Clean Air Act had set forth its permit requirements and had then provided:

The EPA shall by rule determine whether the permit requirements of this Act shall apply:

- (a) to every new or modified piece of pollution-emitting equipment within a plant, or
- (b) only to a new plant or a plant that as a whole increases its emission of pollutants.

In such a case, even the critics would accept that Article III would pose no barrier to the agency’s exercising the authority conferred by the statute.<sup>205</sup> Congress would simply have conferred on the agency discretion to make a policy choice. Congress does that all the time. The barrier to such delegation of discretion would, if anything, be the nondelegation doctrine, not Article III.

*Chevron* deference, however, is nothing more than the generalized functional equivalent of the statute just hypothesized. It merely confers on agencies discretion to make the policy choice among the potential reasonable interpretations of ambiguous statutory language.

This is particularly true when one recalls that, because the critics are claiming that *Chevron* is unconstitutional, defenders of *Chevron*’s constitutionality are permitted to posit that Congress has

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

201. *Id.* at 857–59.

202. *Id.* at 857–58.

203. *Id.* at 857–59.

204. *Id.* at 865–66.

205. See Hamburger, *supra* note 19, at 1200.

passed a statute expressly instructing courts to apply *Chevron*.<sup>206</sup> Let us do just that. It is time to provide language for the statute hypothesized earlier. Suppose that the “*Chevron* Implementation Act” or “CIA” provided:

Any provision of a statute that is administered by an agency and that is susceptible of more than one reasonable interpretation shall be deemed to set out the provision’s possible, reasonable interpretations as permitted alternatives and to authorize and direct the agency to choose and implement one of the permitted alternatives.

Under this hypothetical CIA, ambiguous statutory language, such as the actual Clean Air Act language that was at issue in *Chevron*, would be deemed to set out its possible, reasonable interpretations as permitted alternatives. That is, the actual Clean Air Act language at issue in *Chevron* would be deemed to be rewritten as the hypothetical language suggested above, giving the EPA the policy choice between implementing the bubble concept and applying the permit requirements to each piece of equipment.

Such a regime would maintain the constitutional roles of courts and agencies, even as the *Chevron* critics conceive those roles. A court reviewing an agency’s implementation of an ambiguous statute would determine the meaning of the statute. In accordance with the CIA, that meaning would be an instruction to the agency to implement one of the statute’s possible, reasonable interpretations. The agency would exercise the policy discretion conferred by the statute.<sup>207</sup>

Note that the hypothetical CIA does not authorize the agency to *interpret* an ambiguous agency statute, in the strong sense of “interpret.” Monaghan, in hypothesizing a *Chevron*-implementing statute, imagines that the statute “mak[es] explicit that a court must accept every published administrative statutory *interpretation* so long as it has a ‘reasonable basis in law.’”<sup>208</sup> To answer the *Chevron* critics, however, the hypothetical CIA imagined here does not confer interpretive power on agencies. An agency implementing an ambiguous statute will, necessarily, interpret the statute in the simple sense of determining what it means so that the agency may follow it, and the agency will apply the CIA in that process. The power to interpret the statute in the strong sense remains with the courts, although, in

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206. See *supra* Section II.A.2.

207. This point also addresses Farina’s claim that regarding ambiguities in agency statutes as implicit delegations of power logically implies that there is no distinction between the legislative and judicial roles. Farina, *supra* note 38, at 477. The roles remain distinct. Under the CIA, courts, exercising “the mind-set of the Interpreter,” *id.* at 478, would determine the potential range of reasonable meanings that an agency statute could bear; that statute would then be understood to instruct the agency to implement one of the reasonable alternatives.

208. Monaghan, *supra* note 24, at 5 (emphasis added).

accordance with the CIA, the court will interpret the statute to confer policy discretion on the implementing agency.

The ability of Congress to pass a statute like the hypothetical CIA shows that *Chevron* does not violate Article III. Discretion conferred on an agency via statutory ambiguity is equivalent to discretion expressly conferred to choose among statutory alternatives. Before leaving this Section, however, it is necessary to address several potential objections to the arguments just made.

### 1. Is *Chevron* Deference Really the Same as Discretion Expressly Conferred?

Professor Hamburger would object to the previous argument. He would object to the suggestion that *Chevron* deference to an agency's interpretation of an ambiguous statute is equivalent to an agency's exercise of policy discretion expressly conferred by statute, and that *Chevron* deference therefore does not entail an agency's exercising the judicial power to interpret law. He would say:

Such an argument is correct in assuming that agencies use their interpretation of statutes as a means of making law, but it goes too far when it assumes that administrative interpretation therefore is not an attempt to say what the law is. Undoubtedly, interpretation can function as a mode of making law, but this does not mean it is not also interpretation.<sup>209</sup>

This objection, however, would fail under the regime of the CIA. Hamburger's argument is that agencies cannot exercise their power to make social policy decisions in a way that usurps the judicial power of interpretation. However, the judiciary has an exclusive claim to interpretive power only in the *strong* sense. If the CIA were in place, an agency giving content to an ambiguous statute would be doing no more than interpreting the statute in the *simple* sense. But everyone agrees that agencies can do that.

An agency implementing an ambiguous statute under the regime of the CIA would of course have to interpret the statute in the simple sense of determining what the statute means. As noted earlier, everyone, including Hamburger, recognizes that agencies may (and indeed must) interpret statutes in this sense.<sup>210</sup> But with the CIA in place, an agency conducting its interpretation of an ambiguous statute would have to apply the rule of the CIA; that is, the agency would have to determine that the statute should be deemed to set forth its possible reasonable interpretations as permitted alternatives and to instruct the agency to choose one of the alternatives. Doing so would be part of

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209. Hamburger, *supra* note 19, at 1220.

