metadata, citation and similar papers at core.ac.uk
brought to you by
provided by Duke Law Scholarship R

RE-READING *CHEVRON*

THOMAS W. MERRILL†

ABSTRACT

Though increasingly disfavored by the Supreme Court, Chevron *remains central to administrative law doctrine. This Article suggests a way for the Court to reformulate the* Chevron *doctrine without overruling the* Chevron *decision. Through careful attention to the language of* Chevron *itself, the Court can honor the decision's underlying value of harnessing comparative institutional advantage in judicial review, while setting aside a highly selective reading that unduly narrows judicial review. This re-reading would put the* Chevron *doctrine—and with it, an entire branch of administrative law—on firmer footing.*

TABLE OF CONTENTS

Introduction 1154
I. Judicial Review of Questions of Law: Four Values 1156
A. Rule-of-Law Values 1156
B. Constitutional Values 1160
C. Accountability Values 1165
D. Process Values 1169
E. The Four Values and the *Chevron* Doctrine 1174
II. The *Chevron* Opinion: Parts III–VII 1177
A. Rule-of-Law Values 1178
B. Constitutional Values 1179
C. Accountability Values 1181
D. Process Values 1182
III. The Two Paragraphs 1183
A. The Problematic Aspects of Part II 1184
B. Why Did Justice Stevens Start with the Two Paragraphs? 1188

Copyright © 2021 Thomas W. Merrill.

† Thomas W. Merrill is the Charles Evans Hughes Professor of Law at Columbia Law School. Thanks to Kristin Hickman, Jeremy Kessler, Gillian Metzger, Henry Monaghan, and Peter Strauss for comments on an earlier draft. Lefteri Christodulelis provided outstanding research assistance.

IV. Re-Writing the *Chevron* Doctrine 1191
Conclusion 1195

INTRODUCTION

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.[1] is, if not the most important decision in administrative law, certainly the most cited.[2] It is also one of the most criticized. Academic grousing is one thing, but *Chevron* seems also to have lost favor with the Supreme Court. The Justices generally identified as conservative—some of them, anyway—appear willing to overrule or at least limit the decision, with principles of stare decisis temporizing their willingness to varying extents. The Justices generally identified as liberal are presumably more supportive, although they are reluctant to invoke *Chevron* for fear of what the conservatives might do in response. These calculations are complicated by the addition of the newest member of the Court, Justice Amy Coney Barrett, who has yet to be heard from on *Chevron*. The result, for now, is a kind of paralysis on the Court with respect to the status of *Chevron*. The Court has not relied on the *Chevron* doctrine to uphold an agency interpretation of law for four years.[3] The obvious evasion has prompted Justice Samuel Alito to remark that "the Court, for whatever reason, is simply ignoring *Chevron*," which he characterized as "an important, frequently invoked, once celebrated, and now increasingly maligned precedent."[4]

The Court cannot ignore *Chevron* forever. The decision is far too central to administrative law. Agencies, lower courts, and lawyers need guidance about its status. This Article suggests how the Court might reformulate the *Chevron doctrine* without overruling the *Chevron decision*. That move requires distinguishing between the doctrine and the decision. This Article argues they are not the same. The *Chevron* decision should be allowed to stand; indeed, it can be upheld as an instructive example of how judges should review agency interpretations of the statutes they administer. The *Chevron* doctrine, in contrast, is based on two paragraphs in the *Chevron* decision, taking

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

2. Peter M. Shane & Christopher J. Walker, Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 n.2 (2014).

3. *See* Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2136, 2142 (2016) (relying on *Chevron* to uphold an interpretation of the Patent Office about the scope of construction of patents on *inter partes* review).

4. Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting).

those paragraphs out of context and elevating them into a mechanical doctrine that fails to reflect the broader traditions of administrative law.[5] By reading the *Chevron* decision as a whole, the "increasingly maligned" doctrine can be recast in a way that is more faithful to the values of judicial review and puts this branch of administrative law on sounder footing.

This Article will not appeal to those who would abolish all deference to agency interpretations of law, insisting that only Article III courts are entitled to "say what the law is."[6] Nor will it appeal to those who believe the modern pace of social change requires that agencies replace Congress and the courts as the primary sources of legal norms.[7] It embraces the notion that judicial review of agency legal interpretations should be structured in such a way as to emphasize the comparative strengths of both courts and agencies as institutions. Broadly speaking, it assumes that courts have a comparative advantage in enforcing the rule of law and constitutional values, and that agencies have a comparative advantage in reconciling conflicting policy objectives.

This Article proceeds as follows. Part I briefly sketches four values that should be advanced by a regime that divides authority to interpret the law between agencies and courts. Part II considers the Supreme Court's unanimous *Chevron* decision and demonstrates that most of the decision is highly consistent with the four values identified in Part I. Part III turns to two paragraphs that appear in an introductory section of the *Chevron* opinion, and argues that these paragraphs, at least as they came to be interpreted, are significantly at odds with these values. Part IV then offers some thoughts about how the Court could revise the *Chevron* doctrine by returning to the *Chevron* decision and reaffirming it, as it stands in its entirety, as the proper foundation for a system of judicial review.

---

5. *Infra* Parts I.E. & III.

6. *E.g.*, PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE x (2018). The quoted reference is from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803): "It is emphatically the province and duty of the judicial department to say what the law is."

7. *See, e.g.*, ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 2–3 (2016) (arguing that only agencies have the capacity to respond in a timely and informed manner to unanticipated social crises).

I. JUDICIAL REVIEW OF QUESTIONS OF LAW: FOUR VALUES

Judicial review of questions of law performs multiple functions. This Part offers a brief sketch of four values widely regarded as being important in the context of judicial review of statutory interpretations by administrative agencies—the process to which the *Chevron* doctrine speaks.[8]

A. *Rule-of-Law Values*

Because we are considering the interpretation of law, it makes sense that the regime of judicial review should promote the rule of law. The concept of the "rule of law" has multiple meanings.[9] At its core, it refers to the benefit of having stable expectations about what the law requires, both in terms of what individuals are allowed to do and what the government is allowed to do in its interactions with individuals. Stability of expectations is good because it makes life more predictable. Predictability is good because it promotes security, makes planning for the future possible, encourages investment, and gives individuals the freedom to pursue their aspirations within the space established by these stable expectations.[10]

One extremely important set of settled expectations is the understanding that American law is defined by a hierarchy of legal authority. At the top sits the Constitution, below that are the many statutes that have been enacted by Congress, and below that are the even more numerous regulations and orders issued by administrative agencies. The Constitution trumps statutes, and statutes trump agency regulations and orders. This understanding is not set forth in any foundational document. The Constitution's Supremacy Clause speaks of both the Constitution and federal statutes as the "supreme Law of the Land" without differentiating between them and, further, makes no mention of agency regulations and orders.[11] The hierarchy of legal

---

8. The four values are discussed at greater length in THOMAS W. MERRILL, TO SAY WHAT THE LAW IS: THE SUPREME COURT'S *CHEVRON* DOCTRINE AND THE FUTURE OF THE ADMINISTRATIVE STATE (forthcoming 2022) (manuscript at ch. 1) (on file with the Author).

9. *See* Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137–40 (2002) (noting that the common usage of the term "rule of law" diverges from its technical and philosophical meaning and that, from its inception, there has been little consensus around the term's meaning).

10. *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 33–94 (rev. ed. 1969) (summarizing the virtues of the rule of law); JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW 210, 220 (2d ed. 2009) (similar).

11. *See* U.S. CONST. art. VI.

authority is grounded in settled expectations about how the American legal order is organized.

It is important to note that the rule of law—in the sense of stability of expectations about the law—is not the only value society should promote. It is possible to imagine a society that scrupulously observes the rule of law and yet is pervasively racist, highly inefficient, or generates large inequalities in wealth. The fact that rule-of-law values can coexist with injustice and other unfavorable conditions means that stability of expectations should, on appropriate occasions, give way to legal change. The question is whether judicial review can help strike a proper balance between stability of expectations and accommodating desired change in the law.

Here, a notable difference between agencies and courts becomes relevant. Courts by their very nature are designed to reinforce stability of expectations. The primary function of courts is to resolve disputes. The very legitimacy of courts in performing this function is the perception of the parties that the norms courts invoke in resolving these disputes are grounded in existing law.[12] Moreover, courts by institutional design are independent of direct political control. Federal judges enjoy secure compensation and can be removed from office only by impeachment.[13] This high degree of independence is thought to encourage judges to resolve disputes according to settled law, rather than according to the preferences of the incumbent president or members of Congress.

When it comes to statutory interpretation, courts nearly always seek to determine the best or, at least, the settled meaning of the relevant statute. In other words, they seek the meaning that other participants in the legal system, as advised by their lawyers, most likely understand to be the law. Courts—as a rule—understand that it is the legislature's job to make policy and the court's job to serve as a faithful agent carrying out the instructions of the legislature. Courts are also far more likely to adhere to settled expectations when extrapolating from prior precedent to resolve a new question.[14] In any area of law

12. Thomas W. Merrill, *Legitimate Interpretation—Or Legitimate Adjudication?*, 105 CORNELL L. REV. 1395, 1407–08 (2020).

13. U.S. CONST. art. III, § 1.

14. Vertical stare decisis in the federal system is generally understood to be quite strong. *See generally* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016) (citing authorities supporting the strict rule of vertical stare decisis and discussing examples of lower courts narrowing or extending Supreme Court precedent). Horizontal stare decisis is considered less strong, but nonetheless the Court frequently adheres to a presumption against

that is largely governed by precedent, the courts' authority to compel obedience from the parties is, in significant part, driven by the sense that they adhere to precedents authoritatively rendered in the past. Courts occasionally overrule precedents. More commonly, they narrow or expand on them. But they almost never disregard a controlling precedent that has been called to their attention.

