

# CONGRESS'S DOMAIN: APPROPRIATIONS, TIME, AND *CHEVRON*

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## ABSTRACT

*Annual appropriations and permanent appropriations play contradictory roles in the separation of powers. Annual appropriations preserve agencies' need for congressionally provided funding and enforce a domain of congressional influence over agency action in which the House and the Senate each enforce written unicameral commands through the threat of reduced appropriations in the next annual cycle. Permanent appropriations permit agencies to fund their programs without ongoing congressional support, circumscribing and diluting Congress's domain.*

*The unanswered question of Chevron deference for appropriations demonstrates the importance of the distinction between annual appropriations and permanent appropriations. Uncritical application of governing deference tests that emphasize the time and procedural steps an agency put into an interpretation would tend to favor deference for agency interpretations of permanent appropriations, but not for annual appropriations. Yet this result is upside-down if courts' goal is to promote accountability and avoid interference with the balance of power between the political branches. Chevron has two core functions, a subdelegation function (it transfers the authority delegated in ambiguities from courts to agencies) and an anti-entrenchment function (it relieves interpretations of the solidifying force of stare decisis). As applied to annual appropriations, both functions respect Congress's primary role in enforcement through the appropriations cycle; as applied to permanent appropriations, both functions interfere with Congress's domain.*

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*Courts that evaluate Chevron for appropriations without acknowledging and addressing the elemental difference between annual appropriations and permanent appropriations interfere with the political branches and frustrate Congress's expectations. Courts should adopt a bifurcated approach to Chevron for appropriations that disfavors deference for permanent appropriations provisions, but not for annual appropriations provisions. This Article suggests how the distinction between annual and permanent appropriations may be relevant to the incorporation of appropriations into other aspects of administrative law doctrine, including legislative standing, reviewability, and nondelegation.*

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## INTRODUCTION

“Unless they[re] paying your bills, pay them . . . no mind.”<sup>1</sup>

—*RuPaul*

“The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.”<sup>2</sup>

—*United States Constitution*

In my house, we have our five-year-old feed the dogs. Our reasoning will be intuitive to any pet owner. Pets naturally respect the “hand that feeds,” aware that anyone who they count on for food has a ready means of punishing disobedience—through the stomach. But pets feel no such gastronomic compulsion to obey those who they do not count on for their daily meals. “[H]unger changes worlds.”<sup>3</sup>

This simple metaphor is critical for understanding the contradictory roles of annual appropriations and permanent appropriations in the separation of powers context. The Constitution prohibits federal spending without an “appropriation”—legislation specifying an amount and source of funds for an agency to use for a designated purpose.<sup>4</sup> Much like a pet obeys a master on whom it depends for daily meals, agencies dependent upon annual appropriations obey both houses of Congress because each must consent to enact such appropriations.<sup>5</sup> Through this “hands that feed”

1. RUPAUL, *Sissy That Walk, on BORN NAKED* (RuCo Inc. 2014).

2. U.S. CONST. art. I, § 8, cl. 12.

3. CARL SANDBURG, 75, *in* THE PEOPLE, YES 196, 196 (First Harvest ed. 1990).

4. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 2, at 2-23 to 2-24 (4th ed. 2016) [hereinafter PRINCIPLES OF APPROPRIATIONS LAW], <https://www.gao.gov/assets/680/675709.pdf> [<https://perma.cc/5VBU-ASJ5>]; see, e.g., *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion) (holding that funds appropriated for providing free transcripts could only be spent for that purpose when expressly authorized by statute).

5. U.S. CONST. art I, § 7, cl. 2, § 9, cl. 7.

dynamic, Congress has made annual appropriations a domain where the House of Representatives and the Senate have enduring, independent power and in which each house enforces compliance with “law”—including unicameral texts that no court would enforce even if it had the time to exercise review—through the threat of retribution in the appropriations cycle.<sup>6</sup> On the other hand, permanent appropriations provisions play a destructive role in this dynamic. They give agencies a way to feed themselves without, or, even despite, the House and Senate, thus shrinking and diluting Congress’s domain.

Annual and permanent appropriations are essentially opposites—matter and anti-matter, fire and water—in the separation of powers.<sup>7</sup> One preserves what the other destroys: namely, agencies’ underlying, recurring need for funds that only the mutual assent of both the House and Senate can provide.<sup>8</sup>

This distinction between annual appropriations, which preserve congressional power, and permanent appropriations, which destroy it, was well understood to the Framers. The Constitution explicitly prohibits permanent and future appropriations for the army,<sup>9</sup> a provision the Framers included to secure an ongoing check on the use of military force for popular majorities (who get to elect a new House every two years), no matter what their predecessors might have enacted into law.<sup>10</sup> The two-year clause keeps the use of military force

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6. See *infra* Part II.A (describing how agencies and Congress treat appropriations committee reports, conference reports, and budget justifications as binding legal texts).

7. Annual and permanent appropriations are not precisely opposites—the “essentially” here glosses over subtleties to make a systemic point. From the standpoint of future congresses, permanent appropriations take away power over the particular programs they fund; but from the standpoint of the congress that enacts a permanent appropriation, doing so increases power over the policies that will be in place in the future. Moreover, the specific impact of annual appropriations depends on the program to be funded—if future congresses “like” an annually funded program that their President “dislikes,” then the power generated by the annual funding stream may well inure to the President. Cf. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 961–64 (2020) (noting that Republicans’ preference for limited government can mean they draw more power from threat of government shutdown than Democrats do).

8. Congress can also play a role in generating agencies’ underlying needs for funds, thereby increasing its power. See Matthew B. Lawrence, *Disappropriation*, 120 COLUM. L. REV. 1, 17–21, 27–28 (2020) [hereinafter Lawrence, *Disappropriation*] (explaining that Congress can use legislative conduct and spending commitments to create a future need for funds to honor those commitments).

9. U.S. CONST. art. I, § 8, cl. 12.

10. See THE FEDERALIST NO. 24, at 158 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing limiting durations of appropriations for the army as an “important qualification even

forever within Congress's domain. But despite the constitutional pedigree of the temporal distinction between annual and permanent appropriations, it is underappreciated in contemporary doctrine<sup>11</sup> and scholarship.<sup>12</sup> This is a symptom of administrative law's longstanding failure to, in Professor Gillian Metzger's words, "take appropriations seriously."<sup>13</sup>

This Article explains the contrasting effects of annual (and other near-term) and permanent (and other future) appropriations provisions on the separation of powers.<sup>14</sup> It then demonstrates how this distinction can be determinative in incorporating appropriations into administrative law doctrine by addressing the unresolved question of how *Chevron*<sup>15</sup> applies to appropriations. Blockbuster lawsuits about the construction of a wall along the southern border<sup>16</sup> and the

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of the legislative discretion" which, "upon a nearer view of it will appear to be a great and real security against military establishments without evident necessity"); Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 549 (2007) ("[T]he Military Appropriations Clause necessitates a repeated declaration by the legislature that the appropriation is necessary.").

11. See *infra* Part III.B (describing cases applying *Chevron* to appropriations provisions without regard to their duration).

12. Prior scholarship has acknowledged the distinctive congressional role in the annual appropriations process as well as the fact that permanent appropriations provisions diminish legislative power, but has not developed the annual versus permanent appropriations distinction or its doctrinal implications. See, e.g., JAMES WALLNER, TESTIMONY: "EXAMINING 'BACKDOOR' SPENDING BY FEDERAL AGENCIES," SUBCOMMITTEE ON INTERGOVERNMENTAL AFFAIRS COMMITTEE ON OVERSIGHT AND GOVERNMENT AFFAIRS 8 (Dec. 11, 2018), <https://docs.house.gov/meetings/GO/GO04/20181211/108786/HHRG-115-GO04-Wstate-WallnerJ-20181211.pdf> [<https://perma.cc/B598-G8G5>] (noting that congressional influence is diminished if an "agency's funding d[oes] not require congressional approval"); Alan L. Feld, *The Shrunken Power of the Purse*, 89 B.U. L. REV. 487, 494 (2009) ("Permanent appropriations constrain Congress's ability to review and change priorities through the appropriation process."); Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 813 ("The enforcement of budgetary limitations is almost wholly internal to the political branches of government, and a matter of intense and appropriate congressional interest.").

13. See Gillian Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 1) (on file with author).

14. The distinction between permanent and future appropriations provisions, on the one hand, and annual and other near-term appropriations, on the other, is described *infra* Part I.A.

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

16. *Sierra Club v. Trump*, 929 F.3d 670, 692 (9th Cir. 2019) (refusing to grant *Chevron* deference when determining meaning of an appropriations transfer provision, despite silence about deference from government).

Affordable Care Act's ("ACA") health insurance subsidies<sup>17</sup> have recently brought the question of whether courts should defer to agencies' interpretations of ambiguous appropriations to the fore. Yet the federal appellate courts have not definitively resolved it. District courts have taken contradictory approaches,<sup>18</sup> and legal scholarship has offered little guidance.<sup>19</sup>

The distinction between annual and permanent appropriations is pivotal to evaluating doctrinal paths forward for the unresolved question of *Chevron's* applicability to appropriations law. Unmindful application of the Supreme Court's governing, if indeterminate, *Mead*<sup>20</sup> test for appropriations provisions favors deference for permanent appropriations but not for annual appropriations. This is because permanent appropriations are more likely to be included in a measure specific to one agency and are on the books long enough for agencies to interpret them through notice-and-comment rulemaking. But, as this Article explains, this result is upside-down if courts' goal is avoiding interference with the balance of power between the legislative and the executive branches. *Chevron* has two core functions: a subdelegation function, which transfers the authority delegated in ambiguities from courts to agencies; and an anti-entrenchment function, which relieves interpretations of the solidifying force of stare decisis. Applied to annual appropriations, both functions respect Congress's primary role in enforcing appropriations law. Applied to permanent appropriations, both functions undermine Congress's domain.

Courts that evaluate *Chevron* for appropriations without acknowledging and addressing the elemental difference between annual and permanent appropriations interfere with the political branches and frustrate Congress's likely expectations. Courts that are cognizant of appropriations provisions' distinctive role within the separation of powers should address the confusion that surrounds

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17. U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 188 (D.D.C. 2016) (refusing government's request for *Chevron* deference in determining availability of permanent appropriations to honor legislative commitment).

18. See *infra* Part III.B (surveying cases).

19. No article has squarely confronted the applicability of *Chevron* to appropriations provisions. The article that comes the closest is Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677 (2017). However, that article addresses only deference to agency interpretations that create binding legal commitments, not agency interpretations of appropriations law. For an explanation of the distinction between legal commitments and appropriations, see Lawrence, *Disappropriation*, *supra* note 8, at 10–21.

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

*Chevron*'s applicability to appropriations by employing the bifurcated approach developed in this Article. This approach disfavors deference for permanent appropriations provisions but not annual appropriations provisions.

This Article's contribution is descriptive, doctrinal, normative, and prescriptive. Its descriptive contribution is to elaborate on the role of annual appropriations in preserving and supporting an often-overlooked domain of legislatively enforced law governing agencies and on the role of permanent appropriations in curbing and diluting Congress's domain. Its doctrinal contribution is to map courts' confusion in deciding whether to treat agencies' interpretations of ambiguous appropriations provisions as binding; that is, in deciding whether to apply *Chevron* to appropriations. Its normative contribution is to argue that the effects of applying *Chevron* to appropriations depend critically on whether the interpreted provision is annual (or near term) or permanent (or future term). Finally, its prescriptive contribution is to argue, in light of all of this, that courts and scholars incorporating appropriations into administrative law doctrine should begin with the elemental distinction between annual appropriations and permanent appropriations.

The Article proceeds in four parts. Part I describes appropriations concepts and practices that are helpful in understanding the separation of powers and doctrinal questions appropriations present. It describes the anatomy of a typical statutory appropriation and the outer boundaries of what constitutes an "appropriation." It also elaborates on the distinction between annual (and other near-term) appropriations and permanent (and other future-term) appropriations.

Part II explains how annual appropriations preserve and enforce a domain of unicameral "law" governing administrative agency behavior. This domain includes texts no court would enforce but that agencies and Congress treat as binding, including appropriations committee reports, conference reports, and budget justifications. Part II also explains how permanent appropriations provisions circumscribe and dilute this domain of enduring congressional influence.

Part III demonstrates the doctrinal importance of the distinction between annual and permanent appropriations provisions through the example of *Chevron* for appropriations. It summarizes the doctrinal confusion surrounding *Chevron*'s applicability to appropriations, detailing the inconsistent approaches taken by the few courts to address this question. These approaches demonstrate that appropriations do not fit readily into the literal terms of governing

doctrinal tests. It then argues for a bifurcated approach that hinges deference on whether an appropriations provision is annual or permanent. Among other benefits, this bifurcated approach avoids interference with the separation of powers—it respects Congress’s domain.

Finally, a brief conclusion summarizes the Article’s contribution and reflects on the broader implications of the elemental distinction between annual and permanent appropriations for administrative law doctrine. It suggests, based on this distinction, future inquiry into whether Congress can delegate the appropriations power to the executive branch in permanent law, the applicability of the Supreme Court’s holding that lump-sum appropriations are committed by law to agency discretion to long-term appropriations provisions, and the relevance of the duration of appropriations provisions to the legislative standing debate.

### I. WHAT IS AN “APPROPRIATION”?

Founding-era documents emphasize the Framers’ expectation that Congress’s appropriations power would play a critical role in the separation of powers.<sup>21</sup> Contemporary courts and commentators have validated that expectation.<sup>22</sup> Yet, while the fact that appropriations are

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21. See 5 ANNALS OF CONG. 466 (1796) (statement of Rep. Gallatin) (“[T]he general power of granting money, also vested in Congress, would at all events be used, if necessary, as a check upon, and as controlling the exercise of the powers claimed by the President and Senate.”). The significance of the “power of the purse”—while encompassing more than simply appropriations, see Lawrence, *Disappropriation*, *supra* note 8, at 11–12—was couched in terms equally applicable to the appropriations power:

The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of government. They, in a word, hold the purse . . . [,] the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

THE FEDERALIST NO. 58, *supra* note 10, at 359 (James Madison); see also THE FEDERALIST NO. 30, *supra* note 10, at 188 (Alexander Hamilton) (“Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion and enables it to perform its most essential functions.”). For an excellent overview of the importance of the power of the purse to the Framers, see generally JOSH CHAFETZ, CONGRESS’S CONSTITUTION, LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017).