210. *See id.* at 1196.



simply determining what the statute means so that the agency can implement it.

The agency's interpretation would not be interpretation in the strong sense. It would still be up to a reviewing court to give a definitive construction to the statute. Of course, in accordance with the CIA, the court, if it agreed that the statute was ambiguous, would also need to deem the statute to set forth its possible reasonable interpretations as permitted alternatives and to instruct the agency to choose one of the alternatives. The court's determination of what the permitted alternatives are would be definitive. Thus, the power to interpret the statute in the strong sense would remain with the court.

The critics would doubtless complain that this regime would simply be the functional equivalent of *Chevron* deference. But that's the whole point. The point of imagining the CIA is to show that by giving appropriate interpretive instructions, Congress could transmute the process by which agencies construe ambiguities in statutes from forbidden strong-sense interpretation to permitted (and indeed necessary) simple-sense interpretation.

Under the hypothetical CIA, a court would still definitively interpret an ambiguous agency statute. The court would definitively determine that the statute conferred authority on the agency to exercise discretion to make a policy choice. The court would also definitively determine the limits of the agency's discretion. As shown earlier, an interpretation of an ambiguous statute that determines that the statute confers discretion on an agency is still an interpretation. With the hypothetical CIA in place, it would be the correct interpretation.

## 2. Could Congress Really Give Such an Interpretive Instruction?

A critic might also question whether Congress could really give courts (and agencies) the general interpretive instruction that the CIA would give. Can Congress tell courts how to interpret statutes? The answer is yes.

As I have previously explained,<sup>211</sup> the power to give instructions inherently includes the power to say how those instructions should be understood. Just as a boss may instruct an employee that, "whenever I say 'mail this,' I really mean 'make a copy of this, put the copy in my box, and mail the original by ordinary, first-class mail,'" so too any giver of instructions may give rules for interpreting those instructions. Congress cannot give the courts instructions as to how to interpret the

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211. See Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1500-05 (2000).

Constitution,<sup>212</sup> because Congress is not the source of the instructions in the Constitution. But the People, who are the source of the Constitution, can and did include in it instructions as to how the Constitution should be construed.<sup>213</sup> Similarly, Congress, the giver of statutory instructions, may provide by statute for how those instructions are to be interpreted.<sup>214</sup>

Congress does this frequently and uncontroversially. Congress passes statutes that include interpretive instructions such as defining terms for the statute involved (this is extremely common),<sup>215</sup> or providing more generalized interpretive directions such as a rule that a statute is to be construed liberally to effectuate its purposes.<sup>216</sup> Statutes such as the Dictionary Act even provide definitions or interpretive principles that apply to other statutes generally.<sup>217</sup>

One might still question, however, whether Congress could give the interpretive instruction in the proposed, hypothetical CIA. It is one thing, one might say, for Congress to include a “definitions” section in a statute or even for it to give general definitions applicable to all

212. See *supra* notes 165–167 and accompanying text (citing Supreme Court cases affirming the judiciary’s role as ultimate interpreter of the Constitution).

213. See, e.g., U.S. CONST. art. IV, § 3 (“[N]othing in this Constitution shall be so construed as to Prejudice any [territorial] Claims of the United States, or of any particular State.”); *id.* amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *id.* amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”); *id.* amend. XVII (“This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.”).

214. See, e.g., Rosenkranz, *supra* note 19, at 2106–07. Rosenkranz agrees that Congress has a “vast” power to “codify some tools of statutory interpretation,” *id.* at 2088, and that this power includes the power to provide not only definitions applicable to a particular statute, *id.* at 2105, but also definitions applicable to all statutes, *id.* at 2117–20, and more general interpretive instructions, such as statutes that codify or abrogate judicially developed interpretive canons. *Id.* at 2109; see also 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 27:1, at 604 (7th ed. 2009) (explaining that a legislature may provide statutory definitions or “directives specifying how provisions in the same statute or other statutes are to be construed and applied”).

Rosenkranz correctly points out that there are some limits to Congress’s power over interpretation. Congress could not, for example, require courts to defer to the constructions placed on a statute by a specified congressional committee after the statute is passed, as such a requirement would constitute a delegation of power to Congress itself in violation of the anti-aggrandizement principle of *INS v. Chadha*, 462 U.S. 919 (1983), and *Bowsher v. Synar*, 478 U.S. 714 (1986). Rosenkranz, *supra* note 19, at 2134. But *Chevron* does not violate the rule against self-delegation, as it vests power in the executive, not in Congress itself.

As noted earlier, see *supra* note 19, Rosenkranz suggests that *Chevron* is unconstitutional, but the arguments made in Sections II.B and II.C address his point insofar as it is based on a judicial duty to interpret statutes de novo.

215. See almost any federal statute, really, but for a particular example, see 17 U.S.C. § 101 (2012), which provides numerous definitions of terms used in the Copyright Act.

216. Siegel, *supra* note 211, at 1502.

217. *Id.* at 1502–03.

statutes, as in the Dictionary Act. Does it really follow that Congress can give generalized, mind-bending interpretive instructions such as those posited in the CIA, under which a statute that says one thing is to be deemed to say something entirely different?

The answer is, or at least should be, yes. Existing statutes provide that other statutes shall be deemed rewritten in specified ways, and courts apply these interpretive instructions. Such deeming is, for example, common when powers of one agency are transferred to another. For example, following the transfer of functions from numerous agencies to the new Department of Homeland Security, Congress provided:

With respect to any function transferred[,] . . . reference in any other Federal law to any department, commission, or agency or any officer or office the functions of which are so transferred *shall be deemed* to refer to the Secretary, other official, or component of the Department to which such function is so transferred.<sup>218</sup>

Courts have enforced this provision,<sup>219</sup> and there are numerous other statutes stating that statutory language that says one thing shall be deemed to say something else.<sup>220</sup> A provision of the Dictionary Act even says that “[t]he word ‘company’ or ‘association’, when used in reference to a corporation, shall be deemed to embrace the words ‘successors and assigns of such company or association’, *in like manner as if these last-named words, or words of similar import, were expressed.*”<sup>221</sup> It is thus commonplace for Congress to instruct courts to deem statutory language to be rewritten in specified ways.