Agencies present a much less reassuring picture when it comes to enforcing settled expectations about the law. Some agencies, like the National Labor Relations Board ("NLRB"), use the dispute-resolution function to make policy, which often results in ideological shifts from one administration to the next, oscillating between pro-labor and pro-management perspectives.[15] Similarly, other agencies that use rulemaking to make policy, such as the Environmental Protection Agency ("EPA"), frequently make dramatic policy turns when one presidential administration is replaced by another. The alternating position of the EPA with respect to climate change policy from the Bush II administration to the Obama administration to the Trump administration is a recent example.[16]

If protecting settled expectations were the only value to be served by judicial review, one would generally expect a large dose of interpretive authority to be allocated to courts rather than agencies. One way this can come into play is when consistent agency action has given rise to settled expectations. In these circumstances, rule-of-law values suggest that courts should give added weight to the agency's view of the law, even if the agency's interpretation diverges from what

---

overruling. *See* Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 581–83 (2018) (discussing that, in interpreting constitutional law, "the Supreme Court will give pride of place to its own precedents in order to cultivate an appearance of legality and reinforce its reputation for adherence to its own prior judgments"). The importance of adhering to controlling precedent was common ground among the Justices in a recent wide-ranging debate about whether it is more important to adhere to the *ratio decidendi* of a precedent or to the outcome reached by a precedent. *Compare* Ramos v. Louisiana, 140 S. Ct. 1390, 1404 (2020) (arguing that the *ratio decidendi* is what matters), *with id.* at 1429–30 (Alito, J., dissenting) (maintaining that the outcome is what matters).

15. *See* Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 171 (1985) (noting that "[t]he [NLRB's] behavior—abrupt changes in policy appearing to rework in wholesale major areas of Board law, often undone three or four years later—sows disrespect for the agency," resulting in "courts [being] reluctant to pay little more than lip service to the doctrine of deference to agency policymaking . . . given the agency's apparently cavalier view of its own established rules").

16. *See* Jonathan S. Masur & Eric A. Posner, *Chevronizing Around Cost-Benefit Analysis*, 70 DUKE L.J. 1109, 1114–36 (2021) (discussing several environmental policy reversals by the Trump EPA).

the court considers to be the best reading of the statute. Another way it can come into play is when agencies change course in a way that is likely to upset the expectations created by prior agency action. When this happens, reviewing courts should demand a persuasive explanation from the agency as to why frustrating expectations is justified in terms of competing policy objectives.[17]

There is another institutional distinction between courts and agencies that is relevant to rule-of-law values. A central theme of the literature analyzing rule-of-law values is that persons are entitled to fair notice about the requirements of the law.[18] This in turn means that changes in the law should ordinarily apply only to future conduct. Making legal change prospective allows those affected by the change to adjust their expectations and behavior to avoid coming into conflict with the law.

The strong preference for making changes in law prospective is relevant to the comparison of how courts and agencies function. Courts nearly always engage in dispute resolution by applying the law to behavior that has already taken place. This means judicial decisions are by their nature retroactive. Indeed, the Supreme Court has ruled that federal courts may not resolve a dispute by entering a judgment that applies only prospectively.[19] Agencies, in contrast, typically have a wider array of tools they can use to constrain behavior. Most agencies have the power to issue rules of various kinds, which always apply prospectively unless Congress has conveyed special authority to the agency to make them retroactive—which is rare.[20] These rules include nonbinding statements of policy or interpretation that inform the public about how an agency intends to regulate in the future. So agencies, unlike courts, have the power to make changes in the law

17. *See, e.g.*, Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) (declining to give weight to an agency's regulation because it "was issued without the reasoned explanation that was required in light of the Department[of Labor]'s change in position and the significant reliance interests involved").

18. *See* SEC v. Chenery Corp., 332 U.S. 194, 217 (1947) (Jackson, J., dissenting) ("This decision is an ominous one to those who believe that men should be governed by laws that they may ascertain and abide by . . . .").

19. *See* Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule . . . *must* be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." (emphasis added)).

20. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").

prospective, which is the way changes should be made if protecting settled expectations is important because of reliance interests.

In short, reviewing courts should give added weight to agency interpretations that conform to settled expectations and should subtract weight—or demand an explanation—for interpretations that frustrate settled expectations. They should also, if possible, encourage agencies to make changes in the law prospective.

B. *Constitutional Values*

As administrative governance grows, it inevitably comes into conflict with values that have been identified as constitutional. Here, the division of authority between courts and agencies is settled. By convention, the courts, most notably the Supreme Court, have final authority to determine constitutional meaning, and other governmental actors are duty-bound to accept the decisions issued by the courts in the name of the Constitution.[21]

In considering the role of constitutional values, individual constitutional rights and federalism principles are obviously important, and courts are expected to enforce these limits on the scope of agency authority. Separation of powers principles are even more pervasively relevant in considering judicial review of questions of law. Here, the crux is preserving the constitutional role of Congress in our system of government. The Constitution has always been understood to establish the principle of *legislative supremacy*. What this means is that duly enacted legislation is a higher form of legal authority than any regulation or order issued by an administrative agency or any executive order issued by the president. All agree that if there is a direct and unambiguous conflict between what a statute says and either what an agency does by regulation or order or what the president does by executive order, the statute prevails. There is nevertheless a latent ambiguity about the meaning of legislative supremacy. There are three possible ways of unpacking what it means that Congress's legislative power is supreme relative to regulations and orders issued by administrative agencies or executive orders issued by the president.[22]

---

21. *See generally* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (noting the longstanding historical debate between the "departmentalist" and "judicial supremacy" positions and endorsing the emerging consensus in favor of the judicial supremacy conception as promoting a "settlement function").

22. *See* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2117–18 (2004) (detailing the three conceptions based on different readings of the Constitution).

One possibility is that legislative supremacy means the Constitution gives Congress the *exclusive power* to set policy in a legally binding fashion. This is the understanding associated with the so-called nondelegation doctrine. The Constitution gives "[a]ll legislative [p]owers" to Congress[23] and, therefore, under this conception of supremacy, the sharing of such power is impermissible. Agencies may be charged with enforcing or implementing the law as established by Congress, but they cannot be given the power to make legally binding policy.

A second possibility is that the Constitution gives Congress the exclusive power, if it does not set policy itself, to delegate to another institution, such as an agency, the power to set policy in a legally binding fashion. This is the *anti-inherency* understanding. Given the allocation of all legislative power to Congress, administrative agencies—and for that matter the president and the courts—have no inherent authority to "make law" that binds the public. They must derive their authority to set policy from some form of enacted law—either a specific provision of the Constitution or, more typically, a statute enacted by Congress.

The third possibility is that the Constitution gives Congress the *last word* in determining legally binding policy. Under this understanding, Congress always has the power to override legally binding policy established by the president or an agency. But if Congress is silent, executive and judicial entities have the authority to make legally binding policy in areas where the federal government as a whole is competent to act. In other words, administrative agencies and the president have inherent authority to act in default of Congress, but must conform to any limitations adopted by Congress that limit this discretion.[24]

Although the matter is not entirely free from doubt, the anti-inherency interpretation has the strongest claim to being the dominant conception of legislative supremacy today. There are, to be sure, relatively few explicit statements of this understanding from the Supreme Court in cases involving a direct clash between Congress and the president. The most famous is Justice Hugo Black's opinion in

---

23. U.S. CONST. art. I, § 1.

24. Lest the "last word" conception be regarded as fanciful, it should be noted that this is the understanding that has sometimes been adopted by the Supreme Court in authorizing courts to employ federal common law to resolve particular disputes that implicate "federal interests." For further discussion, see Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 329–31 (1992).

Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*),[25] which invalidated President Harry Truman's effort to nationalize steel mills threatened by a labor shutdown in the midst of the Korean War.[26] Justice Black said flatly that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[27] But the precedential value of this statement was compromised by various concurring opinions, which left the door open to recognizing some inherent presidential power to act in certain circumstances.[28] Where administrative agencies are concerned and the question is limited to domestic policy, there are many more statements from the Supreme Court adopting the anti-inherency position.[29]

More impressive than occasional statements by the Court, however, is the consistent practice of both the executive branch and the judiciary over time. Presidents have consistently acknowledged that they have no authority to create new departments or agencies without the authorization of Congress. Agencies have uniformly recognized the need to ground their authority to act in some statutory authority conferred on them by Congress. And courts have repeatedly exercised their power of judicial review to invalidate agency action perceived as going beyond what Congress has authorized, or as transgressing some limitation imposed by statute. Judging by settled expectations based on actual practice, the anti-inherency position has evolved to become the dominant understanding of the meaning of legislative supremacy.[30]

---

25. Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579 (1952).

26. *Id.* at 587.

27. *Id.* at 585.

28. The most famous being the concurrence of Justice Robert Jackson, who posited a "zone of twilight" where the president asserts his own authority without Congress having spoken on the issue. *Id.* at 634–55 (Jackson, J., concurring).

29. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 386 n.14 (1989) ("[R]ulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch."); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.").

30. *See generally* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 61 (1993) (concluding, based on a wide-ranging review of the relevant history, that "[o]ur tradition is that no official—from the President down—can invade private rights unless authorized by legislation").

The anti-inherency interpretation of legislative supremacy, assuming it is the established understanding, has important implications for judicial review of agency interpretations of law. Under this view, administrative agencies have no authority to act unless and until they have been delegated such authority by Congress, and their authority to act is limited to whatever powers Congress has in fact granted.[31] Congress, in other words, is uniquely endowed with the power to decide who decides.[32] This has important implications for judicial review. The anti-inherency postulate is a critical axiom in our evolved understanding of the separation of powers. Courts, as guardians of the Constitution, should therefore enforce the limitations Congress has placed on the authority of agencies in order to preserve the principle that Congress has the exclusive prerogative to establish agencies and delineate their powers and limits.

The anti-inherency principle, as a postulate of constitutional law, is largely invisible to modern lawyers and judges. This is because it has been subsumed in the nearly universal practice of providing for a right of judicial review when challenging the legality of agency action. From roughly the 1920s to the present, the established device for monitoring agency compliance with the scope of its delegated authority has been judicial review of final agency action. When Congress creates a federal agency and gives it delegated powers, Congress also provides for judicial review of the agency's decisions on behalf of persons aggrieved by final agency action. If an aggrieved person claims that the agency exceeded the scope of its delegated power, the reviewing court will interpret the scope of the agency's delegated power, and if it agrees that the agency has exceeded its authority, it sets aside the agency action as unlawful.[33] Except in unusual cases, the reviewing court will make no reference to the separation of powers premise underlying this mode of review—the need to protect the superior power of Congress

31. *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000) ("Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so.").

32. Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 454 & n.12 (2010).