22. See *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990) (“Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury.”); *U.S. Dep’t of the Navy v. FLRA*, 665 F.3d 1339, 1346 (D.C. Cir. 2012) (“The power over the purse was one of the most important authorities allocated to Congress in the Constitution’s [separation of powers] . . .”);



important to the separation of powers is well-known, the actual nature and role of appropriations are poorly understood.

What is an appropriation? Is the Medicare statute an appropriation? Is the Hyde Amendment, which prohibits the use of federal funds for abortion,<sup>23</sup> an appropriation? And what do appropriations do for Congress when a shutdown is not threatened, or during periods when the president, House, and Senate are controlled by the same party?

Section A details the anatomy of a legislative appropriation, including key terms. Section B describes the fuzzy edges—and the clear center—of the “appropriations law” category. Section C discusses appropriations procedure.

### A. *Anatomy of a Statutory Appropriation*

The Appropriations Clause of the U.S. Constitution prohibits the expenditure of funds from the treasury except “in Consequence of Appropriations made by Law.”<sup>24</sup> This means that even if a law commands an agency to expend funds, the agency that is subject to that command cannot comply—must break the law—unless Congress has also enacted an “appropriation” permitting the expenditure.<sup>25</sup> Congressional rules refer to laws that permit or require spending as “authorizations” and laws that appropriate the funds necessary to actually spend as “appropriations,” though an appropriation need not be preceded by an authorization to be constitutionally effective.<sup>26</sup>

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Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 360 (2018) (describing “Congress’s . . . authority to deny access to public funds” as “one of its most essential constitutional authorities”); *id.* at 367–68 (“Through the ingenious practice, begun with the very first Congress, of appropriating funds only one year at a time, Congress has ensured that presidents must always come back every year seeking money just to keep the government’s lights on.”).

23. *Harris v. McRae*, 448 U.S. 297, 302 (1980).

24. U.S. CONST. art. I, § 9, cl. 7.

25. *See United States v. MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion) (“[T]he expenditure of public funds is proper only when authorized by Congress . . . .”); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (“[N]o money can be paid out of the Treasury unless it has been appropriated by an act of Congress.”); *Reese v. Walker*, 52 U.S. (11 How.) 272, 291 (1851) (“It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress.”). *See generally* Lawrence, *Disappropriation*, *supra* note 8, at 47–61 (exploring what happens when Congress fails to appropriate funds necessary to honor a prior legislative commitment).

26. *See* Amanda Chuzi, Note, *Defense Lawmaking*, 120 COLUM. L. REV. 995, 997–1004 (2020) (describing interplay of authorizations and appropriations).

*Amount, source, purpose.* To be an “appropriation,” there first must be a legislative enactment passed by both Houses and either not vetoed or with any veto overridden.<sup>27</sup> The enactment must specify a source of funds, an amount of funds (which may be written in definite terms or indefinite terms), and a purpose for which the specified funds are to be used.<sup>28</sup> In the early twentieth century, Congress clarified that the making of an appropriation must be explicit; it cannot be inferred<sup>29</sup>

*Funding restrictions.* Laws often specify not only a purpose for which funds may be used, but also purposes for which funds may *not* be used. For example, a law could state that funds may be used “for vehicles in the park, but not for bicycles.” Explicit limitations on the purpose for which funds may be used are known as “funding restrictions,”<sup>30</sup> though the law’s affirmative statement of purpose also naturally restricts the purposes to which funds may be put.<sup>31</sup> The Hyde Amendment, which limits the use of federal funds for abortion, is perhaps the most famous funding restriction.<sup>32</sup> President Barack Obama’s effort to close Guantanamo Bay,<sup>33</sup> the use of cost-benefit analysis in regulatory review during the Reagan administration,<sup>34</sup> and ending military activity in Vietnam have all been the subject of funding restrictions.<sup>35</sup> Given their long historical pedigree and the fact that they act as direct statements of an appropriation’s purpose, it is hard to

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27. PRINCIPLES OF APPROPRIATIONS LAW, *supra* note 4, at 2-59.

28. *Id.* at 2-24, 2-57.

29. Act of June 30, 1906, ch. 3914 § 9, 34 Stat. 764 (codified as amended at 31 U.S.C. § 1301(d)).

30. These restrictions are often strategically deployed as limitation riders “[w]hen no other legislative device is available.” Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 464.

31. *Cf.* United States v. MacCollom, 426 U.S. 317, 321 (1976) (plurality opinion) (“Where Congress has addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized.”).

32. Devins, *supra* note 30, at 466 (describing the Hyde Amendment as “an ingrained part of the appropriations landscape”). *See generally* Harris v. McRae, 448 U.S. 297 (1980) (addressing the constitutionality of the Hyde Amendment).

33. Department of Defense Appropriations Act, 2014, Pub. L. No. 113-76, div. C, tit. VIII, §§ 8110–8111, 128 Stat. 86, 131–32.

34. Judith Havemann, ‘Defunding’ OMB’s Rule Reviewers, WASH. POST, July 18, 1986, at A17.

35. DAVID J. BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS 343–44, 350 (2016) (discussing use of funding restrictions and denials in the Vietnam conflict).

argue that funding restrictions are not themselves part of the underlying “appropriation.”

*Conditional funding authorities.* Analogous to funding restrictions, some enactments expand or alter the purpose to which a designated amount might be put under certain specified conditions.<sup>36</sup> There is not a consistent terminology for such provisions in appropriations law. I refer to them here as “conditional funding authorities.” The conditional funding authority in 10 U.S.C. § 2808, for example, permits the use of certain military funds for certain construction purposes if the president has declared an emergency that “requires use of the armed forces” and the secretary of defense deems such construction to be “necessary to support such use.”<sup>37</sup>

*Transfer authorities.* Relatedly, some enactments direct that some or all of the amount designated for one purpose be used for another purpose under certain specified conditions.<sup>38</sup> Such “transfer authorities” might be thought of as negatively intertwined conditional funding authorities: one of these reduces the amount available for a purpose under certain conditions and the other increases the amount available for a different purpose by a corresponding amount under those same conditions—like a seesaw. The transfer authority in § 8005 of the Department of Defense Appropriations Act of 2019, for example, permits the transfer of certain Department of Defense (“DOD”) funds for use in counternarcotics operations if the secretary believes it necessary and if she has not already requested and been denied such funds from Congress.<sup>39</sup>

*Period of availability (time).* Appropriations provisions—statements of an amount, source, and purpose; funding restrictions; conditional funding authorities; and transfer authorities may have varying periods of availability or applicability. Approximately half of federal spending is controlled by annual appropriations provisions that the law provides will become available either at enactment or for the

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36. Eloise Pasachoff, *The President's Budget Powers in the Trump Era*, in EXECUTIVE POLICYMAKING: THE ROLE OF THE OMB IN THE PRESIDENCY 69, 78–79 (Meena Bose & Andrew Rudalevige eds., 2020) [hereinafter Pasachoff, *The President's Budget Powers*].

37. 10 U.S.C. § 2808 (2018).

38. Pasachoff, *The President's Budget Powers*, *supra* note 36, at 78–79.

39. Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, div. A, tit. VIII, § 8005, 132 Stat. 2982, 2999.

very next fiscal year, and expire (or lapse) within a year or two.<sup>40</sup> The rest is controlled by permanent appropriations provisions, which never expire, or provisions that the law makes available or applicable for some future period well after enactment. For example, the ACA appropriated billions for Medicare innovation, for each of the ten years following the law's enactment.<sup>41</sup>

*Definite versus indefinite.* Usually appropriations set an amount of funding that is “definite”—that is, capped at a specific amount like “\$1 million” or “\$100 billion.” Some appropriations are “indefinite,” though, meaning they are uncapped and permit the expenditure of however much is necessary to satisfy their associated purpose.<sup>42</sup> The Social Security Act's primary appropriation is indefinite: it simply makes funds from the Trust Fund available to satisfy obligations incurred in the Social Security program.<sup>43</sup> Similarly, the Judgment Fund appropriation Congress established to satisfy court judgments is also indefinite.<sup>44</sup> Indefinite appropriations tend to be found in permanent law.

*B. When Is an Appropriation Not an Appropriation (And When Is Ordinary Legislation Actually an Appropriation)?*

Three further issues in defining categories require attention up front. First, of course, a measure that creates an appropriation, whether an annual appropriation or a permanent one, can include provisions that have nothing to do with the appropriation at issue. In budget speak, these are referred to as “general provisions.”<sup>45</sup> For example, the Fiscal Year 2010 appropriations act included a general provision “requir[ing] all federal agencies to have a written policy for ensuring a drug-free workplace.”<sup>46</sup> This Article does not squarely address the

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40. Though approximately two-thirds of federal spending is considered “mandatory” in the sense that Congress has no choice but to allocate funding, a significant fraction of this “mandatory” spending is in fact subject to annual appropriations. See Lawrence, *Disappropriation*, *supra* note 8, at 22.

41. 42 U.S.C. § 1115A (2018).

42. See PRINCIPLES OF APPROPRIATIONS LAW, *supra* note 4, at 2-10.

43. John Harrison, *New Property, Entrenchment, and the Fiscal Constitution*, in FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY ch. 13, at 401, 404 (Elizabeth Garrett, Elizabeth A. Graddy & Howell E. Jackson eds., 2008) (describing Social Security financing structure).

44. 31 U.S.C.A. § 1304 (Westlaw through Pub. L. No. 116-158).

45. See CONG. RSCH. SERV., 98-648, APPROPRIATIONS BILLS: WHAT ARE “GENERAL PROVISIONS”? 1 (2010).

46. *Id.*

interpretation of general provisions that do not describe how funds may be used, and it leaves the extent to which its analysis applies to general provisions to other articles. Although such provisions are part of an “appropriation measure” in a limited formal sense, in other formal senses they are not (namely, they are connected to an appropriation only by the measure that carries them), and they are not at all part of an “appropriation” in a functional sense.

Second, many appropriations provisions incorporate other provisions of law by reference, either explicitly or implicitly. In such a case, interpreting the incorporated underlying provision can itself, in a sense, change the generosity of the appropriation or the purposes it may be put toward. For example, the permanent, indefinite appropriation for refundable tax credits is available for “refunds due from credit provisions” of the tax code,<sup>47</sup> such as the now-expired refundable tax credit for Build America Bonds<sup>48</sup> or the ACA’s premium tax credits.<sup>49</sup> Thus, an interpretation of the underlying law creating those credits would affect the generosity of the appropriation. *King v. Burwell*<sup>50</sup> illustrates this. Because the refundable tax credit appropriation is permanent and indefinite, the Supreme Court’s decision about the meaning of the ACA’s tax credit provision had direct consequences for the purposes for which the tax credit appropriation would be available and the amount expended through that appropriation.<sup>51</sup>

To some extent, the separation of powers issues surrounding permanent appropriations discussed in Part II apply as well to interpretations of statutory terms incorporated by reference in appropriations. That said, this Article does not consider such cross-referenced provisions to be “appropriation” provisions unless Congress itself gives them this label. This respects the distinction between “authorizing” legislation, which may permit or compel spending, and “appropriations,” which provide the constitutional permission to spend that is fundamental to appropriations law and

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47. 31 U.S.C. § 1324(b)(2) (2018).

48. See Blaine G. Saito, *Building a Better America: Tax Expenditure Reform and the Case of State and Local Government Bonds and Build America Bonds*, 11 GEO. J.L. & PUB. POL’Y 577, 580 (2013) (describing the Build America Bonds program).

49. 31 U.S.C. § 1324(b)(2) (indicating I.R.C. § 36B as one such credit provision).

50. *King v. Burwell*, 576 U.S. 473 (2015).

51. See *id.* at 496–98.

practice.<sup>52</sup> Moreover, Congress often chooses to provide for spending in one law while providing the necessary appropriations in another, and this “dissonance” itself has important implications for the separation of powers.<sup>53</sup> Conflating individual spending provisions with their associated appropriations would collapse this distinction and vitiate Congress’s choice to make them distinct. The doctrinal recommendations described in Part III, for operational reasons and out of respect for Congress’s labeling choices, encompass spending provisions in permanent law that happen to be incorporated by reference in an appropriation only to a limited extent. This Article’s core focus is therefore on provisions that are both formally and functionally appropriations provisions: with amount, source, and affirmative purpose statements; funding restrictions; conditional funding authorities; and transfer authorities.

Third, the domain of “appropriations law” includes more than appropriations provisions themselves. This term is also used to describe framework statutes that regulate agencies’ and Congress’s behavior regarding various fiscal issues, including spending and entering contracts. One such framework statute, for example, is the Antideficiency Act, which creates criminal penalties for spending without an appropriation. The Government Accountability Office (“GAO”), the Office of Management and Budget (“OMB”), and the Department of Justice have a significant role in detecting noncompliance with these laws and enforcing them.<sup>54</sup> This Article does not squarely address these framework statutes.

### C. *Appropriations Procedure?*

Appropriations themselves are made by Congress through legislation. But agencies must implement them, obligating funds and

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52. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-05-734SP, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 13, 15, 21 (2005), <https://www.gao.gov/assets/80/76911.pdf> [<https://perma.cc/4X5Y-MURP>]; Use of Appropriated Funds To Provide Light Refreshments to Non-Fed. Participants at EPA Confs., 31 Op. O.L.C. 54, 62–71 (2007) (drawing a line based on Congress’s choice whether to tie a restriction to the appropriations provision or not).