Moreover, courts conduct such mind-bending statutory rewriting even *without* congressional instruction, particularly when doing so saves a statute’s constitutionality. Doing so *with* congressional instruction should therefore certainly be possible.

Consider two examples, one well known, the other less so. The well-known example is *National Federation of Independent Business v. Sebelius* (“*NFIB*”),<sup>222</sup> the case in which the Supreme Court upheld the Patient Protection and Affordable Care Act (also known as

218. 6 U.S.C. § 557 (2012) (emphasis added).

219. *E.g.*, *Scheerer v. U.S. Attorney Gen.*, 513 F.3d 1244, 1251 n.6 (11th Cir. 2008).

220. *E.g.*, 22 U.S.C. § 4191 (2012) (providing that statutes in Title 18 of the Revised Statutes that expressly apply only to particular classes of consular officers shall be deemed to apply as well to all other classes of such officers, plus other State Department employees designated by the Secretary of State); 22 U.S.C. § 6571 (providing, similarly to 6 U.S.C. § 557, that statutory references to agencies whose functions had been transferred shall be deemed references to other agencies); 26 U.S.C. § 6665(a)(2) (2012) (providing that references to “tax” in the tax code shall be deemed to refer also to tax penalties and additions to tax), *enforced*, *Carroll v. United States*, 339 F.3d 61, 76 (2d Cir. 2003).

221. 1 U.S.C. § 5 (2012) (emphasis added), *enforced*, *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991).

222. 567 U.S. 519 (2012).

“Obamacare”) against constitutional challenge. In doing so, the Court upheld the statute’s “individual mandate” that all Americans purchase health insurance. The key opinion, by Chief Justice Roberts, achieved this result by reconceiving the nature of the mandate.<sup>223</sup> Chief Justice Roberts first determined that Congress lacked power under the Commerce Clause and the Necessary and Proper Clause to impose the individual mandate directly.<sup>224</sup> But he then saved the mandate by recharacterizing it, not as a direct command to buy health insurance, but as a tax on not buying health insurance. He did so even though “[t]he most straightforward reading of the mandate is that it commands individuals to purchase insurance,”<sup>225</sup> even though the Court held that the mandate is *not* a tax for purposes of the Anti-Injunction Act,<sup>226</sup> and even though the statute describes the payment required of those who fail to fulfill the mandate as a “penalty,” not as a “tax.”<sup>227</sup> In other words, the Chief Justice saved the mandate by rewriting the statute that imposed it to say something quite different from, although functionally equivalent to, what it actually said. In doing so, the Chief Justice was expressly motivated by the need to save the statute’s constitutionality.<sup>228</sup> *NFIB* thus shows that a court may deem statutory language rewritten in a different way.

One might, perhaps, try to dismiss *NFIB* as *sui generis*; the reasoning of such a momentous and politically charged case should not, one might say, be assumed to apply routinely. But the routine, little-known case of *Durousseau v. United States*<sup>229</sup> shows that the principle that statutes can be notionally rewritten in different language is a general one.

*Durousseau* involved a question of the Supreme Court’s appellate jurisdiction. That jurisdiction is given by Article III of the Constitution, subject to “such Exceptions . . . as the Congress shall make.”<sup>230</sup> That is, Congress does not have power to *give* appellate jurisdiction to the Supreme Court; it has the power to make *exceptions* to the appellate jurisdiction given to the Court by the Constitution. And yet, as the Court observed, Congress has not purported to make

223. *Id.* at 561–70.

224. *Id.* at 546–61.

225. *Id.* at 562.

226. *Id.* at 546.

227. *Id.* at 564.

228. *See id.* at 562 (“[I]f a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.”).

229. 10 U.S. (6 Cranch) 307 (1810). *Durousseau*, decided over two hundred years ago, has been cited about one hundred times in Westlaw’s JLR database. *NFIB* was decided less than a decade ago, yet has already been cited more than 1,800 times.

230. U.S. CONST. art. III, § 2.

exceptions to the Supreme Court's appellate jurisdiction, but has passed statutes describing that jurisdiction affirmatively.<sup>231</sup> Does this mean that the statutes are ineffective? Not at all. Speaking through Chief Justice Marshall, the Court said that the statutes' affirmative description of the Court's appellate jurisdiction "has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it."<sup>232</sup> That is, although the statutes were phrased as affirmatively giving jurisdiction to the Supreme Court, the Court was willing to deem them to be written differently. If the statutes collectively say that "the Supreme Court shall have appellate jurisdiction over cases meeting criteria X, Y, or Z," the Court deems the statutes to say that "the Supreme Court shall *not* have appellate jurisdiction over cases *not* meeting criteria X, Y, or Z."

Again, in agreeing to perceive the statutes as being written quite differently from their actual language, the Court was motivated by constitutional considerations. The Court said that "[w]hen the first legislature of the union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court."<sup>233</sup> Thus, where a statute's actual language appears to be an exercise of power Congress does not constitutionally possess (e.g., conferring appellate jurisdiction on the Supreme Court), a court may deem the statute to be rewritten in different language that would achieve the same result but by exercising a power Congress does possess (e.g., making exceptions to the appellate jurisdiction of the Supreme Court).