33. This understanding was expressly codified in the Administrative Procedure Act, adopted in 1946. *See* 5 U.S.C. § 706 (2018) (reviewing court is to decide all questions of law); *id.* § 706(2)(C) (reviewing court shall set aside agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

to create an agency and delimit the scope of its delegated powers.[34] There has been no need to elevate the issue to the level of constitutional principle because it has been sufficient to invalidate the agency action as contrary to the statute creating its delegated powers. The constitutional principle has remained submerged because Congress has routinely provided for judicial review, implicitly recognizing that such review is the only realistic device available to it for assuring that its intentions about the scope of power it has delegated to an agency will be enforced.[35]

Thus, although the principle of legislative supremacy is ultimately grounded in separation of powers principles, this does not mean that agency action that exceeds the scope of its delegated authority should be held unconstitutional. It is almost never necessary to reach such a judgment.[36] What is necessary—and required by the anti-inherency principle—is that courts engage in careful review to determine that agencies (and, as appropriate, the president) have stayed within the boundaries of their authority as established by duly enacted legislation. The *practice* of careful review by courts in this context is required by the Constitution, even if every exercise of authority by an agency that is ultra vires need not be characterized as unconstitutional.[37] It is not

34. One such unusual case was *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014). The Court invalidated an EPA regulation that interpreted a statutory provision specifying "250 tons" of air pollutant to mean "*100,000* tons" in the context of emissions of carbon dioxide. *Id.* at 325. The Court observed that allowing such an interpretation to stand would "deal a severe blow to the Constitution's separation of powers." *Id.* at 327.

35. The APA recognized that Congress could explicitly or implicitly make agency action unreviewable. 5 U.S.C. § 701(a). But Congress has rarely done so where important private rights are at stake, and the Court has interpreted the APA as creating a broad presumption in favor of judicial review. *See, e.g.*, Dep't of Com. v. New York, 139 S. Ct. 2551, 2567–69 (2019) (holding that the secretary of commerce's broad authority under the Census Act does not preclude judicial review under the APA); Abbott Labs. v. Gardiner, 387 U.S. 136, 140 (1967) (holding that the APA "embodies the basic presumption of judicial review").

36. *See* Dalton v. Specter, 511 U.S. 462, 472 (1994) ("Our cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution.").

37. This proposition seems to suggest that some form of judicial review assuring that agencies act within the scope of their authority is required by the Constitution. For some of the difficulties in sustaining such an argument, see Thomas W. Merrill, *Delegation and Judicial Review*, 33 HARV. J.L. & PUB. POL'Y 73, 79–85 (2010). As long as Congress is still interested in preserving its constitutional prerogative to decide who decides, one can assume Congress will continue to provide for judicial review of agency action in order to hold the executive in check. If Congress decides to acquiesce in allowing the executive branch to become the primary source of policy initiatives, Congress may lose interest in assuring that judicial review is available.

necessary to do so, given that every exercise of authority that is ultra vires is for that reason unlawful.

C. Accountability Values

So far, the discussion has pointed toward the importance of courts exercising autonomous judgment in reviewing agency interpretations of law. A third set of values—the importance of having discretionary policy decisions made by politically accountable institutions—turns the balance decisively in favor of agencies.

How should courts proceed when the question of interpretation falls comfortably within the boundaries of the agency's discretionary authority and does not implicate the importance of settled legal expectations? We can reframe the question as follows: As between the agency and the reviewing court, which institution has a comparative advantage in resolving matters of discretionary interpretive choice?

When rule-of-law values and constitutional values are excluded, it becomes clear that the agency should resolve matters of discretionary interpretive choice. Such choices commonly present trade-offs between competing values. Do we want safer drugs or faster access to medical innovations? Less pollution or more economic growth? Fewer accidents or more affordable products? Resolving these trade-offs entails decisions that are essentially political. Many would argue that such decisions should be made by the people's elected representatives.[38] This is seemingly what the Constitution contemplates, given that the document says that all legislative powers are given to Congress. And indeed, Congress often resolves them by enacting statutes that adopt highly precise answers to questions of public policy.[39]

But Congress and the president—who participates in the legislative process in proposing legislation and exercising the veto—are severely constrained in their capacities to resolve even a fraction of the matters of discretionary interpretive choice that arise. This is especially true in the modern world, with its rapid rate of technological,

---

38. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 130–36 (1980) (arguing that it is "undemocratic" for the legislature to delegate hard issues to "some executive-branch bureaucrat, or perhaps some independent regulatory commission," in order to avoid "the inevitable political heat").

39. Modern legislation increasingly takes the form of extremely lengthy enactments that contain a combination of highly specific provisions intermixed with general or ambiguous directives. *See generally* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (5th ed. 2016) (providing illustrations).

economic, and social change.[40] Therefore, out of necessity, Congress and the president, both acting through the legislative process, have created administrative agencies to address these issues. Of course, as previously discussed, Congress also sets limits on the authority of these agencies, and provides for judicial review to assure that they are respected.

Resolving matters of discretionary interpretive choice in a way that is responsive to the collective wishes of the people presents a kind of second-best choice in most circumstances: Should such issues be decided by agencies or courts? Neither institution is directly accountable to the people. Unlike the members of Congress and the president, the heads of agencies and federal judges do not stand for periodic election. Both the heads of agencies and judges are nominated by the president and subject to confirmation by the Senate, which gives each a measure of indirect accountability. But whereas agency heads turn over fairly frequently—usually at the end of each four-year presidential term at minimum[41]—judges can potentially serve for life. So, agency heads are more likely to have received the assent of the current elected representatives of the people—the president and the Senate—as compared to judges, many of whom ascended to the bench decades ago.

Political scientists also point out that agencies are subject to a number of constraints that make them more accountable to elected politicians than judges.[42] Agencies depend on Congress for their appropriations, which means the heads of agencies must attend closely to the wishes of appropriations committees.[43] High-level agency personnel also appear periodically before congressional oversight committees, which can expose embarrassing missteps and extract commitments about future action.[44] Under current practice, agency

---

40. *See generally* WILLIAM E. SCHEUERMAN, LIBERAL DEMOCRACY AND THE SOCIAL ACCELERATION OF TIME (2004) (examining the effect that the fast pace of modern society has on liberal democracies).

41. *See* PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 69 (1995) (noting that the average tenure of a political appointee in the executive branch is roughly two years).

42. *See, e.g.*, Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 120, 163 (1996).

43. For a general discussion of sources of congressional control, see Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 64, 68 (2006) (concluding that "Congress is deeply involved in the day to day administration of the law").

44. Hammond & Knott, *supra* note 42, at 123–27.

budget requests are also screened by the Office of Management and Budget ("OMB"), a White House agency, which means the heads of agencies must attend to the wishes of the president.[45] And political appointees of agencies are subject to removal from office by the president, either at will or indirectly through various forms of pressure. Lastly, again as a matter of current practice, agency rules that exceed a certain minimum (for example, $100 million in annual effect on the economy) are subject to review by another office of the OMB, the Office of Information and Regulatory Affairs, which again gives the White House a measure of control over agency policy choices.[46] There is nothing comparable in terms of oversight of federal judges.

In short, if interpretations involving discretionary policy choice should be made by the more accountable decisionmaker, agencies win over courts hands down.[47]

Focusing on accountability does not disregard a second reason to prefer agencies over courts in resolving open discretionary issues—namely, the greater expertise of agencies in matters of public policy. Recognizing that agencies are inevitably political does not mean that agency expertise will be ignored. The early proponents of administrative government—the Progressives and their intellectual heirs—characterized administrative agencies as scientific, neutral, apolitical entities, and juxtaposed them with crude actors like big-city political machines.[48] In other words, expertise was seen as incompatible with accountability. But time has revealed this to be a false dichotomy.

45. *See* Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2203–04 (2016) (noting how the OMB's ability to control agencies' spending influences the agencies' policy decisions).

46. *See generally* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013) (discussing the Office of Information and Regulatory Affairs). For sources of presidential control over agencies, see generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). Then-Professor Kagan concluded that "the most important [extrajudicial] development in the last two decades in administrative process, and a development that also has important implications for administrative substance[,] . . . is the presidentialization of administration—the emergence of enhanced methods of presidential control over the regulatory state." *Id.* at 2383.

47. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985) ("Strangely enough it may make sense to imagine the delegation of political authority to administrators as a device for improving the responsiveness of government to the desires of the electorate.").

48. For the social background, values, and attitudes of the Progressives, see generally RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 131–73 (1955). For a portrait of Charles Francis Adams, Jr., a leading advocate of regulatory reform during this era, see THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN 1–57 (1984).

Public opinion will demand that certain decisions be made by those with the requisite skill and experience to make them correctly—or at least those more likely than political appointees or courts to make them correctly. Consider decisions like how to respond to a pandemic, how to determine whether nuclear reactors have been safely designed and operated, or how to fix the money supply to provide the proper balance between inflation and employment. The public generally does not want these sorts of decisions made by White House operatives or by judges—they want someone with specific expertise. And because of this, politicians will also prefer that these decisions be made by agencies with the requisite degree of relevant expertise. Therefore, in structuring judicial review to assure that discretionary interpretive choices are made by politically accountable agencies, the courts will indirectly assure that decisions that should be made by experts *are* made with significant input from experts.

Readers familiar with the literature on judicial review will perceive a potentially serious problem in differentiating between questions that fall outside the boundaries of agency authority and those that fall inside those boundaries. In a fateful decision, Justice Antonin Scalia attacked the concept of "agency jurisdiction" as a "mirage," an "empty distraction," and a "bogeyman."[49] This was rhetorical overkill, as revealed by the fact that he was able to identify a number of Supreme Court decisions that implicated the scope of agency jurisdiction, demonstrating that the distinction is not meaningless.[50] He also conceded that courts have long differentiated between jurisdictional and nonjurisdictional questions in determining their own authority, suggesting that the distinction is conceptually meaningful.[51]

In practice, the boundaries of agency authority will often be easier to discern than it may seem from considering the matter in the abstract. Once again, settled expectations are highly relevant. The scope of agency authority is rarely a matter of reading the words of a statute in a vacuum. When an agency is first created, the principal officers of the agency will nearly always have a clear appreciation of the functions that Congress and the president expect the agency will perform. The initial actions of the agency will reflect this shared understanding. If Congress and the president do not react negatively, this will provide a further signal to agency heads that they have understood their charge

49. City of Arlington v. FCC, 569 U.S. 290, 297, 300, 304 (2013).

50. *Id.* at 300–04.