53. See generally Lawrence, *Disappropriation*, *supra* note 8 (explaining how Congress’s ability to create “permanent but temporarily funded commitments” has implications for the separation of powers).

54. See PRINCIPLES OF APPROPRIATIONS LAW, *supra* note 4, at 2-56 to 2-81.

ultimately “draw[ing] money from the Treasury.”<sup>55</sup> What process do agencies follow in making such decisions?

As Metzger explains, a “lack of statutorily-mandated procedure surrounds . . . administrative decisions on appropriations.”<sup>56</sup> This is due in large part to the fact that the Administrative Procedure Act (“APA”) exempts matters “relating to agency management or personnel or to public property, loans, grants, benefits, or contracts” from notice-and-comment rulemaking requirements.<sup>57</sup>

In practice, agencies take all sorts of approaches to implementing and interpreting appropriations, mindful largely of *substantive* expectations and requirements of the GAO and OMB,<sup>58</sup> not *procedural* requirements such as those created by the APA. The same is true of presidential oversight. Though OMB’s tools to influence agency budget execution are in some ways stronger than its tools through the Office of Information and Regulatory Affairs to influence regulatory activity, the exercise of those tools is not subject to the same transparency or procedural requirements.<sup>59</sup> I am unaware of any systemic study of agency practice in this area. We should be careful not to infer that the appropriations interpretations in published cases are representative. Public accounts offer examples of agencies sometimes putting their appropriations interpretations through notice-and-comment rulemaking, but other times sharing interpretations only internally.<sup>60</sup>

## II. CONGRESS’S DOMAIN

A reader trained in ordinary federal legislation and regulation and armed with a working understanding of the basic components of

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55. U.S. CONST. ART. I, § 9, cl. 7.

56. See Metzger, *supra* note 13 (manuscript at 33).

57. 5 U.S.C. § 553(a)(2) (2018).

58. See PRINCIPLES OF APPROPRIATIONS LAW, *supra* note 4, at 2-30 to 2-36 (discussing requirements for agencies when they exercise discretion); OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-11 25-1 (2019), <https://budgetcounsel.files.wordpress.com/2019/08/2019-omb-circular-a-11-full-june-2019.pdf> [<https://perma.cc/W78L-VMNE>].

59. See Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2287 (2016) [hereinafter Pasachoff, *Agency Policy Control*].

60. E.g., Nestor M. Davidson & Ethan J. Leib, *Regleprudence—At OIRA and Beyond*, 103 GEO. L.J. 259, 269 (2015) (describing the “often internally facing work” on “a wide variety of interpretive tasks”); cf. Pasachoff, *Agency Policy Control*, *supra* note 59, at 2224 (describing “limits [on] agencies’ ability to state publicly their own views of alternative budget and policy priorities”).

appropriations would find the actual workings of the appropriations process byzantine and incomprehensible. This is because when it comes to the annual appropriations process, statutory appropriations themselves are just the tip of the iceberg.

Section A describes how annual appropriations preserve a domain of appropriations “law” beyond judicial cognizance and often confuse courts and commenters.<sup>61</sup> In this domain, each chamber enforces commands in documents and portions of documents that are not “law,” constitutionally speaking, and that could not be enforced in courts. Section B describes how permanent appropriations shrink this domain of congressional influence. Section C explains how discretionary permanent appropriations also dilute Congress’s influence within its domain.

A terminology note: The diminution in congressional power associated with permanent appropriations is not all or nothing; the further an appropriations provision extends from its date of enactment, the greater the diminution. This Article uses the terminology of “annual” and “permanent” because that terminology is common in appropriations law and practice today, and these are the most common forms of appropriations provisions. That said, its analysis of annual appropriations applies to other near-term appropriations and its analysis of permanent appropriations applies to other future appropriations.

*A. Annual Appropriations Preserve the Domain of Congressionally Enforced Appropriations Law*

The fact that many appropriations are available for only one year is critical because it gives both the House of Representatives and the Senate an effective veto over funding for programs subject to annual appropriations, and, therefore, gives them an enduring source of power over agencies. Statutes creating agencies or empowering them to perform functions are entrenched upon enactment. A majority that

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61. The label of “law” for these written sublegislative commands is not load-bearing for any of the analysis that follows, and the label would be controversial in the view of many legal theorists. See Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 579 (2008) (using the term “soft law” to refer to rules that are not strictly law but “produce the same behavioral effects”); Edward K. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 374–75, 377 & n.25 (1989) (discussing competing conceptions of what makes a written directive “law”). See generally Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1244–45 (2017) (describing internal executive branch rules as law).



becomes opposed to these statutes has a diminished hope of forcing change because amending a statute requires not just the approval of the majoritarian House of Representatives (elected by the people every two years) but also the countermajoritarian Senate (two per state elected in staggered six-year terms regardless of state population) and the countermajoritarian electoral college (representatives apportioned by state, based largely but not entirely on population). But agencies' need for funding through the annual appropriations process recurs every year, so each newly elected House or Senate has the opportunity to block an agency or program's funding. This one-house veto not only empowers Congress, it also empowers the majorities that elect a new House of Representatives every two years. In short, as it was put at the time of the ratification, the federal purse has "two strings, one of which [i]s in the hands of the H. of Reps."<sup>62</sup> To release funds, "[b]oth houses must concur."<sup>63</sup> The Framers understood this dynamic to be key to the potency of the power of the purse.<sup>64</sup>

Scholarship describing the power Congress wields through appropriations sometimes focuses on statutory enactments, including funding restrictions,<sup>65</sup> as well as the leverage Congress has in negotiations with the president over legislation, which it gets from its ability to threaten a "shutdown."<sup>66</sup> However, it is important not to overlook another thread of scholarship explaining how Congress uses the threat of reduced appropriations to exert influence over agencies.

Congress uses its power to refuse funding to force agencies to comply with appropriations "laws," including not only the legislative enactments described in Part I but also certain legal materials that are not part of valid legislation and could not be enforced in court. As described below, these include budget justifications, committee reports, and transfer and reprogramming pre-approval requirements.

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62. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 275 (Max Farrand ed., 1911).

63. *Id.*; see also 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 329–30 (photo. reprt. 1941) (2d ed. 1836) (statement of Charles Pinckney) ("The House of Representatives . . . [is] the moving-spring of the system . . . . [O]n them depend the appropriations of money, and consequently all the arrangements of government."); *U.S. House of Representatives v. Mnuchin*, 976 F.3d 1, 13 (D.C. Cir. 2020) ("To put it simply, the Appropriations Clause requires two keys to unlock the Treasury, and the House holds one of those keys.").

64. *Supra* note 21 and accompanying text.

65. *E.g.*, Devins, *supra* note 30, at 456–57.

66. *See, e.g.*, Pasachoff, *Agency Policy Control*, *supra* note 59, at 2232–34.

All of these legal materials are effective in controlling the behavior of agencies because each house of Congress enforces them through the threat of sanction in future annual appropriations enactments—today, they primarily rely on the Appropriations Committees to do so.<sup>67</sup>

*Budget justifications.* Congress and the president have developed a sequenced budget process that unfolds each year through which annual appropriations for the upcoming fiscal year are considered and ultimately enacted.<sup>68</sup> The first step in this process is for the president to submit their proposed budget to Congress, which includes proposed language for each appropriations provision the president recommends Congress enact. Along with this proposed language, the president submits a lengthy appendix including justifications of how each agency expects to spend from the amount requested.<sup>69</sup> When Congress enacts appropriations as requested and without modification, it “expect[s] agencies to adhere to their budget justifications to the extent

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67. ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 271 (3d ed. 2007) (“What gives the appropriations reports special force is not their legal status but the fact that the next appropriations cycle is always less than one year away. An agency that willfully violates report language risks retribution the next time it asks for money.”); *see also* Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 *GEO. MASON L. REV.* 453, 488–89 (describing the same dynamic). *See generally* RICHARD F. FENNO, JR., *THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS* (1966) (describing the inner workings of the appropriations process). Indeed, some internal agency policies expressly require compliance with these legislatively enforced sources of law, notwithstanding the fact that they would not be recognized by a court. CONG. RSCH. SERV., R43098, *TRANSFER AND REPROGRAMMING OF APPROPRIATIONS* 7 & n.35 (2013); *see, e.g.*, FUNDS DISTRIB. & CONTROL TEAM, OFF. OF THE CHIEF FIN. OFFICER, U.S. DEP’T OF ENERGY, *DEPARTMENT OF ENERGY BUDGET EXECUTION—FUNDS DISTRIBUTION AND CONTROL MANUAL* ch. V, at V-1 to V-2 (2006), <https://www.directives.doe.gov/directives-documents/100-series/0135.1-DManual-1a/@images/file> [<https://perma.cc/CML3-BRUS>] (“[F]or areas known to be of interest or concern to Congress, DOE intends to notify congressional committees promptly . . . .”); OFF. OF THE UNDER SEC’Y OF DEF., U.S. DEP’T OF DEF., *BUDGET EXECUTION: PROCESSES AND FLEXIBILITY* 6 (2015), [https://comptroller.defense.gov/Portals/45/Documents/execution/Budget\\_Execution\\_Tutorial.pptx](https://comptroller.defense.gov/Portals/45/Documents/execution/Budget_Execution_Tutorial.pptx) [<https://perma.cc/KU9Z-DD8B>] (“Movement of funds within an account are governed by agreements between DoD and the congressional authorization and appropriations committees.”); 3 U.S. DEP’T OF DEF., *FINANCIAL MANAGEMENT REGULATION* ch. 6, at 6-6 (2019), [https://comptroller.defense.gov/Portals/45/documents/fmr/current/03/03\\_06.pdf](https://comptroller.defense.gov/Portals/45/documents/fmr/current/03/03_06.pdf) [<https://perma.cc/6KZD-K8D5>] (setting procedure for reprogramming actions that “require prior approval of the congressional committees”).

68. SCHICK, *supra* note 67, at 92 (describing the president’s budget preparation process).

69. *Id.* at 103; *see, e.g.*, OFF. OF MGMT. & BUDGET, *A BUDGET FOR AMERICA’S FUTURE APPENDIX* (2021), [https://www.whitehouse.gov/wp-content/uploads/2020/02/appendix\\_fy21.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/02/appendix_fy21.pdf) [<https://perma.cc/PT9W-HT4Z>].

practicable.”<sup>70</sup> Failure to do so could result in punishment in the next year’s appropriation.<sup>71</sup>

*Committee reports.* Several reports are generally produced in the run-up to enactment of an annual appropriations act. These include committee reports from the House Appropriations Committee and the Senate Appropriations Committee, as well as the joint statement of managers on the conference report.<sup>72</sup> When courts interpret statutes, of course, such reports are legislative history that might serve as a controversial tool to interpret the text, but normally do not have independent meaning. Their effect is very different in the annual appropriations process.

Congress routinely includes “detailed guidance on how funds are to be spent” in committee reports and the managers’ statements, rather than in appropriations enactments themselves.<sup>73</sup> Congress expects agencies to abide by the language in these reports, and agencies routinely do so.<sup>74</sup> Indeed, as with any body of law, the wording of these reports has taken on highly specialized meaning that is known and understood by agencies and Congress.<sup>75</sup>

*Transfer and reprogramming pre-approval requirements.* Moreover, Congress often includes the requirement in statutory text or report language that agencies obtain pre-approval from the relevant appropriations subcommittee before exercising a transfer authority or “reprogramming” funds. These requirements, of course, are not

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70. SCHICK, *supra* note 67, at 270.

71. H.R. REP. NO. 93-662, at 16 (1973) (warning that while the DOD could depart from its proffered justifications “[i]n a strictly legal sense,” doing so “would cause Congress to lose confidence in the requests made and probably result in reduced appropriations”).

72. SCHICK, *supra* note 67, at 271.

73. *Id.*

74. *Id.* (“In most cases, . . . agencies comply with the report language.”); *see also* Cross, *supra* note 67, at 486 (describing Congress’s “power to reward or punish agencies in the future based on the extent to which the agencies comply”). As Professors Gluck and Bressman uncover in their famous survey of legislative staffers, such staffers themselves see these appropriations conference reports as “essentially . . . *legislat[ive]*,” such that the drafting experts of the Office of Legislative Counsel—ordinarily tabbed to write only legislation, but not legislative history—are tabbed to write such reports as well. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 980 (2013).

75. SCHICK, *supra* note 67, at 271 (“In these reports, wording is crucial because it conveys the extent to which the committee allows latitude in carrying out instructions; report language is carefully crafted . . .”).

enforceable in court even when they appear in statutory text because the delegation of judicially enforceable power to a subcommittee of Congress would violate the constitutional requirements of bicameralism and presentment.<sup>76</sup> They nonetheless bind the agencies that follow these requirements and are punished by Congress if they do not.<sup>77</sup>

*B. Permanent Appropriations Circumscribe Congress's Domain*

Of course, any delegation of legislative power increases the quotidian power of the executive branch and thereby shifts the balance of power. Delegating the power over spending to the executive in a permanent law that is not subject to annual appropriations, however, does more than that. It not only grants the executive power, but simultaneously takes power away from the legislature. It does so by shrinking and diluting the congressional power to refuse funding described in the prior subpart.

For the most part, Congress does not diminish its legislative power when it delegates regulatory power to an agency.<sup>78</sup> When Congress gives an agency power to regulate a subject, Congress's power to regulate that subject through law is largely undiminished. Congress can always change the law, and the process for doing so is the same one it would be if Congress had never delegated power to the agency in the first place. Prior to a delegation of regulatory power to an agency, Congress can regulate through bicameralism and presentment, and after the delegation, Congress can still do so.

The appropriations power—particularly the power to refuse funding—is different. As discussed in Part II.A, by constitutional default each house of Congress has a unicameral power to refuse

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76. *INS v. Chadha*, 462 U.S. 919, 955–59 (1983).