The interpretive attitude on display in *NFIB* and *Durousseau* helps rescue *Chevron* from the critics. Those cases show that courts have a duty, where possible, to construe statutes in a way that saves their constitutionality, even deeming the statutes to be rewritten in different language where necessary. Therefore, even if one concedes the critics' claim that Article III prohibits Congress from conferring *interpretive* power on agencies, courts would have a duty to deem statutes that appear to do so rewritten in a way that saves their constitutionality. In accomplishing this, the hypothetical CIA would only reinforce what would already be a judicial duty.

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231. 10 U.S. at 314.

232. *Id.*

233. *Id.*

3. Is That How *Chevron* Really Works?

The critics might further object that the CIA is too clever by half. The statute, they might say, is not an accurate picture of how *Chevron* really works. The attempt to envision *Chevron* as a delegation of power to make policy choices ignores, the critics might argue, the reality that *Chevron* effectively delegates interpretive power to agencies. The critics might also point out that even under the hypothetical CIA, courts would in all likelihood not interpret an ambiguous agency statute by spelling out all the reasonable possible interpretations and determining whether the agency had properly exercised its power to choose among them; courts would simply determine whether the one interpretation arrived at by the agency was reasonable. Again, the critics would argue, this suggests that the agency is really exercising interpretive power. The CIA, they might argue, shouldn't fool anyone.

The critics would have a point. Even if the legal world reconceived *Chevron* as deeming ambiguous agency statutes to constitute delegations of policymaking power rather than interpretive power—indeed, even if the hypothetical CIA were in place—the regime of *Chevron* would as a practical matter be equivalent to one in which Congress delegated interpretive power to agencies. Moreover, the conception that ambiguous statutes delegate interpretive power might seem a more natural fit for *Chevron*'s practical impact than the conception that they delegate policymaking power.

But this is not fatal to *Chevron*'s constitutionality. Again, *NFIB* and *Durousseau* are instructive. They show that when a statute's practical effect may be conceived in different ways, one constitutional and the other unconstitutional, the courts should favor the constitutional conception, even when it is the less natural one. The practical effect of statutes *conferring* jurisdiction on the Supreme Court in specified cases and statutes *excepting* jurisdiction in all other cases is the same, but the Court in *Durousseau* adopted the latter, constitutional conception of the statutes at issue even though the statutes' wording was far more consistent with the former. In *NFIB* the Court characterized the individual mandate as a constitutional tax even though in both language and practical effect it was a penalty. Indeed, in *NFIB* the Court performed even further gymnastics when it conceived the individual mandate as a tax for constitutional purposes even as it determined that the mandate was *not* a tax for purposes of the Anti-Injunction Act.<sup>234</sup> So the fact that *Chevron* can be conceived,

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234. *NFIB v. Sebelius*, 567 U.S. 519, 546 (2012).

and indeed might more naturally be conceived, as deeming ambiguous statutes to delegate interpretive power is not fatal.

Nor is it a problem that in practice, even if the CIA were in effect, courts would not likely interpret ambiguous agency statutes by spelling out every possible reasonable interpretation and treating the result as a menu from which the agency might choose, but would determine only whether the particular choice made by the agency is permitted. Courts often decide no more than is necessary to determine the result of a case.<sup>235</sup> In the *Utah* case discussed above, for example, having determined that the Census Clause delegated to Congress the power to choose among reasonable census methodologies, the Supreme Court did not determine the full set of potential reasonable methods; it determined only that the method chosen by Congress was among them.<sup>236</sup> Indeed, when construing the Constitution, the Court frequently leaves matters to future development,<sup>237</sup> but that does not mean that the construction that the Court does give to the Constitution is not an interpretation. Similarly, if a court can dispose of a case by interpreting a statute sufficiently to decide the issues before it, the court need not determine every detail of the statute's meaning for its reading to be an interpretation.

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In sum, the Article III objection to *Chevron* deference fails. Properly understood, *Chevron* does not wrest the interpretive power from courts and give it to agencies. It leaves courts to interpret agency statutes, but under an implicit rule (which could be made explicit by Congress's passage of the hypothetical CIA) that ambiguous statutes are to be deemed to delegate *policy discretion* to agencies. An interpretation of a statute that determines that the statute delegates discretion is still an interpretation.

#### *F. Addressing Other Critiques*

The main point of this Essay, now hopefully accomplished, is to address the critics' Article III objections to *Chevron*. Addressing other

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235. See, e.g., *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 174 (1984) ("Following our usual practice of deciding no more than is necessary to dispose of the case before us, we express no opinion on [an issue not before the Court].").

236. *Utah v. Evans*, 536 U.S. 452, 479 (2002).

237. *E.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (determining that the Second Amendment right to keep and bear arms is subject to some regulation, but not "undertak[ing] an exhaustive historical analysis . . . of the full scope of the Second Amendment").

objections to *Chevron* is not the main point. Still, this Section addresses some other significant points made by the critics.

### 1. Hamburger's "Bias" Objection

As noted above, Hamburger, in addition to arguing that *Chevron* unconstitutionally strips the interpretive power from courts and gives it to agencies, also argues that *Chevron* violates the Due Process Clause by requiring courts to show deference to one of the parties to a case (in *Chevron* cases in which the government is a party).<sup>238</sup> The previous sections of the Essay also refute the bias argument by showing that *Chevron* deference can be assimilated to judicial review of agency action taken pursuant to express delegation of authority.

There is no bias when a judge enforces a statute that expressly delegates authority to an administrative agency. Innumerable statutes expressly delegate authority to an agency to make some decision—say, to set the maximum levels of a pollutant in the air<sup>239</sup> or drinking water<sup>240</sup> in accordance with a statutory standard. In such cases, when the agency exercises the power delegated to it, judicial review is routinely held to be available only for rationality.<sup>241</sup> Challengers of the agency's action therefore labor under the same burden as to which Hamburger complains—they can win only if they convince a reviewing court that the agency's action is not only wrong, but irrational. The agency has a clear advantage. And yet no one would claim that courts are unconstitutionally showing *bias* in favor of agencies in such cases. The agencies have the advantage simply because courts will necessarily permit the agencies to exercise the power conferred on them by statute.