51. *See id.* at 297.

correctly. Over time, the functions of the agency may evolve, in response to problems not foreseen when the initial legislation was enacted. The agency may amend its understanding of its mandate in light of these new problems. Again, if Congress and the president acquiesce, this would provide a signal of approval. All along, the agency's actions may result in periodic review by the courts, and if the courts accept the agency's understanding of its authority, this will provide further confirmation that the agency has correctly understood the scope of its authority. The essential point is that, at any given time, the scope of the agency's authority will be governed not just by the words of the statute, but by settled expectations, which evolve in an incremental fashion. Deviations from these expectations are usually easy to spot.[52]

In any event, even assuming that Justice Scalia was right that the line between the scope of agency authority and the exercise of authority will sometimes be disputable, it does not follow that every difficult question about the scope of authority should be left up to the agency to decide. This would mean largely giving up on judicial enforcement of constitutional values like legislative supremacy. The better position is that any provision of enacted law that limits the discretion of an agency is a "boundary," and hence the interpretation of such a constraint must be resolved by the courts. This does not mean courts should ignore an agency's interpretation of the scope of its authority. Courts should give respectful consideration to the agency's view; and if that view is consistent with settled expectations, it deserves additional weight. The risk of error in these circumstances is reduced by the use of such an intermediate standard of review, as opposed to de novo review. And, of course, erroneous judicial decisions about the scope of agency authority can always be corrected by Congress.

D. Process Values

A final value to be considered is whether judicial review can be structured in such a way as to improve the quality of agency statutory interpretations. Once again, we are considering matters of discretionary interpretive choice. If an agency is not frustrating settled expectations and is acting within the boundaries of its delegated

52. *See*, *e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143–59 (2000) (detailing a long history of agency disclaimers of authority and congressional responses to show that a general understanding had developed that the FDA had no authority to regulate tobacco products).

authority, courts should generally accept an agency's interpretation of the statute it enforces. But perhaps judicial review can be formulated so as to increase the odds that agencies will make good statutory interpretation decisions.

For much of the run-up to *Chevron*, courts differentiated between "good" and "not so good" agency interpretations by asking whether the agency interpretation was "reasonable."[53] Very little, if any, progress has been made by courts in refining what this means, either before or after *Chevron*. Particularly, it has never been clear whether "reasonable" means reasonable as judged by the traditional tools of interpretation used by courts, reasonable in terms of the policy result that the agency seeks to advance by its interpretation, or reasonable in terms of the process the agency followed in reaching its interpretation.

The first meaning—reasonable as a matter of legal interpretation adopting judicial standards of interpretation—seems to require that the agency follow the same decisional process that the courts follow. This requires a duplication of effort by the agency and the court, which makes little sense from the perspective of trying to identify the comparative advantage of each institution. In theory, one can imagine a regime in which reviewing courts exercise great self-restraint by cabining their exercise of interpretation to a narrow, "clause-bound" examination of statutory text, and then ask whether the agency interpretation is "reasonable" in light of a broader range of variables like statutory structure, purpose, and legislative history. In the comparatively small number of cases that invalidate agency interpretations under Step Two of the *Chevron* doctrine, a number of appeals courts have interpreted "reasonable" in this fashion.[54] In the larger scheme of things, this is unrealistic. Once courts are told to engage in de novo review of the question of interpretation, and to do so armed with all the traditional tools of statutory interpretation, it is inevitable that the judicial inquiry will expand into a full-scale judicial exposition of the court's understanding of the statute's best meaning. Once this happens, asking whether the agency interpretation is "reasonable" becomes a foregone conclusion in nearly all cases—as a matter of psychology, if not logic.[55] Indeed, the Supreme Court did not

53. *See, e.g.*, Train v. Nat. Res. Def. Council, Inc., 421 U.S. 60, 75 (1975); Udall v. Tallman, 380 U.S. 1, 4 (1965); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 131 (1944).

54. Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1451–54 (2018).

55. As then-Judge Stephen Breyer remarked in an early critique of the *Chevron* doctrine: "It is difficult, after having examined a legal question in depth with the object of deciding it

hold an agency interpretation "unreasonable" under Step Two of the *Chevron* doctrine until 1999, and has done so on only three occasions overall.[56]

The second meaning—reasonable as a matter of policy—seems to invite courts to substitute their judgment for the agency's as to the wisdom of the policy being pursued. This is inconsistent with the fact that Congress has delegated authority to the agency to make policy judgments, not the courts.

The third possibility—reasonable as a matter of the process followed in reaching the interpretation—seems to hold the most promise for constructive judicial intervention designed to encourage better agency interpretations without constraining the agency's exercise of delegated authority. Fortunately, courts have developed a model for reviewing the process agencies follow in the context of judicial review of agency policy choices adopted through rulemaking. Ever since the 1970s, reviewing courts have sought to discipline agency exercises of policymaking in this context by imposing a norm of reasoned decisionmaking as a condition of upholding agency policies.[57] This is sometimes called "hard look" review, meaning the reviewing court must assure that the agency has taken a hard look at its various policy options before it acts. Assuming that questions of discretionary interpretive choice are at least analogous to policymaking, arguably the same or similar norm of reasoned decisionmaking should be required by courts as a condition of accepting an agency's interpretation. A better name for this form of judicial review is "process review," in

---

correctly, to believe both that the agency's interpretation is legally wrong, *and* that its interpretation is reasonable." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 379 (1986).

56. Michigan v. EPA, 576 U.S. 743, 759–60 (2015); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 325–28 (2014); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 392 (1999). All three decisions, not coincidentally, were authored by Justice Scalia, who concluded late in his judicial career that the only relevant question to ask is whether an agency interpretation is "reasonable." *See* United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring in part and concurring in the judgment).

57. For early examples, see, for example, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), and *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973). This norm of reasoned decisionmaking is generally regarded as having been endorsed in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 48–51 (1983) (holding that plausible alternatives to an agency's proposed course of action must be addressed and adequate reasons given for their rejection).

order to avoid confusing it with the ambiguous requirement of "reasonableness."[58]

The norm of process review, as applied to statutory interpretation, is relatively easy to state in the abstract. The norm requires that the agency: (1) consider plausible alternatives and significant objections to its proposed interpretation of the statute; (2) explain why its interpretation falls within the scope of its delegated authority and summarize the considerations of policy that support its choice; and (3) provide an explanation for either accepting or rejecting plausible alternatives or significant objections to its authority or its preferred interpretation before finally adopting it.[59]

The argument for why process review might increase the odds of agencies making better interpretations is straightforward. If conducted in good faith, process review should be compatible with a variety of outcomes and thus does not carry the implication that the reviewing court is a kind of censor with the power to veto policies with which it disagrees. Under the process-review norm, agencies are likely to engage in more careful deliberation about the relevant issues presented by any proposed interpretation before it is adopted. The agency may come to recognize that the proposed interpretation interferes too much with existing reliance interests or is inconsistent with aspects of its statutory mandate. Or it may conclude that the proposed interpretation is overly broad and should be cut back, or is underinclusive and should be expanded. The need to consider objections and provide an explanation for accepting or rejecting them

58. Gary Lawson, *Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 316, 323–31, 343 (1996).

59. The elements of process review as described here have been developed most fully in the context of notice-and-comment rulemaking under 5 U.S.C. § 553 (2018) and have been shaped by the requirements of that section of the APA. Nevertheless, the modern understanding of process review in the rulemaking process is difficult to square with the language of § 553. *See* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in judgment in part, and dissenting in part) ("Courts have incrementally expanded those APA procedural requirements well beyond what the text [of § 553] provides."). They are commonly justified as a gloss on what is required by the arbitrary and capricious standard of review. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (noting that the arbitrary and capricious standard requires an agency to articulate the rationale behind their decisions). That standard, in turn, applies to all forms of reviewable agency action. Therefore, it is not much of a stretch to regard the elements of process review, as described here, as being required before a court will accept an agency interpretation of law adopted within the agency's delegated space to interpret. For decisions applying elements of process review to agency interpretations of law, see *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016), and *Wyeth v. Levine*, 555 U.S. 555, 581 (2009).

will create the conditions for making these self-corrections, without any direct intrusion by the reviewing court. The reviewing court need only assure that the required decisional process has been followed; it need not usurp the prerogative of the agency as the proper institution to make discretionary interpretational choices.

Counterarguments against adopting process review are that it would increase the costs of agency decisionmaking—called the "ossification" problem in the context of rulemaking—and would increase opportunities for judicial meddling in policy decisions properly left to agency resolutions.[60]

As to cost, extending process review to agency statutory interpretations would arguably be less burdensome than it is in the context of pure policy choices made through rulemaking. Generally speaking, empirical data or studies will not be that relevant to questions of statutory interpretation, and objections and explanatory responses to objections will focus on legal issues rather than complex empirical claims and predictions. Also, to the extent the process-review norm is already applicable to the policy aspect of an agency initiative, extending it to a legal interpretation would add only marginally to the burden on the agency.

As to judicial meddling, enforcing the process review norm would undoubtedly create further opportunities for willful judicial behavior. Some courts would trim their views about whether the agency has complied with the norm in order to affirm an interpretation they like or vacate one they dislike. The concern about the potential for willful judicial behavior is present under virtually any conception of how judicial review should operate. The relevant question is whether adopting a norm of process review would increase the incidence of willful behavior to an unacceptable degree relative to the benefits that might be obtained from better agency interpretations. The answer is obviously speculative. But it is plausible that requiring the agency to consider material alternatives and objections, and give a cogent explanation in response, would result, over the large run of cases, in improved agency interpretations. Reasonable minds can differ about

60. For concerns about ossification in the context of rulemaking, see generally, for example, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process,* 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995). For evidence that judges use process review to advance their own policy preferences, see generally, for example, Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

whether extending process review to questions of statutory interpretation would produce benefits that exceed its costs.

Regardless of how one comes out on that question, a secondary benefit of extending process review to questions of statutory interpretation returns to the earlier point about the desirability of making changes in the law prospective. If acceptance of agency interpretations turns on compliance with the process review norm, as described, the natural way to comply would be to advance the interpretation through substantive or interpretive rulemaking or a declaratory order.[61] Since these forms of administrative action are nearly always prospective, the interpretation would be prospective as well.

All of which suggests that the regime of judicial review should include, as one of its elements, conditioning judicial acceptance of an agency interpretation in a matter of discretionary interpretive choice on the agency's compliance with the process review norm. This condition would create an incentive for agencies to observe the norm and to resolve statutory interpretation questions prospectively.

E. The Four Values and the Chevron *Doctrine*

What this Article calls "the *Chevron* doctrine" refers to a paragraph in Part II of Justice John Paul Stevens's opinion in *Chevron*, which says that judicial review of agency legal interpretations always entails two steps.[62] The D.C. Circuit quickly treated this paragraph as announcing a new standard of review, and that understanding eventually appeared in various opinions by the Supreme Court, largely due to the persistent advocacy of Justice Scalia.[63] In its typical formulation, the *Chevron* doctrine is a compound of two standards. Step One asks whether the statute supplies a "clear" or "unambiguous" answer to the precise question at issue. If yes, that answer must be enforced by the reviewing court. If no, then the court asks, at Step Two,

61. For example, the agency interpretation in *City of Arlington v. FCC* was issued as a declaratory order, which is a form of adjudication, but the FCC nevertheless solicited public comment on its proposed interpretation before it entered the order, thereby complying with the process-review norm. *See* City of Arlington v. FCC, 668 F.3d 229, 235 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013).

62. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

63. For the origins of the *Chevron* doctrine in the D.C. Circuit, see generally Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1 (2013), and Thomas W. Merrill, *The Story of* Chevron: *The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253 (2014) [hereinafter Merrill, *Story of* Chevron].

whether the agency interpretation is a "reasonable" or a "permissible" answer to the question. If yes, then the court must accept the agency interpretation. As formulated, the *Chevron* doctrine does a poor job of advancing each of the four values highlighted here.

With respect to rule-of-law values, understood to mean promoting stability of legal expectations, the problem with the two-step formula is that it provides no obvious way to consider or enforce such values unless they are reflected in an unambiguous text enacted by Congress. Step One, which directs the court to engage in de novo review to determine whether the statute has a clear meaning, provides no occasion to consider whether the agency interpretation otherwise frustrates settled expectations. Step Two, which asks if the agency interpretation is reasonable, could conceivably be used to ask if the agency interpretation reinforces or upsets settled expectations. But the dominant understanding of Step Two has been to ask if the agency interpretation is reasonable in light of judicial interpretational norms.[64] As a result, assessing the agency interpretation against settled expectations effectively drops out under the *Chevron* formula. The relevance of a settled agency interpretation nevertheless persists in the case law, because this is an important value long recognized by courts. But its persistence occurs largely in the form of a random, ad hoc consideration extraneous to the *Chevron* doctrine.[65]

With respect to constitutional values, most prominently the separation of powers principle of legislative supremacy, Step One of the *Chevron* doctrine correctly charges reviewing courts with enforcing clear or unambiguous congressional directives. But the scope of an agency's delegated authority is often implicit in a series of legislative enactments over time or becomes apparent only when considered in light of established conventions about the role of different agencies or the functions of the federal government as opposed to state and local governments. These contextual understandings are ones that courts are particularly well-suited to discern, but it is misleading to say they can always be found in a "clear" or "unambiguous" text. Taken literally, the *Chevron* doctrine seems to say that if Congress fails to spell out the scope of an agency's authority in unambiguous language, the agency can exploit any gap, silence, or ambiguity in its organic act to expand

64. Barnett & Walker, *supra* note 54, at 1451–54.

65. *See generally* Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823 (2015) (collecting decisions referring to the longevity of agency interpretations after *Chevron*).

or contract the scope of its authority in any way that passes muster as a permissible interpretation. The principle of legislative supremacy would inevitably devolve from the anti-inherency understanding to the last-word conception.

One might think that, at the very least, the *Chevron* doctrine would advance the idea that when a question of interpretation is really a matter of discretionary policy choice, the agency interpretation should prevail. Justice Stevens made plain in the concluding paragraphs of his opinion that this was his understanding.[66] The *Chevron* doctrine, however, is a compound of two highly indeterminate standards. How clear is clear? What exactly does it mean for an agency interpretation to be reasonable? Given these indeterminacies, the *Chevron* doctrine, in practice, is more realistically described as a license for judicial willfulness. If a court dislikes an agency interpretation that entails a policy choice, it can declare that the statute "clearly" requires a different choice, or, more rarely, can declare that the agency's interpretation is "unreasonable." Worse, because the two-step formula is highly streamlined compared to the eclectic doctrine and elaborate investigations of legislative history that preceded it, the *Chevron* doctrine actually *reduces* the cost of judicial willfulness, inevitably increasing its incidence.

In terms of providing incentives for agencies to make better interpretations, the *Chevron* doctrine also comes up short. The key here is the ambiguity about what it means for an agency interpretation to be reasonable. The Supreme Court could have interpreted this to mean reasonable as a matter of the decisional process followed by the agency, but it has not consistently done so. In other contexts, the Court seems comfortable with the understanding that the Administrative Procedure Act ("APA") requires reasoned decisionmaking when an agency makes a pure policy decision, whether it be through rulemaking, adjudication, or other informal agency action.[67] But it has failed to condition acceptance of agency interpretations of statutes on

66. *Chevron*, 467 U.S. at 864–66.

67. *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1910–15 (2020) (applying the arbitrary and capricious standard to the rescission of a policy statement and faulting the agency for failing to consider alternatives and not addressing reliance interests); Dep't of Com. v. New York, 139 S. Ct. 2551, 2575 (2019) (applying the arbitrary and capricious standard to an internal memorandum written by the secretary of commerce and holding that it advanced an explanation "incongruent with what the record reveals about the agency's priorities and decisionmaking process"); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009) (ruling that arbitrary and capricious review requires an explanation for a change in agency policy adopted in an FCC adjudication).

agency compliance with such a process. In particular, the Court has applied the *Chevron* doctrine to interpretations announced in adjudications when there has been no advance notice or opportunity to comment on the interpretation before it is rendered.[68]

In short, the *Chevron* doctrine, as commonly understood by lower courts and administrative law professors, fails to sufficiently advance the four values of judicial review briefly adumbrated here. In order to determine whether the Court can reformulate that doctrine to improve on this score, the place to start is by re-reading the *Chevron* decision itself.

II. THE *CHEVRON* OPINION: PARTS III–VII

The legal issue presented in *Chevron* was whether the EPA had correctly interpreted the term "stationary source," for purposes of the nonattainment provisions of the Clean Air Act, to mean an entire plant as opposed to a single apparatus like a smokestack.[69] The term stationary source first appeared in the 1970 version of the Act under another program and included a definition that did not resolve whether it referred to the entire plant or any apparatus in the plant.[70] This definition was not cross-referenced in the nonattainment program, adopted in 1977.[71] The D.C. Circuit rendered three decisions about the meaning of "stationary source" under different Clean Air Act programs and concluded that whether the term referred to the entire plant or each apparatus depended on whether the purpose of the provision was to improve or simply maintain existing air quality.[72]

Chevron is a long opinion, the body of it taking up twenty-seven pages in the U.S. Reports, including forty-one footnotes.[73] It is not surprising that administrative law and legislation casebooks offer only a highly abridged version of the opinion. In fact, most renditions of the

68. *See* United States v. Mead Corp., 533 U.S. 218, 230 n.12 (citing eight cases applying the *Chevron* doctrine to an interpretation rendered in a formal adjudication); *id.* at 231 & n.13 (citing *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251, 256–57 (1995) as a case applying the *Chevron* doctrine to an informal adjudication in the form of a letter of the comptroller of the currency granting the request of a national bank to act as an agent selling annuities).

69. *Chevron*, 467 U.S. at 840.

70. *Id.* at 846.

71. *Id.* at 859–60.

72. For further background about the decision, see Merrill, *Story of* Chevron, *supra* note 63, at 260–66.

73. *Chevron*, 468 U.S. at 837–66.

decision reproduce the opening paragraphs of Part II and three paragraphs near the end of Part VII (under the subheading "Policy"), and they either summarize or offer extremely compressed versions of everything in between.[74] This is understandable, but unfortunate. If the entire opinion is read from beginning to end, one discovers an especially thorough, but generally conventional, exercise in judicial review. Perhaps more surprisingly, the opinion can stand as the very model of a decision that reflects the four values set forth in Part I as critical in a regime of judicial review.

A. Rule-of-Law Values

Consider first, rule-of-law values. Congress can create settled expectations when it legislates. The *Chevron* opinion reveals that Justice Stevens looked hard for, and did not find, any settled expectations created by Congress about the meaning of "stationary source." He meticulously examined the text of both the original Clean Air Act provision dealing with stationary sources and the two later programs dealing with them.[75] He probed the legislative history, looking for any evidence that the relevant committees or floor sponsors of the 1977 amendments harbored any thoughts about the meaning of "source."[76] He found no evidence of any legislative direction on this point in either the text or the legislative history. Without such legislative direction, the action of Congress itself could not have given rise to legitimate expectations about the law on the part of either the subjects or the beneficiaries of new source regulation by the EPA.

Chevron is often cited as a break with previous tradition regarding the relevance of expectations created by agency action.[77] The opinion makes no mention of the established canons of interpretation giving extra weight to agency interpretations that are contemporaneous with the enactment of the statute or are longstanding and consistently maintained by the agency.[78] And in a section of the opinion addressing

74. *E.g.*, JERRY L. MASHAW, RICHARD A. MERRILL, PETER M. SHANE, M. ELIZABETH MAGILL, MARIANO-FLORENTINO CUÉLLAR & NICHOLAS R. PARRILLO, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 1002–07 (7th ed. 2014).

75. *Chevron*, 467 U.S. at 845–52, 859–62.

76. *Id.* at 862–64.

77. *E.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (stating that after *Chevron* "there is no longer any justification for giving 'special' deference to 'long-standing and consistent' agency interpretations of law").

78. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 997–99 (2017).

the respondents' argument that the EPA was entitled to no deference because it had changed its position about the meaning of stationary source, Justice Stevens rejected this as a ground for overturning the agency decision. As he wrote in a frequently quoted passage: "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."[79]

A fair reading of the opinion's larger discussion of this point, however, suggests that Justice Stevens rejected the relevance of the agency's change in position because *no settled expectation about the definition of source had been established* by the agency. To the contrary, Justice Stevens made clear that the agency had consistently preferred a "flexible" definition of "source."[80] It did a flip-flop between 1979 and 1980, but this was caused not by its own inconstancy, but by the insistence of the D.C. Circuit that the statute had to be read "inflexibly to command a plantwide definition for programs designed to maintain clean air and to forbid such a definition for programs designed to improve air quality."[81] In short, the change in agency position was due to the activism of the politically divided D.C. Circuit, not the agency itself. Justice Stevens was not rejecting the relevance of settled expectations in judicial review of agency interpretations; he was making the point that if there are no settled expectations, the agency should be allowed to experiment with different interpretations that are otherwise permissible.

B. Constitutional Values

Constitutional values also furnish no reason to fault the *Chevron* decision. With respect to separation of powers values, the relevant question is whether the EPA, in embracing the plant-wide interpretation of "stationary source," had exceeded the boundaries of its authority established by Congress. The environmental groups that had prevailed in the D.C. Circuit argued vigorously that Congress intended "stationary source" to mean apparatus and therefore that the EPA had exceeded the scope of its delegated authority. Justice Stevens, in the body of the opinion, took this claim very seriously. He carefully canvassed the relevant statutory provisions and found no

---

79. *Chevron*, 467 U.S. at 863–64.

