The Ambiguous Basis of Judicial Deference to Administrative Rules

David M. Hasen[†]

Much of the commentary on the Supreme Court's decision in Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc. *has focused on the nature of power that agencies exercise when they promulgate rules that merit judicial deference under* Chevron. *Some scholars view* Chevron *as reading into statutes an implied delegation from Congress to agencies of legislative power to fill statutory gaps and interpret statutory ambiguities. Other scholars understand* Chevron *as, in effect, a delegation of interpretive power from the courts to agencies.*

This Article argues that neither view of Chevron *is correct.* Chevron *purports to command deference beyond what would be required if* Chevron *merely stated a rule for the allocation of judicial power to interpret statutes. Conversely,* Chevron *deference cannot always rest upon an implied grant of legislative power from Congress, even where the agency exercises validly delegated rulemaking authority and promulgates a rule that satisfies the requirements of the Administrative Procedure Act. In particular, where the statute contains an ambiguity rather than a gap, it is not a rational principle of statutory interpretation to view the statute as authorizing a delegation of legislative rulemaking authority as a way to resolve the ambiguity—ambiguities impliedly call for interpretation, not legislation. Accordingly, even on the most expansive reading of* Chevron, *deference cannot always rest on an implied congressional delegation of legislative authority; in certain circumstances it must rest on an implied delegation of judicial authority.*

This conclusion suggests that agency reversals of prior rules that resolve statutory ambiguities should merit substantially less deference than do rules promulgated de novo. Such reduced deference would be based on the same principles that prevent courts from lightly abandoning precedent. The conclusion also raises questions about the policy justifications of Chevron *in the first place. If the resolution of statutory ambiguity is fundamentally an exercise of judicial power, the question of the scope of deference should turn on the court's evaluation of who is best situated to interpret. This evaluation requires an examination of contextually variable factors that is irreconcilable with* Chevron*'s rule of deference.*

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† Associate, Orrick, Herrington & Sutcliffe LLP, San Francisco, California. B.A., 1984, Reed College; Ph.D., 1993, Harvard University; J.D., 1996, Yale Law School. I would like to thank Jeff Cohen, Diane Eisenberg, and Professor E.D. Elliott for their comments to and criticisms of earlier versions of the manuscript. The author remains solely responsible for the views expressed herein.

Introduction

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[1] the Supreme Court established a new standard for judicial review of agency rules that interpret provisions of statutes the agencies administer. This standard requires the court to determine, as a threshold matter, whether the statute speaks "to the precise question at issue."[2] If it does, then the court is to apply ordinary canons of statutory construction to determine statutory meaning and eschew reliance on administrative interpretation. If the statute does not address the precise question at issue, courts determine, in a second step,[3] whether the agency's rule represents a reasonable construction of the statute. If it does, then the court must defer to the agency's interpretation; if not, the court interprets the statute on its own.[4]

In the sixteen years since *Chevron* was decided, its rule of deference has been the subject of on-going scholarly debate, much of it centering on the rule's statutory and constitutional underpinnings.[5] This Article

1 467 U.S. 837 (1984).
2 *Id.* at 842.
3 Hereinafter referred to as "step two" or "*Chevron* step two."
4 *See Chevron*, 467 U.S. at 842-43.
5 *See* Mark Seidenfeld, *A Syncopated* Chevron: *Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 84 (1994) (noting the disagreement among *Chevron* commentators on the propriety and scope of the *Chevron* doctrine).

contributes to the debate by focusing on the relevance of the type of statutory deficiency that an administrative rule attempts to remedy to the *Chevron* step-two analysis.[6] Although *Chevron* in essence conflated the cases of statutory ambiguity and statutory gap, I argue that the basis for judicial deference in the two instances differs. Whereas an agency's gap-filling rule may be understood as an exercise of congressionally delegated lawmaking authority, resolution of statutory ambiguity may not. Irrespective of the procedure by which an agency promulgates its rule, the nature of statutory ambiguity does not authorize a presumption that Congress has delegated to an agency the authority to legislate under the statute on the point in question. In other words, the resolution of statutory ambiguity implicates the agency in statutory interpretation, an activity that Congress may delegate to agencies but over which Congress lacks the power to command deference from the courts. For this reason, judicial deference in this instance must rest on a basis different from an implied congressional command. This Article identifies as that basis the independent decision of the courts to vest agencies with final interpretive power. In effect, *Chevron* represents a delegation of judicial power to agencies in the case of rules that resolve statutory ambiguity.[7]