Indeed, as noted earlier, even Hamburger's article does not question the ability of courts to uphold agency regulations passed pursuant to an express delegation of authority.<sup>242</sup> If, for example, the

238. Hamburger, *supra* note 19, at 1211–13.

239. *See, e.g.*, *Nat'l Env'tl. Dev. Ass'n's Clean Air Project v. EPA*, 686 F.3d 803, 812–13 (D.C. Cir. 2012) (concerning such an action under the Clean Air Act).

240. *See, e.g.*, *Nat. Res. Def. Council, Inc. v. EPA*, 824 F.2d 1211, 1218–19 (D.C. Cir. 1987) (concerning such an action under the Drinking Water Act).

241. *See, e.g.*, *Nat'l Env'tl. Dev.*, 686 F.3d at 810 (“Although we must perform a ‘searching and careful’ inquiry into the facts, we do not look at the decision as would a scientist, but ‘as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality.’” (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976) (en banc)); *Nat. Res. Def. Council, Inc.*, 824 F.2d at 1216 (“Happily, it is not for the judicial branch to undertake comparative evaluations of conflicting scientific evidence. Our review aims only to discern whether the agency's evaluation was rational.”).

242. Hamburger, *supra* note 19, at 1200. Note that this paragraph is limited to objections posed in the Hamburger article under discussion. Hamburger's other works question the power of agency rulemaking more generally. *See, e.g.*, HAMBURGER, *supra* note 199, at 11, 378.



statute at issue in *Chevron* itself had expressly delegated to the EPA the power to choose between applying the Clean Air Act's permit requirements to each piece of equipment within a plant or only to entire plants, as hypothesized earlier,<sup>243</sup> Hamburger's article would not question letting the agency make that choice, and no one would assert that a court was showing "bias" in approving the agency's exercise of the express power to choose from among statutory alternatives. Of course an agency is empowered to make a selection from among choices expressly stated in a statute. The court would simply have determined that the agency was properly exercising statutory power expressly delegated to it.

But under the hypothetical CIA, an ambiguous agency statute is deemed to be rewritten as an express delegation of power to make a policy choice among the statute's reasonable possible interpretations. Therefore, there would be no "bias" when a court first interprets an ambiguous agency statute in the way Congress has instructed, and then enforces the agency's action within the power delegated to the agency. Courts would not be showing bias toward agencies in approving such choices; they would simply be approving agency power deemed to have been expressly delegated.

In other words, the bias argument does not add anything to the attack on *Chevron*'s constitutionality. If Article III allows courts to deem an ambiguity in an agency statute to be a delegation of power to the agency to make a policy choice among the potentially reasonable interpretations of the ambiguous statutory provision, then the Due Process Clause does not prohibit courts from allowing the agency to exercise the power thus conferred.

## 2. Questioning Whether Congress Intended *Chevron* Deference

The main focus of this Essay has been on the critics' constitutional critique of *Chevron*. Some of the critics, however, also question whether *Chevron* is correct as a matter of statutory construction. Justice Gorsuch argues that there is little evidence that Congress actually intends statutory ambiguities to constitute delegations of authority to agencies.<sup>244</sup> Professor Farina devotes a section of her article to the same point.<sup>245</sup>

On this issue, the critics have a good point. Congress has never passed the hypothetical CIA. Congress's *actual* direction to courts with

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243. See *supra* note 206 and accompanying text.

244. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring).

245. Farina, *supra* note 38, at 468–76.

regard to legal issues that arise in judicial review of administrative action, insofar as one exists, is § 706 of the Administrative Procedure Act. That statute provides that “[t]o the extent necessary to decision and when presented, the reviewing court 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>246</sup> While this language is not, perhaps, completely inconsistent with deferential review, it is surely suggestive of a *de novo* standard.<sup>247</sup> Indeed, Kenneth Culp Davis made this point almost apoplectically in his famous *Administrative Law Treatise* decades ago.<sup>248</sup>

It is not the purpose of this Essay to defend *Chevron* against the charge that it misconstrues Congress’s actual direction to courts regarding statutory interpretation. Perhaps the best that can be said is that Congress’s silence in the face of the long-standing judicial decisions giving deference to agency statutory construction—particularly since *Chevron* but going back even before that<sup>249</sup>—suggests that Congress is not averse to *Chevron* deference. Of course, reasoning from congressional silence is always dangerous, and never more so than in an area in which such silence is imagined to give rise to an inference that Congress has delegated power to the executive. In such an area the president would likely veto any congressional attempt to reclaim the power, and so it would be particularly difficult for Congress to defeat the inference by express action. So the suggestion that courts may infer congressional approval of *Chevron* from Congress’s failure to overturn it is offered tepidly, only so that this critical argument might receive some response. The real response is that Congress *could* eliminate any doubt about its intent by passing the hypothetical CIA.

### 3. Does *Chevron* Make Obedience to Law Harder?

Justice Gorsuch adds the suggestion that *Chevron* makes it more difficult for ordinary citizens to obey the law. He complains:

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246. 5 U.S.C. § 706 (2012) (emphasis added).

247. See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring) (arguing that § 706 “contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations”).

248. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW OF THE EIGHTIES: 1989 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE* 507–26 (1989). Davis was particularly upset that the Court was not following what he regarded as the clear command of § 706 that a reviewing court “shall decide all relevant questions of law.” He quoted that language more than twenty separate times (five times as a block quote), *id.* at 509–13, 515–16, 518–19, 525, and said that “[t]he contrast between the statutory words and the Court’s words could hardly be stronger.” *Id.* at 510.