80. *Id.* at 856, 864.

81. *Id.* at 864.

"specific definition of the term 'stationary source,'" at least not in the nonattainment provisions.[82] There was a definition of "major" stationary source, but it did not shed light in any clear fashion on the meaning of "source."[83] Nor was there any discussion of the meaning of "source" in the legislative history.[84]

Turning to the respondent's specific arguments, Justice Stevens noted that the 1970 Clean Air Act did contain a definition of "stationary source," and he thought it was possible that this definition was intended to carry over to the same term under the nonattainment program. That definition defined "source," in part, to mean "building," and building "could be read to impose the permit conditions on an individual building that is a part of a plant."[85] Justice Stevens then noted that sometimes the meanings of words in a series are qualified by an associated word in the series, and sometimes a word in a series is understood to have "a character of its own," which is not "submerged by its association."[86] Justice Stevens implied that either of these conflicting canons of construction could arguably be invoked in parsing the definition in the original program, leaving the matter in equipoise. Even assuming the second principle of construction was more relevant, there was also the oddity that the definition of "major source" under the nonattainment program equated "source" with "facility," which presumably has a broader meaning than "building." He concluded: "We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress."[87]

This discussion is highly relevant in understanding the role of a reviewing court contemplated by the *Chevron* decision. Justice Stevens did not rest with the absence of any specific definition of "source" under the nonattainment program. Nor did he resolve the scope of the agency's authority with any casual characterization of the statute as "unclear" or "ambiguous." He carefully reviewed all the relevant language, including that of a related provision in the 1970 Act, and

82. *Id.* at 851.

83. *Id.* at 851, 860.

84. *Id.* at 851–53.

85. *Id.* at 860.

86. *Id.*; *see also id.* at 860–61 ("[T]he meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea."). *See Noscitur a sociis*, BLACK'S LAW DICTIONARY (2d ed. 1910). The second is more obscure, but Stevens cited *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923), as having adopted it.

87. *Chevron*, 467 U.S. at 861.

concluded that Congress did not impose any relevant limit on the meaning of "stationary source." He was committed to determining, through the exercise of de novo review, whether Congress had laid down a boundary that limited the agency's authority, or if, to the contrary, Congress had left the agency with the space to make a discretionary choice.[88]

C. Accountability Values

Chevron is justly famous for its emphatic affirmation of accountability values. That affirmation occurred at the end of the opinion, once Justice Stevens had established that Congress had no "actual intent" about the meaning of "stationary source." This meant that the meaning of "stationary source" was a discretionary policy choice that fell within a "gap left open by Congress."[89]

Insofar as filling that gap involved a policy choice, Justice Stevens made clear that it should be made by the agency, not the court.[90] At the end of his opinion, Justice Stevens advanced the critical argument why courts should defer to agencies in matters of interpretation that entail discretionary policy choices:

> Judges are not experts in the field, and are not part of either political branch of Government . . . . In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[91]

---

88. This reading is confirmed by an opinion filed by Justice Stevens seven years later in *Rust v. Sullivan*, 500 U.S. 173, 222 (1991) (Stevens, J., dissenting). Dissenting from the majority's invocation of *Chevron* in upholding an agency regulation, he wrote:

> The new regulations did not merely reflect a change in a policy determination that the Secretary had been authorized by Congress to make. *Cf. Chevron*[, 467 U.S. at 865]. Rather, they represented an assumption of policymaking responsibility that Congress had not delegated to the Secretary. *See id*., at 842–843.

Rust, 500 U.S. at 222 (Stevens, J., dissenting).

89. *Chevron*, 467 U.S. at 859–60, 866.

90. *Id.* at 864.

91. *Id.* at 865–66.

This famous passage is quoted in all excerpts of the decision. Note carefully, however, that Justice Stevens qualifies the sphere of agency policy choice by noting that Congress must have "delegated policymaking responsibilities" to the agency, and the courts must defer to the agency when it acts "within the limits of that delegation." In other words, there must be a delegation of authority to the agency, and the agency's sphere of superior accountability is limited by the scope of the delegation. Consistent with the discussion of the four values in Part I, the operative realm of the accountability value is subordinate to the need to maintain the boundaries of agency discretion.

D. Process Values

The *Chevron* decision also includes statements that are consistent with ideas sketched in Part I about how judicial review might improve the quality of agency statutory interpretation decisions. Justice Stevens noted that the plant-wide definition had been adopted by regulation, and that, before it was adopted in 1981, "proposals for a plantwide definition were considered in at least three formal proceedings."[92] After summarizing the earlier proceedings, Justice Stevens noted that the EPA began by observing that the definitional issue was not squarely addressed in either the statute or the legislative history and therefore the issue involved an agency "judgment as [to] how to best carry out the Act."[93] He then noted that the EPA had offered several reasons for concluding that the plant-wide definition was more appropriate.[94] These conclusions, Justice Stevens observed, were set forth in a proposed rulemaking in August 1981 that was formally promulgated in October of that year.[95]

This description of the EPA's process established that the Court regarded the agency as having determined the meaning of "stationary source" through a process that included full disclosure of the agency's reasoning to the public, an opportunity for any interested party to comment, and to have—at least ordinarily—an agency response to any material comments submitted.

The Court's final characterization about the process followed by the EPA in rendering its interpretation is also telling. Justice Stevens concluded that the EPA's interpretation "represents a reasonable

92. *Id.* at 853.

93. *Id.* at 858 (quoting 46 Fed. Reg. 16,280, 16,281 (Mar. 12, 1981)).

94. *Id.* at 858–59.

95. *Id.*

accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, *the agency considered the matter in a detailed and reasoned fashion,* and the decision involves reconciling conflicting policies."[96] Although this is not a complete endorsement of the process-review model—adopted in decisions like *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*[97]—it is fully consistent with, and may presuppose the use of, that model.

In sum, if one were to take a pair of scissors and cut out the first paragraphs of Part II of the opinion—and maybe one or two sentences in the concluding section that seem to endorse the elimination of any constraint on Congress's power to delegate decisions to administrative agencies—one would have an opinion that is almost entirely congruent with the four values of judicial review set forth in Part I. The Justices, and their law clerks, likely read the opinion this way, assuming they plowed their way through the entire draft. Indeed, the Court as a whole regarded the decision as an ordinary exercise in judicial review in the initial period after it was decided.[98] It was the D.C. Circuit, not the Court, that decided Part II set forth a new standard of review applicable to virtually all judicial challenges to agency statutory interpretation decisions.[99] Justice Scalia championed the D.C. Circuit's view once he joined the Court, and eventually "the *Chevron* doctrine"—something materially different from the *Chevron* decision—was born.

III. THE TWO PARAGRAPHS

If twenty-six out of twenty-seven pages in the *Chevron* decision are consistent with the four values traced in Part I, where do the paragraphs at the beginning of Part II of the *Chevron* opinion fit into the picture? These are the paragraphs that are quoted or paraphrased

96. *Id.* at 865 (emphasis added) (footnotes omitted).

97. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

98. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 981 (1992) (discussing the initial reception of *Chevron* by the Supreme Court).

99. The key cases are *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1566–67 (D.C. Cir. 1984) (en banc) and *Rettig v. Pension Benefit Guaranty Corp*., 744 F.2d 133, 150–51 (D.C. Cir. 1984). Both decisions were authored by Chief Judge Patricia Wald and were decided roughly three months after the *Chevron* decision was announced. For details about how the *Chevron* doctrine got started in the D.C. Circuit and migrated back to the Supreme Court, see Lawson & Kam, *supra* note 63, at 39–59 and Merrill, *Story of* Chevron, *supra* note 63, at 277–82.

in casebooks and thousands of later decisions. They constitute what came to be known as "the *Chevron* doctrine."

A. The Problematic Aspects of Part II

The first of these two paragraphs sets forth the "two-step" approach to agency interpretations of law. It is quoted here in its entirety:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[100]

There are two principal differences between this paragraph and what Justice Stevens wrote in the balance of the opinion. First, the paragraph asks whether Congress spoke directly to the "precise question at issue," whereas the balance of the opinion asks whether Congress left the issue for the agency to determine. This is a subtle but important difference. The "precise question" formulation seems to charge the reviewing court with finding affirmative evidence of a legislative intent in support of a specific interpretation. Such evidence will be rare, and therefore the first paragraph seems to imply that the agency in nearly all cases will have authority to render a dispositive interpretation. The agency, in other words, is given a very large "space" in which to interpret, subject only to small pockets where Congress has prescribed an answer. In contrast, determining whether Congress left the issue for the agency to decide is more consistent with a boundary-maintenance conception of the role of the reviewing court. This would

---

100. *Chevron*, 467 U.S. at 842–43 (footnotes omitted). The footnotes omitted here proved to be important. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 446–48 (1987) ("The question whether Congress intended the . . . standards to be identical is a pure question of statutory construction for the courts to decide . . . . In *Chevron* . . . we explained: 'The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.'" (quoting *Chevron*, 467 U.S. at 843 n.9)).

presumably result in a more confined "space" in which Congress has left the agency free to act.

Second, the opening paragraph advances a rule-like conception of the role of the reviewing court, expressed in terms of a sequential inquiry—first Step One, then Step Two. The two-step sequence is rule-like only in the sense that it prescribes a certain ordering of inquiries. The substance of the inquiries themselves is not rule-like at all. Rather, they describe open-ended standards. The first step examines whether Congress had a "clear" or "unambiguous" intent. Clear versus unclear and unambiguous versus ambiguous prescribe very general standards that require examination of statutory context. The second step asks whether the agency interpretation is "permissible," or as stated in the following paragraph, "reasonable." Permissible versus impermissible or reasonable versus unreasonable are also general standards. What the first paragraph actually seems to mandate, therefore, is a double standard, both prongs of which are quite general.

That said, the *form* of the two-step structure is strikingly at odds with the remainder of the opinion. If the opening paragraph was intended to prescribe a general two-step decisional sequence, one would expect to see this process mirrored in the analytical sections of the opinion. Instead, the balance of the opinion proceeds in a much more conventional fashion, carefully seeking to figure out what Congress did and did not decide, and carefully reviewing the course of the EPA's struggle with the issue. Neither the rule-like articulation of the sequencing of the decisional process, nor the formulation of the steps in terms of clarity and permissibility—or ambiguity and reasonableness—make an appearance in the body of the opinion, with the exception of Justice Stevens's conclusion that the EPA's decision to adopt the plant-wide definition was the product of a reasoned decisionmaking process. So there is, again, an odd disconnect between the first paragraph and the balance of the opinion.