77. See *The Fiscal Year 2020 National Defense Authorization Budget Request from the Department of Defense: Hearing Before the H. Comm. on Armed Servs.*, 116th Cong. 9 (2019) (explaining “gentleman’s agreement” by which DOD sought advance approval from relevant committees before reprogramming funds pursuant to its legal authority); Pasachoff, *The President’s Budget Powers*, *supra* note 36, at 79 (“Some committees expect advance notification when transfers or reprogramming above a certain amount are planned, while others expect that no transfers or reprogramming will take place without advance approval, sometimes not only by the appropriations committees but by the authorizing committees as well.”).

78. Programs can become politically entrenched, in which case legislative delegations can reduce the power of future Congresses in a political sense. See Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 *YALE L.J.* 400, 463 (2015) (recognizing that a new program may bring popular support that makes it politically difficult to undo).

funding. But when Congress creates a permanent appropriation, it destroys that power to refuse funding as it applies to the subject of the appropriation. Prior to a delegation of permanent spending authority, each house can influence spending by refusing to fund, and after the delegation, neither house can do so.<sup>79</sup> Permanent appropriations shrink Congress's domain.<sup>80</sup>

### C. *Permanent Appropriations Dilute Congress's Power in Its Domain*

Each chamber's loss of control over some spending is not the only way permanent appropriations provisions diminish congressional power. The increasing levels of executive discretion to spend without Congress's approval dilutes the importance of the annual appropriations process altogether. It increases the executive's ability to fend for itself when Congress tries to punish it by denying funding pursuant to the annual appropriations process.

Professor Randy Kozel unpacks this concept of leverage. Discretion as to a particular question or function can be expanded into other areas by means of "overreach"—"the government might mix and match benefits and burdens in order to affect conduct it has no business influencing"—and by means of "aggrandizement"—"enhancing . . . influence without operating through proper channels."<sup>81</sup>

There are acute risks of overreach and aggrandizement in executive discretion over funding. The potential of explicit conditions on funding to influence behavior completely unrelated to the funding itself is well explored in the "legislative conditions" context.<sup>82</sup> However, executive discretion over spending means the executive can

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79. See Harrison, *supra* note 43, at 403 ("A Congress that wanted to commit its successors as little as possible to a program of public benefit would authorize or appropriate only for a limited period of time."); *id.* ("Unless a future Congress musters a majority to the contrary, . . . programs [funded by a permanent, indefinite appropriation] commit the expenditure of federal funds for all future time.").

80. Provisions in permanent law that enhance executive power include direct permanent appropriations, provisions in permanent law permitting agencies to transfer funds within annual appropriations from one area to another, and provisions in permanent law that permit agencies to generate resources in ways outside of the appropriations process, such as by creating instrumentalities for nonappropriated funds. All of these give the executive enduring control over spending in ways beyond each chamber's power to refuse funds in the annual appropriations process.

81. Randy J. Kozel, *Leverage*, 61 B.C. L. REV. (forthcoming 2021) (manuscript at 36, 39–41), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3566436](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3566436) [<https://perma.cc/UJ2J-GDHJ>].

82. See generally, e.g., Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861 (2013) (discussing this doctrine).

impose conditions, too, and the executive's conditions need not be public or explicit. The president and agencies can leverage the promise of funding, or the threat of denying funding, to compel behavior by third parties or Congress elsewhere that they could not otherwise compel. And these third parties have limited ability to challenge such conditions without upsetting the "hand that feeds."

In fact, two examples illustrating the dangerous potential of the power to refuse funding have taken place in the past few years. The first instance occurred when President Donald Trump attempted to pressure Ukraine into investigating his political rival by impounding appropriated military aid pending the country's agreement to do so.<sup>83</sup> And the second took place more recently when Trump attempted to withhold funding for the World Health Organization ("WHO").<sup>84</sup>

It is important to note that the public quickly learned about both the Ukraine and the WHO examples, and they were controversial because the executive discretion over the implicated expenditures was subject to the annual appropriations process.<sup>85</sup> They occurred within Congress's domain. Yes, Congress granted the executive some discretion over funding for Ukraine and the WHO, but it held a purse string to ensure it could effectively oversee the executive's use of that discretion.

Executive discretion over permanently appropriated funding brings the same risks of leverage without meaningful hope of either a legislative or a judicial check. Congress loses its direct oversight role over permanently funded programs in the annual appropriations process. Meanwhile, judicial review of presidential discretion over spending is unlikely, especially where the executive declines to spend.

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83. See H.R. REP. NO. 116-346, at 2 (2019) (describing the president as a "threat to national security and the Constitution").

84. Teo Armus, *Trump Threatens To Permanently Cut WHO Funding, Leave Body If Changes Aren't Made Within 30 Days*, WASH. POST (May 19, 2020, 8:46 AM), <https://www.washingtonpost.com/nation/2020/05/19/who-funding-trump> [<https://perma.cc/4QR5-ZR7T>].

85. Indeed, the Ukraine aid impoundment was subject to congressional alarm and investigation even before a whistleblower complaint revealed the extortion attempt behind it. See Letter from John Yarmuth, Chairman, H. Comm. on the Budget to The Hon. Mick Mulvaney, Acting Chief of Staff, The White House (Sept. 18, 2019), [https://budget.house.gov/sites/democrats.budget.house.gov/files/documents/OMB%20Letter\\_081919\\_0.pdf](https://budget.house.gov/sites/democrats.budget.house.gov/files/documents/OMB%20Letter_081919_0.pdf) [<https://perma.cc/CA4P-H6TK>] (raising concerns about impoundment of Ukraine funds). The discovery ultimately led to the president's impeachment. See Emily Cochrane, Eric Lipton & Chris Cameron, *G.A.O. Report Says Trump Administration Broke Law in Withholding Ukraine Aid*, N.Y. TIMES (Jan. 17, 2020), <https://nyti.ms/2FXR5e2> [<https://perma.cc/2X7Z-PHT3>].

Entities who hope for funding but who are denied may not be able to generate standing—unattainable without the ability to point to a specific denial—unless the approvals process is tightly controlled by law.<sup>86</sup> And, as Professor Mila Sohoni points out in her discussion of executive creation of new entitlements, a lawsuit to challenge the grant of funding to others is unlikely without taxpayer standing.<sup>87</sup>

### III. *CHEVRON* FOR APPROPRIATIONS?

The distinction between annual appropriations provisions, which preserve congressional authority, and permanent appropriations provisions, which diminish it, can have implications for administrative law doctrine. The open doctrinal question of whether courts should defer to agency interpretations of appropriations provisions—otherwise known as *Chevron* for appropriations—offers an important example. This Part explains why.

Section A offers a refresher on *Chevron*. Section B explains that when interpreting appropriations provisions, courts have come to varying conclusions about whether to apply an interpretive presumption to appropriations provisions—often either deferring or applying a rule of narrow interpretation—or simply to interpret them *de novo*. Section C argues that courts should presumptively deny deference for permanent appropriations provisions, but not for annual appropriations provisions. Section D argues that courts should consider the unique nature of annual and permanent appropriations in evaluating whether to defer in particular cases. Section E identifies doctrinal support for tailoring deference to the nature of annual and permanent appropriations.

#### A. *A Chevron Refresher*

When a federal administrative agency has interpreted an ambiguous statutory provision, courts may defer to that agency's

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86. *Sherley v. Sebelius* is an exception that illustrates the difficulty that those who wish for but do not receive funding have in bringing suit. 610 F.3d 69, 70 (D.C. Cir. 2010). There, the D.C. Circuit found that a grant applicant had standing to challenge a funding award to a competitor, but only because the applicant had formally applied for and been denied the grant and because the award to the competitor of the zero-sum grant pool diminished the challenger's likelihood of being funded. *Id.* at 72–74.

87. See Sohoni, *supra* note 19, at 1685 (addressing a lack of judicial review of executive discretion over spending, as well as the possibility of political entrenchment when the executive creates entitlements).

interpretation and treat its interpretation as binding under *Chevron*. Doctrinally, courts decide whether to treat an agency's interpretation as binding in three steps, though each has substeps and the boundaries between them can blur. The steps are referred to as *Chevron* Step Zero, *Chevron* Step One, and *Chevron* Step Two.

Step Zero explores the character of the statute at issue and the agency interpretation of that statute to decide whether to proceed. Some statutes and some agency interpretations are simply ineligible for deference at this step. Step Zero doctrine "is a mess."<sup>88</sup> Under *Mead*, courts ask whether Congress intended the agency to be able to act with the force of law and, if so, whether the agency has utilized its force-of-law authority in developing its interpretation.<sup>89</sup> Courts also insist at Step Zero that the statute the agency has interpreted be one the agency implements.<sup>90</sup> The Supreme Court has instructed that this will often be true for agency interpretations developed through statutorily authorized notice-and-comment processes, but not always.<sup>91</sup>

Courts applying the *Mead* test draw further guidance, beyond these presumptions, from factors articulated by the Supreme Court in *Barnhart v. Walton*<sup>92</sup>: "[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."<sup>93</sup> Professors Kristin Hickman and Aaron Nielson highlight a related but somewhat more fundamental set of considerations that courts and scholars tend to focus on in mapping *Chevron*'s domain: expertise (Would judicial resolution of ambiguities reduce the correctness of decisions reached, especially complicated scientific and technical questions?), political accountability (Would agency determination entail greater opportunities for public

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88. Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931, 977 (2021).

89. See Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from Chevron Principles in United States v. Mead*, 107 DICK. L. REV. 289, 309–13 (2002).

90. See RICHARD J. PIERCE, JR. & KRISTIN E. HICKMAN, ADMINISTRATIVE LAW TREATISE § 3.6.2 (6th ed. 2020).

91. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

92. *Barnhart v. Walton*, 535 U.S. 212 (2002).

93. *Id.* at 222.



participation?), and delegation (Is there some indication that Congress intended agencies rather than that courts to resolve ambiguities?).<sup>94</sup>

If Step Zero cuts against deference, that ends the inquiry. If it cuts in favor, courts proceed to Steps One and Two. Step One explores the text of the statute, searching for ambiguity.<sup>95</sup> Step One depends entirely on ordinary questions of statutory interpretation, though the meaning of “ambiguity” and the decision of which statutory tools to employ at Step One are crucial and thorny questions.<sup>96</sup> If a statute is ambiguous, then the court proceeds to Step Two. If not, the court refuses deference.

Step Two does two things. What can be thought of as the statutory component of Step Two explores the text of the statute, this time focusing on the consistencies between the agency’s interpretation and the scope of the textual ambiguity. Depending on the way a court frames Step One, this component merges with that inquiry. The more substantive component of Step Two evaluates the traditional administrative law question of whether the agency’s policy decision of how to resolve the statutory ambiguity is itself arbitrary and capricious.<sup>97</sup>

Why does this complicated doctrine get so much attention? Because it is one of the most important levers that courts have to modulate the balance of power between themselves and agencies.<sup>98</sup> Congress has used its legislative power to entrench broad and significant authority in the administrative state, most of which it gives directly to agencies, part of the executive branch (some would say the fourth branch, others the second; I do not mean to engage the unitary executive debate). But legislation inevitably, and often intentionally, entails ambiguities. The question of what to do about those ambiguities is an interpretive one that, under the U.S. Constitution, falls by default within the authority of the third branch, the courts. So, by default,

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94. See Hickman & Nielson, *supra* note 88, at 938. Uniformity also comes up as a factor, PIERCE & HICKMAN, *supra* note 90, § 3.8, but I do not evaluate it separately here on the assumption that it is unlikely that one agency could become subject to competing orders about the legality of its spending from a particular appropriations provision, even without *Chevron*.

95. PIERCE & HICKMAN, *supra* note 90, § 3.5.1.

96. *Id.*

97. See *id.* (discussing equivalence of Step Two and arbitrary and capricious review).

98. Cf. *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (applying *Chevron* “wrests from Courts the ultimate interpretive authority to ‘say what the law is’ and hands it over to the Executive” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

congressional delegations give some power to agencies (through clear language) and some power to courts (through ambiguities).

*Chevron* does two distinct things to ambiguities to change the constitutional default. First, *Chevron* delegates (or deems Congress to have delegated) the power entailed in resolving ambiguities to agencies rather than the constitutional default, courts. It thereby consolidates the power given away by Congress through delegations in the executive branch rather than leaving that power divided between the executive and the judiciary.

Second, *Chevron* preserves ambiguities and the delegated power they entail. In the act of interpreting an ambiguity, an appellate court solidifies it. *Stare decisis* both denies future courts the option of changing the interpretation, with rare exceptions, and grants those regulated by the law predictability about the meaning of the previously uncertain provision.<sup>99</sup> This anti-entrenchment function of *Chevron* is not subsidiary to its delegation function. It is independent. An agency cannot choose to solidify the meaning of an ambiguous provision of law even if it wants to. Inevitably, a subsequent agency head, or president, might choose to change it.

#### *B. Courts' Varied Approaches to Chevron for Appropriations*

Judicial decisions regarding the applicability of *Chevron* to appropriations are relatively rare. Courts' approaches in these relatively few reported instances have run the gamut. Some courts have applied a clear statement rule against funding rather than *Chevron*, others have applied a categorical bar that treats appropriations as exceptional and ineligible for deference, and still others have applied the tests from *Mead* and *Barnhart* to preclude and to find deference—sometimes based on the process used by an agency to reach its interpretation. Other courts have given *Chevron* deference to appropriations provisions without questioning whether appropriations might be different.

1. *Rule of Narrow Interpretation in ACA Case.* The district court for the District of Columbia applied a clear statement rule requiring that appropriations be interpreted narrowly in *United States House of*

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99. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1304–05 (2007) (describing tension between deference under *Chevron* and *Skidmore* and *stare decisis*).