249. See, e.g., *supra* notes 39–41 and accompanying text.

Under *Chevron* the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*; required to guess whether the statute will be declared "ambiguous" (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed "reasonable." Who can even attempt all that, at least without an army of perfumed lawyers and lobbyists?<sup>250</sup>

Putting aside Justice Gorsuch's reference to "perfumed" lawyers,<sup>251</sup> this attack on *Chevron* seems misguided. It is certainly true that it can be difficult for ordinary citizens to discern the meaning of complex statutory law that they are nonetheless assumed to understand.<sup>252</sup> But Justice Gorsuch provides no evidence that *Chevron* makes things worse on this point. After all, even in areas where *Chevron* does not apply (or before *Chevron* was decided), the public faces (or faced) the same difficulty of discerning the meaning of statutory texts. It took years of litigation and conflicting lower court opinions before the Supreme Court finally decided, for example, that the Americans with Disabilities Act requires professional golf tournaments to make accommodations for disabled golfers,<sup>253</sup> that the Civil Rights Act of 1991 did not apply retroactively,<sup>254</sup> and that plaintiffs in a class action cannot aggregate claims to meet the amount-in-controversy requirement for diversity jurisdiction.<sup>255</sup> Justice Gorsuch implicitly suggests that the public may predict "the fairest reading of the law that a detached magistrate can muster" easily, or at least more easily than the public can predict the outcome of statutory interpretation under *Chevron*'s deference regime, but he offers no evidence that this is true. Yes, courts may disagree as to whether a statute is ambiguous and whether an agency's interpretation is reasonable, but courts might disagree about the meanings of statutes even if there were no such thing as *Chevron* deference.

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250. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

251. Presumably, Justice Gorsuch is not seriously suggesting that lawyers who wear perfume serve an especially elite clientele. Perfume is seemingly used here as a metaphor for high costs. Justice Gorsuch appears to be appealing to populist resentment against members of the elite who can afford to hire high-priced lawyers to help them decipher and exploit obscure legal requirements.

252. *E.g.*, *Atkins v. Parker*, 472 U.S. 115, 130 (1985) ("All citizens are presumptively charged with knowledge of the law.").

253. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674 (2001) (noting conflicting decisions in the courts of appeals on this point).

254. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) (determining that Congress had no intent for the statute to apply retroactively). For conflicting lower court decisions, see, for example, *Estate of Reynolds v. Martin*, 985 F.2d 470, 476 (9th Cir. 1993), which holds the act to be retroactive and notes that the holding "break[s] ranks with the other circuits that have decided this issue".

255. *See Snyder v. Harris*, 394 U.S. 332, 334 (1969) (noting conflict in circuits).

4. Does *Chevron* Violate the Nondelegation Doctrine?

As noted earlier, some of the critics acknowledge that the alleged Article III problem with *Chevron* might be ameliorated by regarding the power implicitly delegated to agencies by an ambiguous statute as being not the power to *interpret* the statute, but rather the power to make a *policy choice*.<sup>256</sup> They suggest, however, that so conceived, *Chevron* may violate the nondelegation doctrine.<sup>257</sup> Congress, these critics suggest, may no more give agencies the legislative power than it may give them the judicial power. *Chevron*, they contend, makes a mockery of the nondelegation doctrine's requirement that statutes granting discretion to agencies must lay down an "intelligible principle" to guide that discretion.<sup>258</sup>

There can be little doubt that the nondelegation doctrine has failed to live up to that promise. Courts apply the "intelligible principle" test in theory but in practice approve delegations of power restricted by principles that can only be called unintelligible. Courts approve delegations limited by standards such as that rates be "just and reasonable,"<sup>259</sup> or that an agency's actions serve "the public interest, convenience, and necessity,"<sup>260</sup> even though these empty standards are open to "any conceivable interpretation."<sup>261</sup> Courts applying the "intelligible principle" test regularly find "intelligible principles where less discerning readers find gibberish."<sup>262</sup> The result is that "supposed limitations on delegations of legislative power are little more than a legal joke."<sup>263</sup>

So the critics are correct that the nondelegation doctrine does little to enforce its supposed restraints on the delegation of legislative power to executive agencies. Again, however, what is missing from the critics' arguments is any real showing that *Chevron* makes things worse

256. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (noting ambiguity); *Hamburger*, *supra* note 19, at 1206–10 (discussing the decisionmaking power of judges); *supra* text accompanying note 81 (noting Justice Gorsuch's concurrence).

257. See *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) (noting the "potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference"); *Gutierrez-Brizuela*, 834 F.3d at 1153–54 ("The fact is, *Chevron's* claim about legislative intentions is no more than a fiction . . .").

258. *Gutierrez-Brizuela*, 834 F.3d at 1153–54.

259. *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 600–01 (1944).

260. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943).

261. Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 474 (1985).

262. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 329 (2002).

263. Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 161 (2013).

in this regard. Recall that, as noted earlier, Congress might have *expressly* delegated to an agency any choice that it is deemed under *Chevron* to have delegated implicitly via ambiguity.<sup>264</sup> Such an express delegation of power to make a policy choice might or might not violate the nondelegation doctrine (almost certainly not, these days), but if it does not, a functionally equivalent implicit delegation of power to make the same choice should be equally valid. The nondelegation doctrine is about whether the executive is capable of receiving a given choicemaking power at all, not about whether Congress confers the power implicitly or explicitly.