The second paragraph has received less attention in subsequent decisions and commentary. As a matter of jurisprudence, however, it is more radical than the first. Again, it is important to quote the text:

> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). 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.[101]

The first three sentences in this paragraph are unproblematic. The quotation from *Morton v. Ruiz*[102] says that agencies must act to fill gaps left in statutes, whether these gaps are left explicitly or implicitly.[103] This is surely correct, although it says nothing about the standard of review courts should apply in reviewing these gap-filling efforts—something that was not at issue in *Ruiz*.[104] The second sentence says that Congress occasionally enacts an express delegation of authority directing an agency to interpret a particular term in a statute, which is true but unusual. The third says that in reviewing such an express delegation for agency interpretation, courts have applied the arbitrary and capricious standard, which is what the Court held in *Batterton v. Francis*.[105]

More questionable are the fourth and fifth sentences. The fourth seems to repeat the point from *Ruiz* about implicit gaps, but reframes it in terms of implicit delegations to interpret, a characterization not found in *Ruiz*. Then comes the final sentence, which seems to say that courts should apply the same deferential standard of review to agency interpretations of "implicit" delegations as they apply to explicit delegations of authority to interpret specific terms. Admittedly, the last sentence is not completely clear about this. Saying that courts may not substitute their judgment for a "reasonable" agency interpretation is not quite the same as saying that courts must uphold agency regulations that are not arbitrary and capricious. But most courts and commentators have read the last sentence as directing courts to apply

101. *Chevron*, 467 U.S. at 843–44 (footnote omitted).

102. Morton v. Ruiz, 415 U.S. 199 (1974).

103. *Id.* at 231.

104. *Ruiz* was concerned with the merits of an agency interpretation and did not discuss the standard of review:

> We are confronted . . . with the issues whether the geographical limitation placed on general assistance eligibility by the BIA is consistent with congressional intent and the meaning of the applicable statutes, or, to phrase it somewhat differently, whether the congressional appropriations are properly limited by the BIA's restrictions, and, if so, whether the limitation withstands constitutional analysis.

Id. at 209–10.

105. Batterton v. Francis, 432 U.S. 416, 424–26 (1977).

the same highly deferential standard to "implicit" delegations as they apply to explicit delegations.[106]

Note carefully, however, that the fourth and fifth sentences do not say Congress has implicitly delegated authority to an agency whenever a statute is unclear or ambiguous. Lower courts and commentators drew this conclusion by reading the description of the two steps in the previous paragraph into the point about "implicit" delegations in the second.[107] But in fact, Justice Stevens says nothing about what sort of evidence will suffice to establish that Congress has implicitly delegated authority to an agency to interpret a particular provision in its organic act.

Indeed, the interpretation of the second paragraph as endorsing the idea that any ambiguity, gap, or silence constitutes an implicit delegation of authority to the agency is hardly supported by the balance of the opinion. If any ambiguity or lack of clarity constitutes an implied delegation of authority to interpret, this would be revolutionary. Vague statutory provisions are common. Silences about issues that perhaps were not anticipated when the statute was adopted are ubiquitous. Inconsistencies and internal tensions abound, especially when statutes have been patched together from different sources. Ordinary ambiguities are encountered routinely. All these situations would qualify as implied delegations of interpretive authority to an agency. The balance of the *Chevron* opinion makes no such assumption. Instead, it proceeds on the understanding that the definition of "stationary source" must be determined by a careful investigation of the relevant text and legislative history of the Clean Air Act, which yields the conclusion that the meaning of this term was left undecided by Congress, requiring that it be particularized by the agency.

The second paragraph would prove to have significance beyond the revolutionary idea that any lack of clarity represents a delegation of authority to the agency to interpret. It also contains the seeds of a theory that would provide a legal justification for "the *Chevron* doctrine"—that is, the interpretation of the first two paragraphs taken out of context from the balance of the opinion. The legal justification

106. Indeed, the Court on several occasions has described Step Two of *Chevron* as requiring application of the "arbitrary and capricious" standard of review, which is what the Court said was required when reviewing explicit delegations. *See* Judulang v. Holder, 565 U.S. 42, 52 n.7 (2011); Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 53 (2011); United States v. Mead Corp., 533 U.S. 218, 229 (2001).

107. *E.g.*, Scalia, *supra* note 77, at 516.

is that the strong deference seemingly mandated by the first two paragraphs has been directed, if only "implicitly," by Congress. Proponents of this theory, such as Justice Scalia, admitted that any such congressional intent is "fictional."[108] Indeed, it was wholly made up. Congress has on multiple occasions sought to say the opposite—that courts should exercise independent judgment in interpreting agency statutes.[109] And on one occasion—the enactment of the APA in 1946—Congress succeeded in legislating this understanding explicitly.[110]

Chevron's greatest weakness as a legal opinion is that it ignores this aspect of the APA. However, if any ambiguity is an implicit delegation of interpretive authority to agencies, then every time Congress enacted an agency statute that contains an ambiguity *after 1946*, it impliedly amended the APA. The second paragraph thus provided a theory for reconciling "the *Chevron* doctrine" with the APA. It also gave rise to the most important attempt to rein in that doctrine, in *United States v. Mead Corp.*[111]

B. Why Did Justice Stevens Start with the Two Paragraphs?

The question remains why Justice Stevens decided to launch his lengthy opinion with these highly novel paragraphs. This is the ultimate paradox of the *Chevron* decision. The opening paragraphs, which are the font of "the *Chevron* doctrine" and are endlessly quoted or paraphrased in thousands of decisions, do not appear to reflect the

---

108. As Justice Scalia acknowledged:

> And to tell the truth, the quest for the "genuine" legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress . . . didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.

Id. at 517.

109. Prominent examples are the Separation of Powers Restoration Act, S. 909, 116th Cong. § 2(2)(B) (2019), which passed the House but not the Senate, and the Bumpers Amendment, S. 1080, 97th Cong. § 5 (1981), which came close to enactment in the years before *Chevron*, 128 Cong. Rec. 5297, 5302 (1982).

110. 5 U.S.C. § 706 (2018). Section 706 begins by stating that a "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." *Id.* On its face, this seems unequivocally to instruct courts to apply independent judgment on all questions of law. A subsection of § 706 says that the reviewing court shall set aside agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* § 706(2)(C). There is ample evidence that Congress prefers that ambiguities be resolved by its faithful agent—the courts—rather than by agencies subject to greater influence by its great institutional rival—the executive.

111. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

standard of review that Justice Stevens actually applied in the decision itself. If courts are always supposed to engage in review using the notions advanced in the opening paragraphs, one would surely expect these ideas to form the foundation for the analysis in the balance of the opinion. Instead, after their appearance in Part II, they effectively disappear.

Although this is necessarily conjectural, Justice Stevens most likely authored Part II *after* he completed the remainder of the opinion. The best evidence of this is the very lack of integration in the opinion between Part II and the balance of the discussion. If Justice Stevens began by drafting the opening paragraphs, with the two-step decisional sequence and so forth, one would expect him to apply similar concepts in the balance of the opinion. Instead, the opinion contains the multiple disconnects previously discussed.

In addition, Justice Stevens is known to have followed a practice of dictating first drafts of his opinions.[112] And the balance of the opinion reflects this. After the opening paragraphs, the decision reads like someone proceeding through familiar steps of statutory analysis and recording as he went along. Part III describes the history of the Clean Air Act and the features of the Act that led to the adoption of the new source review provisions. Part IV discusses the historical evolution of the 1977 amendments to the Act. Part V describes the internal legislative history of the 1977 amendments insofar as it touches on the new source provisions of the nonattainment program. Part VI addresses the EPA's multiple efforts over time to define the meaning of "stationary source." Part VII—the concluding portion of the opinion—considers and rejects the respondents' specific arguments in opposition to the plant-wide definition, based on statutory language, legislative history, and policy. One can almost picture Justice Stevens at his desk, patiently poring through different piles of relevant material, and dictating his conclusions after he completed his review of each pile.

Indeed, Justice Harry Blackmun's notes indicate that at conference Justice Stevens said he was "not at rest."[113] Justice Stevens had not fully settled on the right answer or approach to the case when he was assigned to write the opinion for the Court. For a careful and diligent judge like Justice Stevens, the logical thing to do when not at

112. Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y. TIMES (Sept. 23, 2007), https://www.nytimes.com/2007/09/23/magazine/23stevens-t.html [https://perma.cc/MD3Y-MRUZ].

113. Merrill, *Story of* Chevron, *supra* note 63, at 272.

rest would be to unravel the pieces of the puzzle, bit by bit, until the answer became clear. This surmise is reinforced by two memos Justice Stevens wrote to Justice William Brennan after the initial conference vote in the case. Justice Brennan, who voted to affirm the D.C. Circuit at conference, was hoping that Justice Stevens would adopt an approach that would eliminate any need for a dissent in the case. In his first response to Justice Brennan, written on March 6, 1984, Justice Stevens wrote: "At this point I really am not far enough into the case to give you a definitive answer, but I certainly will do my best to prepare an opinion that will achieve as broad a consensus as possible."[114] In the second memo, dated May 23, 1984, Justice Stevens wrote:

> At long last I have found the time to get back into these cases and to begin work on a draft opinion. Since you wrote to me on March 6, in the hope that you might be able to escape the chore of writing a dissenting opinion if I could see my way clear to accepting your approach to the case, I thought I should let you know that I am now quite firmly persuaded that the Government is correct in arguing that the EPA's interpretation of the term "source" is permissible.[115]

This correspondence confirms that Stevens moved from doubt to certainty about the proper outcome as he worked his way through the complex materials. The public evidence that he followed such a process is found in Parts III–VII of the opinion, which therefore had to be drafted first.

If this conjecture is correct, why then would Justice Stevens, after drafting the longest portion of the opinion, turn back and draft the short introductory passages that make up Part II? The best explanation for this may be the precarious situation in which Justice Stevens found himself. Because of recusals, only six Justices were still in the case,[116] two of whom had voted to affirm; the other three, aside from Stevens himself, had all indicated varying degrees of uncertainty about the right outcome.[117] Justice Stevens had convinced himself of the right

114. Letter from John Paul Stevens, Assoc. J. of the U.S. Sup. Ct., to Justice William J. Brennan, Jr., Assoc. J. of the U.S. Sup. Ct. 16 (Mar. 6, 1984), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1983/82-1005.pdf [https://perma.cc/EF7F-7DQB].