*Representatives v. Burwell*<sup>100</sup> (against funding). In this case, the House of Representatives challenged the expenditure of funds from the permanent, indefinite refundable tax credit appropriation. The expenditure was used for an ACA subsidy that the House alleged required an annual appropriation.<sup>101</sup> The district court read the “purpose statute,” 31 U.S.C. § 1301(d), to mandate such a clear statement rule.<sup>102</sup> This approach foreclosed any possibility of *Chevron* deference.<sup>103</sup>

I have explained elsewhere the misunderstanding of § 1301(d) on which this clear statement rule approach rests.<sup>104</sup> That provision creates a clear statement rule for the question of whether an enactment creates an appropriation; however, it does not address the scope of an appropriation once created.<sup>105</sup>

In *California v. Trump*,<sup>106</sup> the district court for the Northern District of California addressed the same question that had been presented in *House v. Burwell* about the meaning of the refundable tax credit appropriation.<sup>107</sup> (By that time, the Trump administration had halted the payment on the ground that it lacked an appropriation, so the suit was brought by states arguing the Trump administration had gotten that judgment wrong.<sup>108</sup> Thus, the position of the agency was reversed but the legal question was identical.) It refused to find a clear statement rule based in § 1301(d) for the reason just explained—the provision governs the question of whether an enactment appropriates funds, not the subsidiary question of the scope of the appropriation

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100. *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016), *vacated in part sub nom. U.S. House of Representatives v. Azar*, No. 14-CV-01967, 2018 WL 8576647 (D.D.C. May 18, 2018).

101. *Burwell*, 185 F. Supp. 3d at 168, 170, 188.

102. *See id.* at 174 (“[A]n appropriation cannot be inferred . . . ‘A law may be construed to make an appropriation . . . only if the law specifically states that an appropriation is made.’” (quoting 31 U.S.C. § 1301(d) (2018))).

103. *See id.* at 188 (rejecting any ambiguity in the statute’s terms and relying in part on § 1301(d) to preclude the agency’s proposed interpretation).

104. Lawrence, *Disappropriation*, *supra* note 8, at 76.

105. *Id.*

106. *California v. Trump*, 267 F. Supp. 3d 1119 (N.D. Cal. 2017).

107. *See id.* at 1124–26.

108. *Id.* at 1126.

thus made.<sup>109</sup> Nonetheless, the *California v. Trump* court hinted at a rule of narrow interpretation based in the separation of powers.<sup>110</sup>

2. *Chevron for Appropriations in Stem Cell and Other Cases.* The fullest discussion in a case finding *Chevron* Step Zero satisfied and deference applicable is in *Norton Construction Co. v. United States Army Corps of Engineers*.<sup>111</sup> There, the court granted *Chevron* deference to an agency's interpretation of an appropriations rider's funding restriction that prohibited the use of funds in an annual appropriation for a permit application.<sup>112</sup> The court held that "[b]ecause this was an appropriations bill related to matters already delegated to the Corps, it is reasonable to assume that to the extent the Congress was not clear it implicitly delegated interpretation of section 103 to the Corps."<sup>113</sup> That said, the court declined to address the question of whether the appropriations riders counted as the Corps's "governing statute" because neither party had raised it.<sup>114</sup>

Several other cases have explicitly deferred to agencies' interpretations of annual appropriations provisions. These include district court decisions addressing agencies' interpretations of an appropriation's affirmative purpose statement<sup>115</sup> and funding

109. *Id.* at 1132 ("[T]he clear-statement rule announced in [§ 1301(d)] is of limited relevance here, since . . . the disagreement concerns the scope of that appropriation, not its existence.").

110. The court recognized the constitutional implications in the appropriations context:

Looming over this whole discussion is the fact that the parties are disputing the meaning of an appropriations statute, not just any statute . . . . [T]he role of the Appropriations Clause in enforcing the constitutional separation of powers provides reason for caution in adopting a reading of an appropriations statute broader than the one most obviously provided by the text.

*Id.* (citing *U.S. Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012)).

111. *Norton Constr. Co. v. U.S. Army Corps of Eng'rs*, No. 03-CV-2257, 2007 WL 1431907 (N.D. Ohio May 14, 2007).

112. *Id.* at \*1, \*5.

113. *Id.* at \*4.

114. *Norton Constr. Co. v. U.S. Army Corps of Eng'rs*, No. 03-CV-2257, 2005 WL 8168489, at \*5 n.4 (N.D. Ohio May 10, 2005), *vacated*, No. 03-CV-2257, 2005 WL 8168489 (N.D. Ohio June 22, 2006) ("The Court is not entirely convinced that the appropriations riders herein constitute the Corps' 'governing statute,' to which *Chevron* principles would apply. However, as neither party raises the issue, the Court has not addressed it herein.").

115. *Healthy Teen Network v. Azar*, 322 F. Supp. 3d 647, 659 n.16 (D. Md. 2018) (recognizing that "HHS may well receive [*Chevron*] deference on its own interpretation of the relevant factors" of the affirmative purpose statement of the annual appropriations act); *see also* *Gay Men's Health Crisis v. Sullivan*, 733 F. Supp. 619, 634 (S.D.N.Y. 1989) ("[T]his Court must defer to an agency's reasonable construction of its own enabling legislation and of the appropriations bills that fund it.").

restrictions.<sup>116</sup> Perhaps the most famous case in this category is the D.C. Circuit's decision in *Sherley v. Sebelius*<sup>117</sup> regarding the applicability of the Dickey-Wicker Amendment—a funding restriction—to embryonic stem cell research.<sup>118</sup> The funding restriction had been included in the National Institutes of Health's annual appropriations provisions each year since 1996.<sup>119</sup> The agency was able to, and did, go through notice-and-comment rulemaking in developing its interpretation that the amendment did not bar funding for certain stem cell research.<sup>120</sup> The D.C. Circuit cited that fact, treated the case as a relatively straightforward *Chevron* case, and ultimately deferred to the agency's interpretation.

3. *Categorical Ineligibility for Deference in Western Watersheds Reflects Stray Language Taking Root.* One district court decision held that agency interpretations of annual appropriations are categorically ineligible for deference at *Chevron* Step Zero because agencies do not administer “budget bills.”<sup>121</sup> In *Western Watersheds Project v. United States Forest Service*,<sup>122</sup> the District of Idaho refused to defer to the Forest Service's interpretation of a funding restriction in the Department of Interior, Environment, and Related Agencies Appropriations Act of 2012.<sup>123</sup>

*Western Watersheds* may be a budding example of a regrettable phenomenon familiar in the law: a case is taken to have held something it did not hold based on an out-of-context quote, but the holding

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116. *Moore v. Navy Pub. Works Ctr.*, 139 F. Supp. 2d 1349, 1357–58 (N.D. Fla. 2001) (deferring to the Navy's interpretation of a funding restriction in the DOD Appropriations Act).

117. *Sherley v. Sebelius*, 644 F.3d 388 (D.C. Cir. 2011).

118. *Id.* at 389–90.

119. *Id.* at 390.

120. *Id.* at 391.

121. *W. Watersheds Project v. U.S. Forest Serv.*, No. 12-cv-00286, 2012 WL 2254206, at \*1 (D. Idaho June 15, 2012).

122. *W. Watersheds Project v. U.S. Forest Serv.*, No. 12-cv-00286, 2012 WL 2254206 (D. Idaho June 15, 2012).

123. The District Court reasoned that:

*Chevron* deference does not apply to cases where an agency interprets a statute that it does not administer and therefore falls outside its scope of expertise. The Forest Service Administers its organic statute, NFMA, not budget bills . . . Reconciling the appropriations rider with NFMA's substantive obligations is therefore a purely legal question warranting a less deferential standard.

*Id.* at \*1 (citation omitted) (referring to the “appropriations rider” in the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2012, Pub. L. No. 112-74, div. E, tit. IV, § 431, 125 Stat. 985, 1047).

becomes real when a subsequent case relies on its misinterpretation of the quote to make new law. In the *Western Watersheds* case, the only case to date to hold appropriations categorically ineligible for deference, the only precedent that the district court cited in coming to that holding was a Ninth Circuit Federal Labor Relations Authority (“FLRA”) case.<sup>124</sup> Similarly, in an insightful analysis of *King v. Burwell* that elsewhere recognizes the question is not settled, Sohoni cites a D.C. Circuit case, *United States Department of the Navy v. FLRA*,<sup>125</sup> as having held that “interpretations of appropriations statutes by agencies . . . are not entitled to deference.”<sup>126</sup>

The Ninth and D.C. Circuits’ FLRA cases do not support the conclusion for which they are cited—that agencies do not receive deference for their interpretations of appropriations. They instead deal with a different, far simpler issue. The FLRA oversees labor relations within the federal government, and thus frequently engages with and is tasked with interpreting legislation that applies to other agencies.<sup>127</sup> Not surprisingly then, in several somewhat recent cases to reach the circuit courts, the issue in dispute has been the FLRA’s interpretation of a provision in an appropriations statute applicable to another agency.<sup>128</sup>

Of course, the FLRA should not receive deference when it interprets a statutory provision that applies to another agency—whether that provision is in an appropriation or not—because such a provision is not one that Congress has “entrusted the [FLRA] to administer.”<sup>129</sup> That is what these FLRA cases have held. However, the language the circuits have used can be read out of context to comment on the applicability of *Chevron* to appropriations generally. For example, in one case the D.C. Circuit said that “the court owes no

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124. *Id.* (citing *Ass’n of Civilian Technicians, Silver Barons Chapter v. FLRA*, 200 F.3d 590, 592 (9th Cir. 2000)).

125. *U.S. Dep’t of the Navy v. FLRA*, 665 F.3d 1339 (D.C. Cir. 2012).

126. Mila Sohoni, *King’s Domain*, 93 NOTRE DAME L. REV. 1419, 1428 (2018).

127. *E.g.*, *NLRB v. FLRA*, 613 F.3d 275, 277–78 (D.C. Cir. 2010) (addressing dispute between FLRA and NLRB about how to shape bargaining units at NLRB that turned on the meaning of separation of functions provisions governing the NLRB general counsel in the National Labor Relations Act).

128. *See Dep’t of the Navy*, 665 F.3d at 1348; *Ass’n of Civilian Technicians, P.R. Army Chapter v. FLRA*, 370 F.3d 1214, 1221–22 (D.C. Cir. 2004); *Ass’n of Civilian Technicians, Tony Kempenich Mem’l Chapter 21 v. FLRA*, 269 F.3d 1119, 1121 (D.C. Cir. 2001); *Silver Barons Chapter*, 200 F.3d at 592.

129. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

deference to FLRA's interpretation of the appropriations act."<sup>130</sup> Reading this line alone, a reader might take the court to have refused deference based on the nature of the enactment rather than the agency doing the interpreting. In another case, the D.C. Circuit held that another agency's appropriation statute was "not within [FLRA's] area of expertise."<sup>131</sup> In a similar vein, the Ninth Circuit noted that "courts do not owe deference to an agency's interpretation of a statute it is not charged with administering" and went on to refuse deference to the FLRA's interpretation of a DOD Appropriations Act because "the FLRA is not charged with administering the DOD Appropriations Act."<sup>132</sup> Although the question of *Chevron's* applicability to appropriations is interesting and important, these FLRA cases do not offer an answer.

4. *Application of Barnhart Factors To Reject Deference in Wall Case.* Most recently, the Ninth Circuit refused to apply *Chevron* deference to the Trump administration's interpretation of an annual transfer authority. In early 2019, the federal government went through the longest partial shutdown in its history in a standoff between Democrats, who had received majority support in the 2018 midterms and thus controlled the House of Representatives, and Trump, who had received a majority of the electoral votes in 2016.<sup>133</sup> The standoff was about whether Congress would provide the funds the president wanted to build a wall along the southern border.<sup>134</sup>

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130. *P.R. Army Chapter*, 370 F.3d at 1221 (citing *Kempnich Memorial Chapter*, 269 F.3d at 1121). *Kempnich* explained that the court would owe deference to FLRA's interpretation of the Federal Service Labor Management Relations Act, but not to "FLRA's interpretation of a statute not committed to the Authority's administration," such as the DOD Appropriations Act. 269 F.3d at 1121.

131. *Dep't of the Navy*, 665 F.3d at 1348 (repeating that the FLRA receives deference when interpreting its "organic statute" but it "receives no deference, however, when it 'has endeavored to reconcile its organic statute with another statute'—such as a federal appropriations statute—'not within its area of expertise'" (quoting *U.S. Dep't of the Air Force v. FLRA*, 648 F.3d 841, 846 (D.C. Cir. 2011))).

132. *Silver Barons Chapter*, 200 F.3d at 592.

133. Kristina Peterson, Michael C. Bender & Rebecca Ballhaus, *Shutdown Breaks Record for Longest in Modern History*, WALL ST. J. (Jan. 13, 2019, 12:00 AM), <https://www.wsj.com/articles/trump-plays-down-emergency-option-to-get-wall-funding-11547238564> [perma.cc/MF4B-JZGM].

134. See Aaron Blake, *Trump's Extraordinary Oval Office Squabble with Chuck Schumer and Nancy Pelosi, Annotated*, WASH. POST (Dec. 11, 2018, 1:02 PM), <https://www.washingtonpost.com/politics/2018/12/11/trumps-extraordinary-oval-office-squabble-with-chuck-schumer-nancy-pelosi-annotated> [https://perma.cc/5D32-YRZ6] ("TRUMP: . . . If we don't get what we want one way or

The standoff ended with a victory of sorts for Democrats, who appropriated \$1.375 billion for fencing along the Rio Grande,<sup>135</sup> not the \$5 billion the president had requested for a “down payment” on a longer wall.<sup>136</sup> However, on the same day that he signed the appropriations into law, Trump announced that he would nonetheless pay for a longer wall using funds cobbled together through various appropriations authorities. Specifically, the White House issued a “victory” fact sheet explaining the complex web of appropriations provisions it would utilize to generate roughly \$6.8 billion in funding for wall construction.<sup>137</sup>

The money would primarily come through two complicated and legally controversial appropriations two-steps that used a combination of annual transfer authorities and permanent conditional funding authorities to tap into and redirect previously appropriated annual funds. Section 8005 of the DOD Appropriations Act of 2019 would be used to transfer \$2.5 billion in existing appropriations—which had been enacted in September 2018—into a DOD counterdrug activities account.<sup>138</sup> The available purposes for that account would then, through operation of the permanent conditional funding authority for counternarcotics operations in 10 U.S.C. § 284, be expanded to include wall construction.<sup>139</sup> In a separate but similarly complicated two-step, the president would declare a national emergency, which would allegedly make it possible for the secretary of defense to utilize another permanent conditional funding authority, 10 U.S.C. § 2808, to put another \$3.6 billion in previously appropriated annual funds toward

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the other, whether it's through you, through a military, through anything you want to call, I will shut down the government, absolutely . . . I'm going to shut it down for border security.”).