True, the nondelegation doctrine theoretically demands that Congress lay down an “intelligible principle” to guide power delegated to an executive agency. But as just noted, courts are willing to let almost any standard satisfy this test. A general standard could easily be provided by the hypothetical *Chevron* Implementation Act. Recall that the CIA language given earlier provided that an ambiguous provision in an agency statute shall be deemed to set out its reasonable interpretations as alternatives and to authorize and direct the implementing agency to choose one of the alternatives.<sup>265</sup> A second sentence could easily add that “In making this choice, the agency shall be guided by the purposes of the statute containing the ambiguous provision.” That would suffice for nondelegation doctrine purposes.<sup>266</sup>

Justice Gorsuch argues that *Chevron* makes things worse (from the perspective of the nondelegation doctrine) by permitting agencies to change their interpretations of ambiguous statutes over time.<sup>267</sup> Permitting such vacillation, he argues, erodes the limitations that the nondelegation doctrine requires on the exercise of delegated power.<sup>268</sup> Again, however, *Chevron* makes things no worse on this point. Agencies are equally allowed to change the rules they make when acting pursuant to express delegations of power.<sup>269</sup> Any vacillation permitted

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264. See *supra* Section II.E (discussing how Article III does not bar Congress from expressly delegating the authority to an agency to make any decision that would otherwise be made under *Chevron*).

265. See *supra* notes 206–208 and accompanying text.

266. Cf. *Yakus v. United States*, 321 U.S. 414, 420, 426–27 (1944) (approving the delegation of power to fix certain prices in a way that “the prices fixed shall be fair and equitable, that in addition they shall tend to promote the purposes of the Act”).

267. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1154–55 (10th Cir. 2016) (Gorsuch, J., concurring) (noting that agencies that are able to change rules from one day to the next offer little “substantial guidance” or “clearly delineated boundaries”).

268. See *id.* (stating that *Chevron* serves to place the power of determining the meaning of the law in the hands of those who are charged with enforcing the law).

269. In *Whitman v. American Trucking Ass’n*s, 531 U.S. 457 (2001), for example, the Supreme Court upheld the EPA’s revision of its National Ambient Air Quality Standards (“NAAQS”) against a nondelegation challenge. In holding that the scope of discretion conferred by the relevant statute

by *Chevron* could equally be permitted by an express delegation of power to make a policy choice accompanied by express authorization to vary that choice over time in response to changing social and political conditions (such authorization could also be added to the hypothetical CIA to apply generally). Again, there might or might not be a nondelegation problem, but if there is one, it derives from the scope of the power conferred, not from the fact that the power is conferred implicitly via statutory ambiguity.

Perhaps what Justices Thomas and Gorsuch mean is that the principle of *Chevron* deference violates nondelegation as it *should* be—a robust, reinvigorated nondelegation doctrine of the kind that Justice Thomas has hinted he might be willing to adopt.<sup>270</sup> That may well be true. If the nondelegation doctrine were more robust, it might forbid empowering agencies to make the choices that *Chevron* posits Congress has delegated to them. But such a vigorous nondelegation doctrine would equally undermine Congress’s ability to delegate those same choices to agencies expressly. Again, the issue is the vast degree of delegation that the Court has approved, not the way that *Chevron* allows the delegation to be implicit rather than express.

Alone among the critics, Professor Farina provides some reasons why *Chevron* makes things worse in terms of the nondelegation doctrine. She suggests that when the Supreme Court loosened the nondelegation doctrine by inventing the “intelligible principle” test<sup>271</sup> and the requirement that statutory standards be sufficiently clear that a reviewing court could tell whether they were being obeyed,<sup>272</sup> the Court reached a “constitutional accommodation” whereby extra power could be delegated to agencies provided there was judicial policing of the limits on that power.<sup>273</sup> The result was not, Farina suggests, simply

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was “well within the outer limits of our nondelegation precedents,” *id.* at 474, the Court looked at the content of the applicable statutory standard. It noted that the statute required the EPA to set the NAAQS at a level “requisite . . . to protect the public health with an adequate margin of safety.” *Id.* at 475–76 (internal quotation marks omitted). The Court barely mentioned the fact that the statute allowed, and indeed required, the agency to change the NAAQS over time; it mentioned that the NAAQS “reflect the latest scientific knowledge.” *Id.* at 473. But this seemed of little relevance to the nondelegation holding.

270. *See supra* note 78.

271. Farina, *supra* note 38, at 483–84.

272. *Id.* at 485–86.

273. *Id.* at 487. Of course, some authorities would deny that the nondelegation doctrine permits some delegation of lawmaking authority, provided the authority be sufficiently circumscribed, preferring instead to say that the doctrine permits the delegation of some *decisionmaking authority* (provided the authority be guided by an intelligible principle), but not any lawmaking power whatsoever. Compare *Whitman*, 531 U.S. at 472 (holding that the Constitution permits *no* delegation of the legislative power), with *id.* at 488 (Stevens, J., concurring) (asserting that the rulemaking power delegated to the agency should be forthrightly characterized as legislative).

that the Court approved extra delegation of power; rather, that approval occurred as part of a bargain that included a certain level of judicial review. *Chevron*, Farina suggests, undoes the terms of that bargain by permitting agencies to interpret the limits of their own powers<sup>274</sup> and also contributes to a dangerous accumulation of power in the executive branch.<sup>275</sup>

One might respond with the same response given above to the other critics: whatever decisionmaking authority Congress implicitly confers on agencies by virtue of *Chevron*, Congress could have conveyed to agencies expressly.<sup>276</sup> The authority conferred might or might not violate the nondelegation doctrine, but the form by which the authority was conferred should make no difference. Once again, therefore, *Chevron* makes things no worse from a nondelegation perspective.