115. Letter from John Paul Stevens, Assoc. J. of the U.S. Sup. Ct., to Justice William J. Brennan, Jr., Assoc. J. of the U.S. Sup. Ct. 17 (May 23, 1984), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1983/82-1005.pdf [https://perma.cc/EF7F-7DQB].

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

117. Merrill, *Story of* Chevron, *supra* note 63, at 273. Justices William Rehnquist and Thurgood Marshall were recused for health reasons, and Justice Sandra Day O'Connor was

outcome, but the written evidence of the steps leading to this confidence took up some twenty pages in the slip opinion, and required attending to a highly technical set of statutory provisions, a convoluted administrative history, and an esoteric policy debate. What was needed was some *arresting* language that would grab the reader's attention and suggest that the outcome was compelled by first principles.

Reduced to their essence, the first two paragraphs are a strong invocation, albeit expressed in a novel way, of the distinction between law and policy. Courts concern themselves only with enforcing the law; policy is for politically accountable institutions like legislatures and agencies. The sharp distinction between law and policy resonates strongly with lawyers and judges. Justice Stevens, by raising the distinction early in the opinion, and concluding with it again at the end, was attempting to condition the reader to accept his ultimate conclusion: that the definition of stationary source was a policy question, not a legal one, and hence one in which the view of the administrative agency should be accepted.

In short, Justice Stevens turned to drafting what became Part II in an effort to condense the result of a conventional process of reasoning into a set of precepts unconventional enough for readers to sit up and take note. In his own mind, Justice Stevens probably saw no contradiction between Part II and the balance of the opinion. However, by reducing the complexity of his effort to a rule-like framework, and invoking a problematic equation of implicit gaps and delegations to interpret, Justice Stevens inadvertently produced language that could be used by later courts to create something very different—something with which Justice Stevens, for one, was deeply uncomfortable.[118]

IV. RE-WRITING THE *CHEVRON* DOCTRINE

Parts II and III of this Article present a re-reading of the *Chevron* decision, and that re-reading provides the foundation for a possible re-

---

recused because of a financial interest in one of the parties. *Id.* This left only Chief Justice Warren Burger and Justices William Brennan, Byron White, Lewis Powell, Harry Blackmun, and John Paul Stevens participating.

118. *See generally* Wyeth v. Levine, 555 U.S. 555 (2009) (Stevens, J.) (declining to give *Chevron* deference to an agency interpretation about the preemptive effect of a federal statute); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (Stevens, J.) (declining to apply *Chevron* to a "pure question of law").

writing of the *Chevron* doctrine, without any need to overrule the decision. Such a re-writing should entail the following central points.

The paragraphs of Part II of the *Chevron* decision must be read in the context of the opinion as a whole. When so read, Part II establishes two critical propositions, which are sound and should be reaffirmed:

1. If a reviewing court determines, using the traditional tools of statutory interpretation, that a statute has a clear or unambiguous meaning, that meaning must be enforced, notwithstanding any agency interpretation to the contrary. This understanding is required by rule-of-law values and by the separation of powers principle of legislative supremacy.

2. If a reviewing court determines, using the traditional tools of statutory interpretation, that Congress has expressly or impliedly delegated authority to the agency to fill a gap or space in the statute, the agency interpretation should be reviewed in a manner similar to the way courts review agency policy determinations more generally under the arbitrary and capricious standard of the APA. This is required by understanding that the agency, because of its political accountability and expertise, is the preferred institution for resolving questions of discretionary policy.

The balance of the *Chevron* decision, found in Parts III–VII, either establishes or is consistent with the following propositions:

3. The *Chevron* decision did not hold that settled expectations created by prior agency action are irrelevant in reviewing an agency's exercise of interpretative authority. The Court found that prior legislative and administrative action had not created any settled expectations. Many decisions before and after *Chevron* reaffirm that settled expectations created by contemporary or longstanding agency understanding of its statutory mandate are relevant in reviewing agency interpretations of law. Giving weight to such expectations is required by rule-of-law values.

4. In speaking of implied delegations of interpretative authority, the Court did not suggest that any silence, gap, or ambiguity in a statute automatically constitutes a delegation of interpretive authority to the agency. The reviewing court must

determine, as a matter of independent judgment using the traditional tools of statutory interpretation, whether Congress has left space for the agency to fill in the exercise of delegated authority. Only after determining that the best reading of the statute is that Congress actually intended the agency to exercise discretionary interpretive authority should the reviewing court accept the agency's interpretation. This is required by constitutional values—most prominently, the anti-inherency understanding of the principle of legislative supremacy.

5. When a reviewing court concludes that the agency interpretation is consistent with settled expectations and falls within the delegated space created by Congress where the agency is to exercise interpretive authority, the agency interpretation should be reviewed like other exercises of delegated policymaking authority. This is required by considerations of comparative institutional analysis—namely, that the agency is a superior institution for establishing policy on grounds of political accountability and expertise.
6. A critical element in exercising the review of such discretionary agency interpretations, as is required for any exercise of review if an agency has discretionary policymaking authority, is whether the agency developed its position through a process of reasoned decisionmaking. Typically, this entails providing notice, an opportunity to object, and an explanation by the agency for rejecting any plausible alternatives or objections deemed significant.

This does not exhaust the elements the Court should draw upon in re-writing the *Chevron* doctrine. As in *Kisor v. Wilkie*,[119] where the Court re-wrote the *Auer* doctrine,[120] the Court should draw from additional elements as well.

119. Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

120. Auer v. Robbins, 519 U.S. 452 (1945). *Auer* required that courts give "controlling" weight to an agency interpretation of their own regulations unless it is "plainly erroneous or inconsistent with the regulation." *Id.* at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)). *Kisor* declined to overrule *Auer*, but recognized six qualifications to its standard of review, most of which were drawn from prior precedent. *Kisor*, 139 S. Ct. at 2415–18.

The APA, which was ignored in *Chevron* and in most of the later cases invoking the *Chevron* doctrine, provides powerful support for this re-writing. As Professor Henry Monaghan explained years ago, deferring to agency interpretations of law when Congress actually intends that the agency should serve as the primary interpreter is fully consistent with the Act's general instruction to courts to "decide all relevant questions of law."[121] By deferring to the agency interpretation, the court is following the law. But it is inconsistent with the APA to defer to the agency regarding the scope of its own authority. The APA instructs courts to "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[122] As Chief Justice John Roberts wrote, in dissent, in *City of Arlington v. FCC*[123]:

> Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.[124]

The APA requires this much. The discovery, if belated, of a conflict between judge-made doctrine and a controlling statute fully justifies making appropriate qualifications to the doctrine.

The Court can also draw on aspects of its *Chevron* jurisprudence, such as the decisions that continue to emphasize the importance of longstanding and consistent agency interpretations,[125] the decisions that interpret *Mead* as requiring an all-things-considered inquiry into whether Congress actually intended the agency to exercise delegated interpretive authority,[126] and the decisions that decline to apply the

---

121. 5 U.S.C. § 706 (2018); *see* Henry Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27–28 (1983).

122. 5 U.S.C. § 706(2)(C).

123. City of Arlington v. FCC, 569 U.S. 290 (2013).

124. *Id.* at 312 (Roberts, C.J., dissenting).

125. *See generally* Krishnakumar, *supra* note 65 (collecting decisions referencing the duration of an agency interpretation in considering whether deference is appropriate).

126. *See* Long Island Care at Home Ltd. v. Coke, 551 U.S. 158, 173–74 (2007); Barnhart v. Walton, 535 U.S. 212, 222 (2002). Although *Mead* instructed that the *Chevron* doctrine should apply only when an agency had made its interpretation pursuant to delegated authority to act with the force of law, United States v. Mead Corp., 553 U.S. 218, 226–27 (2001), this is inadequate to ensure that the agency is acting within the scope of its delegated authority. The question of agency authority exists along two dimensions. One is whether Congress has given the agency the authority to act with the force of law. The other is whether Congress has given the agency the authority to decide the particular question presented. It is quite possible to imagine an agency

Chevron doctrine where the agency has failed to follow a reasoned decisionmaking process.[127]

In short, it is well within the capacities of the Justices to reform the *Chevron* doctrine without overruling the *Chevron* decision. They can do so by emphasizing the analysis set forth in the body of the *Chevron* opinion, by emphasizing the importance of the judicial-review provisions of the APA, and by drawing upon qualifications introduced in post-*Chevron* decisions.

CONCLUSION

This Article has advanced one simple idea about how to revise the *Chevron* doctrine without overruling the *Chevron* decision. Ignoring the provocative paragraphs in Part II of the decision and concentrating instead on the balance of the opinion, the *Chevron* decision is highly consistent with four important values that should inform judicial review of agency interpretations of law. Those are rule-of-law values, constitutional values including the principle of legislative supremacy, the desirability of accepting agency decisions that reflect discretionary policy choices, and the importance of reasoned decisionmaking by agencies. While the body of the *Chevron* opinion reflects these values well, the *Chevron* doctrine, which was created by reading two introductory paragraphs of the opinion out of context, reflects these values poorly. The first step to reform the *Chevron* doctrine is to re-read the *Chevron* decision, concentrating on the body of the opinion

---

that is given authority to act with the force of law (for example, to issue binding regulations governing the marketing of drugs and medical devices) but is not given authority over a particular set of issues (for example, to regulate tobacco products). *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 156 (2000). Conversely, it is possible to imagine an agency that is given authority over a particular set of issues (for example, to make sure employees get paid time and a half for overtime) but not given authority to act with the force of law with respect to those issues (for example, to bring an enforcement action before the agency when a violation is suspected). *See* Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944). The principle of legislative supremacy requires that both types of limits be enforced.

127. *See, e.g.*, Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125–26 (2016) (refusing to give *Chevron* deference to an agency interpretation that failed to explain its departure from previous interpretations); Wyeth v. Levine, 555 U.S. 555, 577 (2009) (refusing to apply the *Chevron* doctrine in part because the agency had not provided any notice of its interpretation before it was adopted). For recent decisions applying a robust version of the reasoned decisionmaking norm, see *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1910–15 (2020) (invalidating the rescission of a policy statement for failure to consider alternatives), and *Department of Commerce v. New York*, 139 S. Ct. 2551, 2573–76 (2019) (invalidating an order from the secretary of commerce based on a finding that his stated rationale was "pretextual").

and interpreting the paragraphs setting forth the two-step approach in light of that analysis. Starting with this foundation, the process of articulating a better deference doctrine should be attainable.