135. See Department of Homeland Security Appropriations Act, 2019, Pub. L. No. 116-6, div. A, tit. II, § 230(a)(1), 133 Stat. 15, 28.

136. Ben Zimmer, *Trump's 'Down Payment' Trick*, ATLANTIC (Jan. 25, 2019), <https://www.theatlantic.com/entertainment/archive/2019/01/the-history-behind-trumps-down-payment-trick/581275> [<https://perma.cc/FL2X-KAFR>].

137. See *President Donald J. Trump's Border Security Victory*, WHITE HOUSE (Feb. 15, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory> [<https://perma.cc/B6LC-9ZGB>] [hereafter *Victory Fact Sheet*].

138. See *id.* For the operation of § 8005 transfers, see *supra* note 39 and accompanying text.

139. See *Victory Fact Sheet*, *supra* note 137 (referencing 10 U.S.C. § 284 (2018), which permits support to be provided for “[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States”).



wall construction.<sup>140</sup> The remaining \$700 million would come directly from the Treasury Forfeiture Fund.<sup>141</sup>

In Ninth Circuit litigation regarding the \$2.5 billion in funding tapped through the § 8005 transfer, the Court squarely addressed whether to give *Chevron* deference to the agency's interpretation of that annual transfer authority.<sup>142</sup> Section 8005 permits the secretary of defense to transfer up to \$4 billion in DOD working capital funds appropriated in the 2019 appropriations act "for military functions (except military construction) . . . *Provided*, That such authority to transfer may not be used . . . where the item for which funds are requested has been denied by the Congress."<sup>143</sup> Plaintiffs challenging the transfer argued that wall construction was "military construction" and so ineligible for transfer.<sup>144</sup> They also argued that Congress had affirmatively denied funds for wall construction by refusing to grant them when the president asked.<sup>145</sup> The DOD disagreed on both counts.<sup>146</sup>

Although the government did not raise the issue of *Chevron* deference,<sup>147</sup> the Ninth Circuit addressed it anyway in upholding a preliminary injunction, which was ultimately stayed by the Supreme Court. It conducted a Step Zero analysis by applying the *Barnhart* factors one by one, finding they weighed against deference.<sup>148</sup> Specifically, it concluded that the agency's interpretation of § 8005 was not entitled to deference at *Chevron* Step Zero because the DOD's authorizing and appropriations statutes did not contain an "explicit grant of rulemaking power" as the agency lacked expertise to determine whether funds had been "denied by the Congress."<sup>149</sup> This happened due to the agency not engaging in notice-and-comment rulemaking when coming to its interpretation, and because the

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140. *See Victory Fact Sheet, supra* note 137.

141. *Id.* The fund is governed by 31 U.S.C. § 9705(a) (2018).

142. *Sierra Club v. Trump*, 929 F.3d 670, 692–93 (9th Cir. 2019).

143. Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, div. A, tit. VIII, § 8005, 132 Stat. 2982, 2999.

144. *Sierra Club*, 929 F.3d at 683.

145. *Id.*

146. *Id.* at 683, 690.

147. *Id.* ("Defendants did not argue in their briefing to the district court, their stay motion, or their supplemental briefing that their contrary interpretation of section 8005 is entitled to agency deference.").

148. *Id.* at 692–93.

149. *Id.*

agency's interpretation had apparently been decided upon "in a matter of weeks."<sup>150</sup>

### C. *A Bifurcated Approach*

What approach to *Chevron* for appropriations should future courts employ and, ultimately, should the judiciary settle on? Courts' default may be to follow the Ninth Circuit by simply applying a literal version of the *Barnhart* factors to any appropriations interpretation they confront as if it were an interpretation of ordinary legislation, without tailoring deference to the appropriations context.<sup>151</sup>

Literal application of the *Barnhart* factors will tend to favor deference for permanent appropriations provisions and appropriations riders that are regularly included in legislation with identical language. The "long period of time" factor favors permanent appropriations for obvious reasons. The ephemeral nature of annual appropriations makes notice-and-comment rulemaking difficult except in the case of language reenacted year after year, so the question of whether the agency went through notice and comment similarly favors permanent appropriations.<sup>152</sup> (Whether and how the "interstitial nature of the legal question" and "expertise of the agency" will come into play does not obviously depend on the duration of the appropriation provision at issue.)

The "tools" by which a tightening *Chevron* Step Zero limits deference—in particular, by demanding notice and comment<sup>153</sup>—are a poor fit for the distinctive considerations presented by appropriations. In light of the differing impacts of annual and permanent appropriations provisions on the separation of powers described in Part II, the results dictated by literal application of the *Barnhart* factors would be upside-down if courts' goal is to avoid interference with the separation of powers. Deference for permanent appropriations diminishes legislative power, and deference for annual appropriations is consistent with Congress's expectation of a back-and-forth with agencies in which they will comply not only with appropriations provisions but also with various unicameral "legal" requirements.

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150. *Id.*

151. *See supra* Part III.B.4.

152. *See, e.g.,* *Sherley v. Sebelius*, 644 F.3d 388, 395–96 (D.C. Cir. 2011) (deferring under *Chevron* to an agency interpretation of an annual appropriations provision reenacted in multiple years, that had been subject to notice and comment).

153. *Hickman & Nielson, supra* note 88, at 995–96.

Courts should take a bifurcated approach to *Chevron* for appropriations instead of an untailed, literal application of tests from *Mead* or *Barnhart*. As elaborated upon below, permanent appropriations provisions should be presumptively ineligible for deference, but not annual appropriations provisions.

1. *Assumptions.* The prescriptions below rest on several normative assumptions about how courts “should” decide questions about deference, though the analysis endeavors to identify points of departure for those who do not share these assumptions. These include assumptions common to *Chevron* analysis about the role of intent, expertise, political accountability, and history. One is that of presumed intent, that courts should look for particularized indicia that Congress itself would (or would not) want or expect deference.<sup>154</sup> Two more are that *Chevron*’s applicability should be considered in light of whether deference would tend to promote expertise and political accountability.<sup>155</sup> Another—drawn from the idea of presumed intent as well as rule-of-law values—is that courts’ historical application (or refusal) of deference for types of cases should inform decisions about related cases’ eligibility for deference in the future.<sup>156</sup>

The driving assumption here is newer to *Chevron* analysis. It is that courts, in resolving open interpretive questions, should endeavor not to diminish legislative power in the appropriations process. In other words, the separation of powers analysis in Part II should influence courts’ decisions about deference, and they should disfavor approaches that interfere unnecessarily with Congress’s domain—at least where considerations of expertise, accountability, presumed intent, and precedent do not favor deference.

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154. *Chevron* is based in part on a presumption about congressional intent, that Congress intended certain ambiguities to be resolved by agencies rather than courts. Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 872 (2001).

155. *Supra* note 94 and accompanying text.

156. *City of Arlington v. FCC*, 569 U.S. 290, 301–05 (2013) (looking to past judicial precedent in analogous cases in considering availability of deference).

This assumption may be controversial among legal scholars,<sup>157</sup> but it is defensible,<sup>158</sup> and courts have employed it.<sup>159</sup> *Chevron* calibrates

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157. Scholars have occasionally argued that it is better for Congress to engage in policymaking through ordinary legislation, which is controlled in part by authorizing committees, than through appropriations legislation, which is controlled by appropriations committees. See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 88–90 (2006) (discussing critiques of appropriations riders and earmarks); Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 969–71 (expressing concern about collective action problems inherent in the appropriations process); Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2668 (2003) (describing agency- and program-specific appropriations riders abrogating *Chevron* and stating that “[u]sing the appropriations process is not the best way to make [interpretive] decision[s]”); Devins, *supra* note 30, at 464 (“Appropriations-based policymaking may be useful, but there are strong reasons to caution against it.”); *id.* at 464–65 (listing reasons weighing against appropriations-based policymaking, including the fact that appropriations bypass authorizing committees and their staffs); Chuzi, *supra* note 26, at 1005–06 (describing benefits of including authorizing committees in the legislative process).

158. See Metzger, *supra* note 13 (manuscript at 6, 32–39) (arguing that administrative law doctrine should not disfavor governing through appropriations). Professor Price’s defense of congressional power in annual appropriations is well stated:

[I]n a world of broad delegations and expansive executive authority, Congress’s power of the purse is the single feature of our system that most effectively guarantees an ongoing political constraint on the president’s authority to set policy unilaterally. One might say that if it did not exist we would have had to invent it.

Price, *supra* note 22, at 369; cf. Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1940–46, 1974–93 (2020) (a sustained defense of giving Congress evergreen influence over agency behavior to overcome democratic accountability problems with permanent delegations). Arguments in favor of respecting rather than marginalizing appropriations are particularly strong when it comes to calibrating *Chevron* deference. Even critics of the use of the appropriations process to influence policy have made such arguments from the perspective of Congress, framing the choice as one Congress must make between influencing policy through permanent law and influencing policy through annual appropriations. They have not advocated for a role for courts in discouraging some forms of congressional influence or encouraging others. Such a role would be inconsistent with the view that courts should not seek to interfere with the balance of powers or Congress’s use of its appropriations power. See *In re Austrian & German Holocaust Litig.*, 250 F.3d 156, 163–64 (2d Cir. 2001) (“The doctrine of separation of powers prohibits the federal courts from excursions into areas committed to the Executive Branch or the Legislative Branch.”); *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring in the judgment) (“The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.”); Michael Sant’Ambrogio, *Legislative Exhaustion*, 58 WM. & MARY L. REV. 1253, 1257 n.3 (2017) (collecting sources supporting the idea that the political branches should “resolv[e] their differences through nonjudicial means”); THE FEDERALIST NO. 78, *supra* note 10, at 465 (Alexander Hamilton) (“The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.”). Moreover, there is no reason to assume that courts, by discouraging legislative influence through the appropriations process, simultaneously encourage Congress to act through permanent legislation; they may simply discourage congressional influence altogether.

the balance of power between the second and third branches—agencies and courts; it is a tool by which courts can give to agencies the power that Congress otherwise delegates to courts when it writes ambiguous statutes. Appropriations calibrate the balance of power between the first and second branches—Congress and agencies; they are a tool Congress reserves even as it gives away some of its power in entrenched legislation to agencies (and perhaps courts), thereby preserving some enduring influence for itself. Courts avoid interference with the political branches by taking account of this interaction in evaluating deference.

One additional normative assumption in the discussion that follows is that courts' approach to interpreting appropriations should also seek to avoid systematically favoring or disfavoring social ordering, such as federal spending. This assumption also may be controversial, though it is defensible.<sup>160</sup>

2. *Against Deference for Permanent Appropriations.* When it comes to permanent appropriations provisions, *Chevron* is a big deal. In this context, *Chevron*'s delegation function diminishes legislative power by expanding a potent form of presidential power. Moreover, when applied to permanent appropriations, *Chevron*'s anti-entrenchment function frustrates congressional budgeting, and undermines spending programs. It also conflicts with Congress's presumed intent, when it chooses to fund a spending program through a permanent appropriation, to engender reliance on that program. Courts should therefore disfavor deference for permanent appropriations.

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159. Recent judicial decisions in which courts have found it appropriate to treat appropriations as exceptional for interpretation purposes have pointed to appropriations' separation of powers implications as the reason. See *California v. Trump*, 267 F. Supp. 3d 1119, 1132 (N.D. Cal. 2017) (“[T]he role of the Appropriations Clause in enforcing the constitutional separation of powers provides reason for caution . . . .”); *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 169–70 (D.D.C. 2016) (“[A]ppropriations are an integral part of our constitutional checks and balances, insofar as they tie the Executive Branch to the Legislative Branch via purse strings.”).

160. See generally Matthew B. Lawrence, *The Real Imbalance in the Balance of Powers* (Jan. 14, 2021) (unpublished manuscript) (on file with the *Duke Law Journal*) (describing and defending the principle that structural features intended to generate power for political branches should not themselves take a side on whether resources are allocated through market or social ordering); cf. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overturning *Lochner v. United States*, 198 U.S. 45 (1905), and rejecting constitutional challenge to state minimum wage law premised on contract freedom).

*a. Delegation Function.* Applying *Chevron* to permanent appropriations provisions converts any ambiguity in such a provision into executive discretion regarding the availability of funding. It thus tends to diminish each chamber's power in the annual appropriations process. When Congress intentionally reduces its purse power by enacting a permanent appropriation that gives agencies discretion as described in Parts II.B and C, *Chevron* deepens the self-inflicted wound. If Congress does not intend to give the executive discretion over funding in permanent law but inadvertently creates an ambiguity in a permanent appropriation, *Chevron* makes Congress's inadvertence costly for Congress and a windfall for the executive.