Farina, however, might suggest that this analysis assumes that whenever Congress vests an agency with authority via an ambiguous statute (thereby triggering *Chevron* deference), Congress would be willing to vest the agency with the same authority via an express delegation. But this is not necessarily true. Yes, one possible reason for statutory ambiguity is that Congress desired to vest the agency with authority and chose to do so by using broad or ambiguous statutory language.<sup>277</sup> However, it is also possible that competing factions within Congress each desired to give the agency clearer instructions but neither side had the votes to clarify the statutory text in its preferred way,<sup>278</sup> or that members of Congress thought the statutory language *was* clear and did not know that they were delegating authority to the agency.<sup>279</sup> The principle of *Chevron* deference applies without regard to which of these reasons might be the true reason for statutory ambiguity.<sup>280</sup>

Thus, Farina could argue, *Chevron* deference does make things worse from a nondelegation perspective, because it does more than simply approve intentional, but implicit, delegations of power that could have been made explicit. It also enhances agency powers in situations in which Congress did not imagine that it was delegating power at all.<sup>281</sup> The former delegations might be just as valid as express delegations, but the additional, “accidental” delegations might further enhance

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274. Farina, *supra* note 38, at 487–88.

275. *Id.* at 497–98.

276. *See supra* note 264 and accompanying text.

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

278. *Id.*

279. *Id.*

280. *Id.*

281. *See Farina, supra* note 38, at 468–76, 497–98 (discussing this problem).

executive power to the point where the balance between the branches is irretrievably upset.

This argument does bring out a difficulty with *Chevron* doctrine. *Chevron*'s assumption that every ambiguity in an agency statute represents a congressional delegation of power to the agency is probably false. Congress does sometimes intentionally use broad or ambiguous language for the purpose of vesting authority in an agency,<sup>282</sup> but statutory ambiguity also arises for other reasons.<sup>283</sup> Allowing agencies to resolve ambiguities that accidentally arise enhances agency power. We could limit *Chevron* to cases in which a court determines that Congress deliberately, or at least not purely accidentally, used statutory ambiguity as a device to delegate authority, but such determinations would be very difficult for courts to make, as the legislative record might often provide no solid evidence as to the reason for a statutory ambiguity.<sup>284</sup> This difficulty may underlie *Chevron*'s presumption that statutory ambiguity represents implicit delegation.<sup>285</sup>

Three points help rescue *Chevron* from Farina's suggestion that it violates the nondelegation doctrine. First, Farina's argument is partly rooted in her doubt as to the accuracy of *Chevron*'s presumption about the likely reason for statutory ambiguity—she asserts that the Supreme Court had no basis for assuming that ambiguity represents implicit delegation.<sup>286</sup> Congress could, however, address this part of the problem by passing the hypothetical CIA. If Congress provided by statute that ambiguity does represent implicit delegation, there would be no doubt that Congress desired *Chevron* deference in all cases of statutory ambiguity.

Moreover, such an expression of congressional desire would narrow the set of cases where *Chevron* deference would do any more than express delegation. As noted above, to the extent that *Chevron* deference provides only an alternative vehicle for Congress to make delegations of authority that it could have made expressly, it should not

282. 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, 995–97 (2013) (providing empirical evidence that congressional staff sometimes “quite intentional[ly]” draft ambiguous language for an agency to administer “because regulators have the expertise and things get worked out better by the agency” (internal quotation marks omitted)).

283. *Id.*; see also David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212 (“*Chevron* doctrine at most can rely on a fictionalized statement of legislative desire . . .”).

284. Farina, *supra* note 38, at 470; John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1950–51 (2015).

285. Farina, *supra* note 38, at 470.

286. *Id.* at 470–71.



matter from the standpoint of the nondelegation doctrine.<sup>287</sup> *Chevron* provides agencies with genuine additional authority only to the extent that it creates situations where Congress is deemed to have delegated authority to agencies even though it did not intend to. But if Congress stated that it *did* intend every ambiguity in an agency statute as a delegation of authority, we would have Congress's own assurance that its delegations via ambiguity were the equivalent of (and indeed under the CIA should be deemed to be rewritten as) express delegations. Both practically and legally that would likely result in fewer unintentional delegations than one might currently believe exist.

Finally, even if some residue of unintentional delegations of authority might still exist in a world in which Congress has adopted the CIA, it seems unlikely that the additional authority thereby granted to agencies would make a decisive difference from the perspective of the nondelegation doctrine. As acknowledged above, such unintentional delegations do represent an additional accumulation of power within the executive. But the *extra* power involved pales in comparison to the amount delegated expressly. Congress has, with judicial approval, turned over broadcast policy to the FCC,<sup>288</sup> the setting of prices to a Price Administrator,<sup>289</sup> and the determination of what constitutes "unfair methods of competition" to the FTC.<sup>290</sup> By comparison to these enormous powers, the additional power to choose among reasonable constructions of unintentionally ambiguous provisions of agency statutes seems small. To accept the enormous powers conferred expressly but to regard these additional powers as unconstitutional is to swallow the camel and strain at the gnat.

## CONCLUSION

The recent constitutional attacks on *Chevron* are misdirected. *Chevron* does not wrest the interpretive power from courts and give it to the executive. Even accepting the critics' claim that courts must exercise "independent judgment" when determining the meaning of statutes, *Chevron* does not prevent courts from exercising such judgment. *Chevron* does not prevent courts from fulfilling their duty to

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287. See *supra* text accompanying notes 264, 276.

288. See *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (approving a statute authorizing the FCC to grant broadcast licenses on the basis of serving the "public interest").

289. See *Yakus v. United States*, 321 U.S. 414, 427 (1944) (approving a statute authorizing a Price Administrator to fix commodities prices, provided that they be "fair and equitable").

290. *Sears, Roebuck & Co. v. FTC*, 258 F. 307, 311–12 (7th Cir. 1919); see also *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532–33 (1935) (distinguishing the FTC Act from a statute held to violate the nondelegation doctrine).

interpret statutes. An interpretation of a statute that concludes that the statute delegates power to an executive agency is still an interpretation.