This effect of *Chevron* on the balance of powers is direct when a dispute about the meaning of a permanent appropriation reaches the courts, but its impact may be even greater *ex ante*. The conclusion that *Chevron* applies may influence internal executive behavior *vis-à-vis* permanent appropriations provisions, even where the risk of actual judicial intervention is low. In appropriations, as elsewhere in administrative law, the first line of defense for the rule of law is internal—civil servants, especially agency lawyers, and appointees who take seriously their oaths to uphold the Constitution and avoid unlawful actions, whether or not they might be caught or punished.<sup>161</sup> In appropriations, this check is strengthened by the Antideficiency Act, which makes “willfully” spending without an appropriation a criminal offense.<sup>162</sup>

Treating ambiguous permanent appropriations as having one meaning governed by statutory tools empowers this internal check; it makes the meaning of such appropriations a legal question that must be overseen by lawyers whose ethical duties and professional training discourage them from blessing unreasonable interpretations or unlawful actions. And it makes it harder for an agency to change its view of the meaning of a permanent appropriation, once adopted. Treating ambiguous permanent appropriations as policy questions delegated to agencies to decide (applying *Chevron*) does the opposite.

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161. See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 540–47 (2015) (discussing the incentives driving civil servants to follow the law for its own sake). But cf. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2334–35 (2006) (“[Do] civil servants today view themselves as ‘servants of the country and not of a party’? Or that their ‘success does not lie wholly in their ability to retain the favor of political leaders’? . . . [F]ew agencies could say [so] . . .”).

162. 31 U.S.C.A. §§ 1341, 1350 (Westlaw through Pub. L. No. 116-163).

*Chevron* tends to empower agency officials who lack legal training, leaving them no reason to include lawyers in decisionmaking processes where an ambiguity is present.

*b. Entrenchment Function.* Applying *Chevron* to permanent appropriations also means that their meaning can change from administration to administration, or even year to year. This anti-entrenchment effect also undermines congressional power in the annual appropriations process by impeding congressional budgeting, as well as Congress's presumed intent.

Congress works hard to measure and predict federal expenditures under "current law"—the laws currently on the books—both in order to understand the nation's direction and as a point of comparison to assess the effects of proposed legislation. Creating and tracking this "current law baseline"—and then measuring proposed legislation's effects against it—is a primary purpose of the Congressional Budget Office and the budget committees.<sup>163</sup> In turn, setting tax and spending levels to reflect congressional priorities for the future progress of the country, while establishing a framework for legislation to fit within those priorities, is another primary task of the budget committees.<sup>164</sup> Allowing the meaning of permanent appropriations to change, whether through judicial or executive interpretation, makes both jobs harder by making the government's future expenditures under "current law" depend on choices that will be made in the future.

*King* was nearly an example of this challenge. In that case, the Supreme Court applied the "major questions" doctrine exception<sup>165</sup> to refuse to defer to the executive branch's interpretation of an ambiguous tax credit provision in the ACA, which was incorporated by

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163. See David Kamin, *Basing Budget Baselines*, 57 WM. & MARY L. REV. 143, 175–77 (2015) (discussing the current law baseline as "show[ing] what would happen if no further legislation were enacted"); Howell E. Jackson, *Counting the Ways: The Structure of Federal Spending* 10 (Mar. 2007) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=985201](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=985201) [<https://perma.cc/JZ77-CQNC>] (describing the budget process as built around the "baseline," which uses "future projections" that "convey the consequences of current fiscal commitments as extrapolated into the future" and "set a benchmark against which policy changes can be scored").

164. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297.

165. See generally Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777 (2017) (describing the major questions exception formulated in *King v. Burwell* and its proliferation in the lower courts).

reference in the permanent indefinite tax credit appropriation.<sup>166</sup> But had the court deferred, it would have created a significant source of unpredictability in future federal expenditures, as it would have empowered the executive branch essentially to turn “on” or “off” the ACA’s most expensive subsidy—the premium tax credits that cost roughly \$53 billion annually.

Whatever logic underlies the *Chevron* assumption that Congress intended to empower agencies through ambiguities, it is another, unjustified leap to assume that Congress intended to disempower itself while frustrating its own budgeting processes. Yet deferring to agency interpretations of ambiguities in permanent appropriations provisions does just that.

Moreover, *Chevron*’s anti-entrenchment function makes it harder for Congress to create federal spending commitments in permanent law on which people can rely. One strong reason for Congress to create permanent appropriations, despite its separation of powers costs, is to engender reliance on the part of funding recipients. “New property” entitlements are emblematic of this. To the extent a permanent appropriation is ambiguous, such reliance is still possible if there is a mechanism to entrench a given interpretation, like *stare decisis*. But if *Chevron* applies then ambiguity destroys reliance, because while an agency head can adopt whatever interpretation she thinks best, she cannot commit her successor to follow that interpretation.

*King* provides another example. Had the Supreme Court deferred to the Obama administration’s interpretation of the ambiguous tax credit provision, it would have created a shaky state of affairs for residents considering relying on the ACA’s insurance marketplaces or insurers considering entering them. Yes, it is doubtful that the Obama administration would have changed its interpretation to make the credits unavailable, but it seems altogether possible that the Trump administration would have done so. And the mere fear of that result would make reliance difficult, defeating the purpose of encoding the tax credit in permanent law.

Congress has a choice when creating a spending program. It can fund the program annually, maintaining tight control over the program through the annual appropriations process but leaving the program susceptible to abandonment, restriction, or sabotage as the political winds shift. Or it can fund the program permanently, insulating it from

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166. For more on *King v. Burwell*, see *infra* Part III.D (discussing the “major questions” exception as a doctrinal path forward).



the political process and engendering reliance. When Congress chooses to fund a program permanently, it is reasonable to assume that Congress intends to create a stable program. *Chevron* for ambiguous permanent appropriations frustrates this presumed intent, by leaving the program's funding, to the extent of the ambiguity, up to the changing views of the executive branch. Refusing *Chevron* for ambiguous permanent appropriations, on the other hand, fulfills this presumed intent, because through stare decisis courts applying de novo review entrench the meaning of ambiguous provisions.

*c. Sticky Deference Where Courts Do Defer.* The fact that courts should disfavor deference for permanent appropriations provisions does not necessarily mean that courts should adopt a categorical bar against such deference. It is possible that in particular cases Congress will clearly signal its intent that it expects resolution of ambiguities in a permanent appropriation to be resolved by the agency.

In such cases, if courts do grant deference to agency interpretations of ambiguous permanent appropriations, they should seek to mitigate the problematic consequences of *Chevron*'s anti-entrenchment function for reliance interests in the programs whose funding is at stake in the ambiguity.<sup>167</sup> Courts could do so by adopting a version of Professor Kurt Eggert's proposal for "sticky deference" in *Chevron* cases involving reliance interests, deferring to an agency's interpretation of a statutory ambiguity but not permitting the agency to change an interpretation once announced.<sup>168</sup>

Courts could, under current law, employ a version of "sticky deference" through *Chevron* Step Two. Recall that Step Two includes a substantive component in which a court will not defer to an agency's interpretation if it is arbitrary and capricious.<sup>169</sup> In the Supreme Court's recent Deferred Action for Childhood Arrivals ("DACA") decision, it held that the agency's decision to rescind DACA—to change its mind about the program—was arbitrary and capricious because the agency did not sufficiently consider the reliance interests participants had formed around its prior interpretation.<sup>170</sup>

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167. See *supra* Part III.C.3.

168. Kurt Eggert, *Deference and Fiction: Reforming Chevron's Legal Fictions After King v. Burwell*, 95 NEB. L. REV. 702, 750–51 (2017).

169. See *supra* Part III.A (describing *Chevron* deference).

170. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) ("When an agency changes course, . . . it must 'be cognizant that longstanding policies may have

Following this approach, courts might hold at *Chevron* Step Two that an agency's changed interpretation of an ambiguous appropriation is arbitrary and capricious unless the agency meaningfully justifies that interpretive change, despite any reliance interests generated around its prior interpretation of that ambiguity. In this way, courts could apply a form of "sticky deference," partially decouple *Chevron*'s delegation and anti-entrenchment functions, and mitigate one of the ways *Chevron* for permanent appropriations interferes with congressional power and practice.

*d. Employing a Rule of Narrow Interpretation is Overkill.* One additional note about a path not endorsed here. Some courts have avoided considering questions of deference by applying a clear statement rule against the availability of appropriations.<sup>171</sup> This approach is problematic. Yes, insisting that appropriations be interpreted narrowly would avoid the separation of powers concerns posed by deference to such appropriations. But it would throw the baby out with the bathwater, creating substantive problems,<sup>172</sup>

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'engendered serious reliance interests that must be taken into account.'" (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016))).

171. See *supra* Part III.B.1 (discussing *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016), and *California v. Trump*, 267 F. Supp. 3d 1119, 1132 (N.D. Cal. 2017)).

172. Such a rule would, in a stroke of the judicial pen, shrink permanent appropriations of all stripes in current law, upsetting hard-won legislative victories in which ambiguity might have reflected compromise. Simultaneously, if applied in the annual appropriations context, it would expand the reach of controversial funding restrictions like the Hyde Amendment and the Dickey-Wicker Amendment to their maximum—for these restrictions also limit the availability of appropriations.

undermining accountability,<sup>173</sup> and breaking with history.<sup>174</sup> The presumption against deference for permanent appropriations endorsed here mitigates disruptions to the separation of powers without these collateral consequences.

3. *For Deference for Annual Appropriations.* Whether courts defer to agency interpretations of annual appropriations provisions does not matter very much for congressional power and practice. *Chevron* operates at the margins of annual appropriations, or in their ambiguities, and Congress can and does enforce those margins on its own, usually without courts.<sup>175</sup>

Moreover, opportunities for judicial intervention in annual appropriations are necessarily rare because lawsuits usually take longer to resolve through district court litigation—notwithstanding any possible appeals—than annual appropriations last. This mismatch between the speed of annual appropriations and the speed of litigation is exacerbated by two further impediments to judicial intervention. First, the possibility that the Appropriations Clause precludes courts from ordering emergency relief requiring expenditure when an agency believes an appropriation is insufficient makes quick relief unlikely for failure-to-pay claims.<sup>176</sup> Second, the fact that taxpayers lack standing to

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173. A clear statement rule against funding would undermine political accountability by making spending legislation harder to enact in the future. Ambiguity in legislation is often an intentional compromise; sides unable to agree on an outcome might be able to agree to roll the dice on that outcome by leaving it to the interpretive process. Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 628 (2002) (“Ambiguity serves a legislative purpose. When legislators perceive a need to compromise they can, among other strategies, ‘obscur[e] the particular meaning of a statute, allowing different legislators to read the obscured provisions the way they wish.’” (alteration in original) (quoting ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 779–80 (1995))); see also Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 EMORY L.J. 117, 118 (1995) (“[B]oth factions [may] accept the vague terminology because the language *can* be interpreted to include their positions . . .”). A clear statement rule would preclude this form of compromise in legislation permitting federal spending, tending to make such legislation harder to pass.

174. See Lawrence, *Disappropriation*, *supra* note 8, at 75–77 (describing agency practice that does not acknowledge a clear statement rule); *supra* notes 104–05 and accompanying text (explaining that a district court’s adoption of such a clear statement rule was based on a misunderstanding of a relevant statutory provision).

175. See *supra* Part II.A.

176. See Lawrence, *Disappropriation*, *supra* note 8, at 84–85 (raising this possibility). The above discussion refers to the “margins” of appropriations—it does not speak to the question of courts’ role in enforcing outright defiance of the Appropriations Clause, which raises important questions not considered here. See *U.S. House of Representatives v. Mnuchin*, 976 F.3d 1, 10

challenge unlawful expenditures means that unlawful expenditure claims are often nonjusticiable.<sup>177</sup>

Additionally, if courts incorrectly interpret annual appropriations, Congress has ready and automatic opportunities to clarify its intent through the annual appropriations process.<sup>178</sup> Indeed, if courts defer to agency interpretations of annual appropriations and Congress does not like it, it can even prohibit deference to one or all agencies' annual appropriations without upsetting the doctrine in other contexts.<sup>179</sup>

That said, to the extent it does matter, shifting authority to interpret ambiguities from courts to agencies (*Chevron's* delegation function) generally respects Congress's primary role in overseeing agencies' implementations of annual appropriations laws. Deference means no third party can undo the results of the political branches' resolutions of disputes about the meanings of appropriations laws. De novo review, on the other hand, creates a risk of surprise and disruption, adding unpredictability to the annual appropriations process.<sup>180</sup>

*Chevron's* anti-entrenchment function also respects the nature of the annual appropriations process. As Professor Neil Devins points out, there is an incongruity between stare decisis and the fact that annual appropriations are altered or reenacted each year.<sup>181</sup> Even riders like the Hyde Amendment that are perennially reenacted may have their wording changed in the process—and even if their wording does not change, the legislative context and intent behind their enactment likely will.<sup>182</sup> *Chevron* avoids this incongruence by allowing

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(D.C. Cir. 2020) (discussing separation of powers implications if there were no external mechanism to enforce Appropriations Clause against a resistant executive branch).

177. Sohoni, *supra* note 19, at 1706–07 (explaining barriers to standing in litigation challenging an unconstitutional expenditure).

178. See Garrett, *supra* note 157, at 2668–69.

179. See *id.* at 2656 (suggesting that Congress could plainly express a preference “that courts serve as the primary interpreters of vague and ambiguous language”).

180. For a discussion of the consequences of unpredictability, see generally Lucy White, *Prudence in Bargaining: The Effect of Uncertainty on Bargaining Outcomes*, 62 GAMES & ECON. BEHAV. 211 (2008) (showing how uncertainty produces bargaining failure), and Oren Bar-Gill, *The Evolution and Persistence of Optimism in Litigation*, 22 J.L. ECON. & ORG. 490 (2006) (noting that “uncertainty and asymmetric information . . . have been invoked to explain bargaining impasse” and collecting pertinent sources).

181. Devins, *supra* note 30, at 498–99.

182. *Id.* at 466–68.

variations in the interpretation of ambiguous riders when they are reenacted in multiple years.

Courts should be open, then, to *Chevron* for annual appropriations. That leaves the question of how courts should decide whether to defer in particular cases. The following distinctive considerations about these unique statutory provisions should inform this inquiry:

*Insisting on notice and comment for annual appropriations may undermine rather than enhance accountability.* The accountability value ordinarily supports courts favoring (or insisting upon) notice-and-comment rulemaking in deciding whether to defer to agency action.<sup>183</sup> Doing so encourages agencies to make their decisions in a way that features active public participation and explanations. Readers alarmed to learn about the lack of procedure that so often surrounds appropriations decisionmaking<sup>184</sup> may see this as a context ripe for judicial encouragement of notice-and-comment rulemaking. Favoring, or insisting upon, this procedure as a prerequisite to deference for interpretations of annual appropriations provisions would certainly encourage proceduralization of appropriations decisions.

I hesitate to endorse such a pro-procedure approach, however, without more information. The reason for my hesitation is the fact that, unlike other areas of administrative law, agency decisions about annual appropriations are checked first and foremost by Congress. Here is a domain within the administrative state in which Congress remains active and involved, itself a central, though sometimes controversial, form of “political accountability” contemplated by the Framers.<sup>185</sup> Might judicial encouragement of notice-and-comment rulemaking for appropriations decisions have unintended consequences for this arguably salutary arrangement? Could notice-and-comment rulemaking processes themselves crowd out informal congressional influence, effectively trading one form of participation (congressional influence) for another (notice-and-comment rulemaking)?<sup>186</sup>

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183. This consideration is part of Hickman and Nielson’s well-considered and interesting call to simplify *Chevron* by insisting, for the most part, on notice-and-comment rulemaking. Hickman & Nielson, *supra* note 88, at 965–68.

184. *See supra* Part I.C.

185. *See supra* notes 21–22 and accompanying text (describing the debate about the legitimacy of congressional influence through the appropriations process).

186. *Cf. Sierra Club v. Costle*, 657 F.2d 298, 408–10 (D.C. Cir. 1981) (discussing limitations on undisclosed congressional involvement in notice-and-comment rulemaking).

Resolution of these currently unstudied questions is necessary to decide whether courts should explicitly preference notice-and-comment rulemaking when it comes to annual appropriations on the ground that doing so would promote accountability.<sup>187</sup>

*Annual appropriations are naturally transitory.* The transitory nature of annual appropriations usually precludes lengthy or procedurally involved agency consideration. The absence of these factors is therefore poor evidence that Congress intended courts rather than agencies to make judgments about the meaning of ambiguous annual appropriations provisions.

*Appropriations directed to a single secretary or agency.* When it comes to annual appropriations, courts must look beyond the legislative vehicle to the actual provision being interpreted to determine whether it is administered by a single agency. Although they may include different sections applicable to different agencies, appropriations bills are written largely by subcommittees focused on particular agencies, and appropriations provisions usually apply to a specific agency or agency head.

#### *D. Doctrinal Basis for Tailoring*

Although courts have not yet adopted the bifurcated approach advocated here, there is doctrinal support for such a move. The Supreme Court has noted that, in general, in deciding whether to defer in particular cases “[t]he Court’s choice has been to tailor deference to variety.”<sup>188</sup> I argue here not for “exceptionalism” in appropriations,<sup>189</sup> but rather for informed application of the *Chevron* framework to the distinctive features of appropriations provisions, especially the contradictory role of annual and permanent appropriations provisions in the separation of powers.

Moreover, appropriations have long been understood to be an area of the law with distinctive features to which existing legal

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187. This hesitation does not apply to permanent appropriations; falling outside Congress’s domain, they do not present the same risk that notice-and-comment procedures could crowd out congressional influence.

188. *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001).

189. *See Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 55–56 (2011) (refusing to create a special deference rule for tax law); *City of Arlington v. FCC*, 569 U.S. 290, 297, 301 (2013) (refusing to create a special deference rule for “jurisdictional” provisions).

frameworks must be tailored.<sup>190</sup> This is exemplified in administrative law by the rule stating that decisions on how to spend lump-sum appropriations are committed to agency discretion by law.<sup>191</sup> And it is exemplified in statutory interpretation by the rule that implied repeals in annual appropriations are particularly disfavored.<sup>192</sup>

Indeed, if one were needed, the Appropriations Clause itself offers a textual basis for a categorical limitation on *Chevron* in appropriations law. The clause says that appropriations must be made “by Law,”<sup>193</sup> but *Chevron* deference for appropriations provisions would give agencies the power to turn appropriations “on” or “off,” arguably running afoul of that requirement.<sup>194</sup> A nondelegation canon

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190. Professor Metzger has recently lamented that courts have often treated appropriations differently to marginalize them. *See Metzger, supra* note 13 (manuscript at Part III).

191. *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

192. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189–90 (1978).

193. U.S. CONST. art. I, § 9, cl. 7.

194. The Appropriations Clause insists that Congress approve of all expenditures from the treasury. *Id.* The question has not previously been explored, and a historical analysis of Congress’s delegation of the appropriations power is beyond this Article’s scope. However, it may be supportable to hold that Congress cannot delegate the appropriations power as it can its other powers, including its spending power. On this view, Congress could appropriate “such sums as the Secretary of the Treasury deems essential to respond to a viral pandemic” without running afoul of the nondelegation doctrine or the Appropriations Clause. In this hypothetical, Congress would have appropriated the funds and set their amount and available purposes—here, anything deemed essential by the secretary of the treasury. But, as the argument would go, Congress could not delegate the power to appropriate to the secretary, such as providing that “the Secretary of the Treasury shall make such appropriations from the Treasury as she deems essential to respond to a viral pandemic.” Such a delegation would run afoul of the constitutional requirement that appropriations be “made by Law.” *Id.*

The difference between delegating power to influence the purposes to which an appropriation might be devoted or the amount expended through the appropriation, on the one hand, and delegating power to appropriate funds, on the other, may seem largely formalistic. However, it respects, even if in some cases only formally, Congress’s ultimate responsibility and accountability for the use of taxpayer funds, which is an expressive benefit. Indeed, the distinction between *legal* spending—which is legal because it is authorized—and *constitutional* spending—which is constitutional because it is appropriated—mattered enough to the Framers that they addressed the subjects separately, giving Congress authority over spending in one clause of the Constitution and prohibiting expenditures absent appropriations in another. *Compare id.* § 8, cl. 1 (granting Congress power to “pay the Debts and provide for the common Defence and general Welfare of the United States”), *with id.* § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”). It also creates avenues to impose heightened internal restrictions on agencies for undermining Congress’s domain—willful expenditure without an appropriation is a felony under the Antideficiency Act, for example, but willfully awarding a grant to a recipient who does not meet statutory conditions of eligibility is not. *Use of Appropriated Funds To Provide Light Refreshments to Non-Fed. Participants at EPA Confs.*, 31 Op. O.L.C. 54, 62–71 (2007) (explaining that the Antideficiency Act does not apply to

that limits deference in appropriations law could thus arguably be drawn from the Appropriations Clause.<sup>195</sup>

Doctrinally, the bifurcated approach recommended here is consistent with courts' past treatment of *Chevron* for appropriations, because cases expressly considering deference have done so with regard to annual appropriations, not permanent ones.<sup>196</sup> This makes sense even if courts draw a nondelegation canon from the Appropriations Clause. A court might hold that the existence of the annual appropriations process is an effective check on executive discretion, and thus mitigates nondelegation concerns in that context. Therefore, this process limits the application of any nondelegation canon forbidding *Chevron* for appropriations to *permanent* appropriations provisions.<sup>197</sup>

Courts might also look to *King v. Burwell* as a doctrinal basis for an anti-deference rule in appropriations, though such a doctrinal move creates some challenges. *King* held that the question of whether the ACA provided for billions in federal subsidies necessary to make the law work was a "major question" excepted from *Chevron*.<sup>198</sup> The Court held that the credits were one of the ACA's "key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people."<sup>199</sup> The credits' availability thus posed "a question of deep 'economic and political significance' that is central to th[e] statutory scheme."<sup>200</sup> And because the IRS lacked

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spending in violation of legal provision not included in statute creating appropriation). If one accepts the argument that Congress cannot delegate the appropriations power, it is a logical next step to say courts should presume Congress delegated authority to turn an appropriation "on" and "off," as *Chevron* for appropriations would entail.

195. Cf. *Bowsher v. Synar*, 478 U.S. 714, 736 n.10 (1986) (noting that in light of the conclusion that the comptroller general was not a permissible target for delegation, "we have no occasion for considering appellees' . . . argument that the assignment of powers to the Comptroller General in § 251 violates the delegation doctrine"); Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1741–43 (2012) (arguing in favor of an antidelegation presumption drawn from the Offenses Clause). On nondelegation canons generally, see Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 330–37 (2000) (describing such canons).

196. See *supra* Part III.B.

197. For an argument that courts should consider the possibility of congressional oversight through the annual appropriations process in reviewing nondelegation challenges, see Metzger, *supra* note 13, (manuscript at 64).

198. *King v. Burwell*, 576 U.S. 473, 485–86 (2015).

199. *Id.* at 485 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

200. *Id.* at 486.



expertise in health care, the tax credits represented one of those “extraordinary cases” where the court finds “reason to hesitate before concluding” that ambiguity in a statute represents an implicit delegation.<sup>201</sup> Could this case represent a path forward for appropriations?

Sohoni focuses on *King*'s reference to federal spending and suggests that the case can be understood to reflect not an expansion of the “major questions” doctrine but a straightforward rule that “agency interpretations of ambiguous statutory authority that cause large amounts of federal spending” should not receive deference.<sup>202</sup> That view is difficult to square with the *King* opinion. It carves out *King*'s reference to the political and personal stakes of the statutory interpretation question at issue to focus exclusively on the court's reference to financial stakes, and leaves significant ambiguity about how much money is enough to trigger the rule.<sup>203</sup> Moreover, by denying deference not only to appropriations but also to spending provisions generally, this approach is broader than the approaches identified previously in a way that contradicts a longstanding body of case law deferring to agency interpretations of spending provisions.<sup>204</sup>

Sohoni's view would, however, provide a doctrinal means to limit agency discretion to interpret some permanent appropriations should any court wish to pursue it. If so, I offer two friendly amendments to Sohoni's proposed understanding of *King* as a potential doctrinal path forward, based on the foregoing. First, rather than the undefined modifier of “large scale” as the boundary line between spending ambiguities that receive deference and those that do not, courts should make the dividing line spending authorities that are funded through permanent appropriations provisions (reviewed de novo) versus spending authorities that are subject to annual appropriations

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201. *Id.* at 485 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

202. Sohoni, *supra* note 126, at 1432.

203. *King* might be better read as precluding deference as to ambiguities that entail particularly significant reliance interests, such as the “deep ‘economic and political significance’” of the premium tax credits. *King*, 576 U.S. at 486. As described in the opinion, they played a foundational role in developing the new ACA marketplaces. The law depended on these marketplaces in order to attract the investment of both customers and insurers, both of which were crucial to the credits' practical and political success.

204. *See, e.g.*, *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 700–01 (D.C. Cir. 2014) (deferring to an agency interpretation of a spending provision in a Medicare statute); *see also supra* Part I (describing difference between authorizing statutes and appropriations).

(reviewed applying *Chevron*). Second, rather than refuse agency deference only when an agency reads an appropriation to “cause” federal spending,<sup>205</sup> courts pursuing this approach should refuse deference to any agency interpretation of an ambiguous permanent appropriation, whether the agency chooses to spend money or refuses to spend money. A one-way exception to deference that permits it when an agency does not spend but grants it when the agency does spend would have a significant substantive valence against spending. But it would still permit the executive to leverage the threat of funding cutoffs to aggrandize its own power and undermine congressional power.<sup>206</sup>

#### CONCLUSION: APPROPRIATION DURATION, ADMINISTRATIVE LAW, AND CONGRESS’S DOMAIN

This Article has described Congress’s domain—the world of legislatively enforced administrative law and congressional influence made possible by each chamber’s unicameral power to refuse funding for any agency or program that relies on annual appropriations. It has also explained how permanent appropriations provisions shrink Congress’s domain. This dynamic has implications for the incorporation of appropriations into administrative law doctrine. When it comes to *Chevron* for appropriations, it means that deference for annual appropriations respects congressional authority but that deference for permanent appropriations undermines it. Thus, this Article recommends a bifurcated approach to *Chevron* for appropriations.

The dichotomy between annual and permanent appropriations has implications beyond the narrow but important question of the applicability of *Chevron* to appropriations. One such implication is the possibility that discretionary permanent appropriations may implicate heightened nondelegation doctrine concerns drawn in part from the Appropriations Clause. Another possibility that future scholarship might productively consider is whether *Lincoln v. Vigil*<sup>207</sup> holding that agency decisions about how to spend lump-sum appropriations are not reviewable in court under the APA should be limited to the annual

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205. Sohoni, *supra* note 126, at 1432.

206. See *supra* note 173 and accompanying text (describing the normative assumption that an interpretive rule should strive to avoid favoring or disfavoring particular substantive outcomes).

207. *Lincoln v. Vigil*, 508 U.S. 182 (1993).

appropriations context, given the relevance of congressional oversight in that context to the reasoning in that case and the separation of powers implications of long-term appropriations.<sup>208</sup> Similarly, Congress's enforcement tools in the annual appropriations space may impact the need for legislative standing to enforce the Appropriations Clause in this context.

Finally, moving beyond doctrinal questions, future scholarship could helpfully explore and problematize the extent to which the rules for agency behavior created and enforced by Congress through the annual appropriations process are consistent with, undermine, or otherwise interact with the rules for agency behavior created by the APA and enforced by the courts—and vice versa.<sup>209</sup> As scholars, judges, and policymakers work to understand, negotiate, and shape the many legal and extralegal influences on the administrative state, they should remain mindful that changes that affect agencies' dependence on annual appropriations redraw the boundaries of Congress's domain.

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208. *See supra* Part II.C.

209. Scholarship might also consider how Congress's control of agencies through the appropriations process interacts not just with statutory administration law but also with internal administrative law. *See generally* Metzger & Stack, *supra* note 61 (describing executive branch rules governing the behavior of agencies).