This focus on the distinct bases of judicial deference has at least two important implications for judicial application of *Chevron*. First, it indicates that a blanket rule of deference to reasonable agency interpretations at *Chevron*'s step two is inappropriate. In certain instances deference will be appropriate if, and only if, the agency has exercised delegated legislative authority. Where the statutory defect cannot logically be understood to support such a delegation, deference must give way to

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Opinion is divided between commentators who support *Chevron*'s expansive deference policy and those who oppose it. *Compare, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (supporting *Chevron's* rule of deference), *and* Cass Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990) (same), *with* Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post*-Chevron *Era*, 32 B.C. L. REV. 757, 759-64, 786-815 (1991) (opposing *Chevron* as an invasion of the judiciary's Article III power to interpret law), *and* Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) (same).

6 See *infra* Part II for a discussion of the difference between gaps and ambiguities. Simply stated, a gap typically occurs in one of two instances. First, the statute literally may be silent on the precise question at issue, providing no guidance whatsoever. More commonly, the statute may contain a term that is undefined and clearly susceptible to a multiplicity of meanings.

7 Other commentators have argued that *Chevron* embodies a principle of judicial self-restraint rather than one of legislative allocation or inherent executive authority to interpret the law. *See, e.g.*, Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for* Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275, 1278 ("*Chevron*'s rule of required deference is better understood as a judicially self-imposed, prudential limitation on the federal courts' interpretive authority."); Caust-Ellenbogen, *supra* note 5, at 821-27 (arguing that *Chevron* is incompatible with an independent judiciary and that it represents an unwise limitation by the judiciary of its own power). None has suggested, however, that the basis for judicial deference to administrative rulemaking hinges on the nature of the statutory defect the rule addresses.

more searching judicial review. Second, the focus on the basis of deference highlights the ultimately interpretive character of much agency rulemaking, notwithstanding that such rulemaking frequently is legislative in form. As I argue in Part III, because the relative capacity of courts and agencies to interpret the law inevitably hinges on contextually variable factors, *Chevron*'s blanket rule of deference is flawed because it precludes an efficient allocation of "interpretive resources."

The argument proceeds as follows. Part I describes the Court's opinion in *Chevron*, explains the differences between legislative and interpretative rules that undergird the opinion, and briefly sets forth the pre- and post-*Chevron* doctrine on judicial deference. The emphasis in this part is on agency reinterpretations of their governing statutes, because the nature of the power exercised by an agency—quasi-legislative or quasi-judicial—is decisive for purposes of determining the extent of constitutionally permissible judicial deference to agency rules that reinterpret earlier rules.[8] Part II then explores the doctrinal basis of the *Chevron* rule. Here, the focus is not on the policy justifications for *Chevron*, but on the outer limits of judicial deference consistent with established separation of powers principles. I examine the basic differences between legislative gaps and ambiguities and then draw on this analysis to explain the basis for differing sources of agency power to promulgate rules. Finally, Part III uses the analytical framework developed in Parts I and II to show that *Chevron* represents bad policy, apart from the constitutional difficulties it faces.

I. Judicial Deference Before and After *Chevron*

A. Chevron v. NRDC

Chevron involved the proper interpretation of the term "stationary source" as used in section 172(b)(6) of the Clean Air Act (the Act)[9] following its amendment by The Clean Air Act Amendments of 1977 (the Amendments).[10] Under the Amendments, states that had failed to achieve pollution reduction targets mandated under the Act (non-attainment states) were required to limit the output of pollutants by stationary sources located within the states to certain specified levels. The Act, both prior to and

8 *But see* David M. Gossett, Comment, Chevron, *Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 682 n.6 (1997) (arguing that deference analysis under *Chevron* should not depend on whether the rule is an initial agency interpretation or reinterpretation).

9 42 U.S.C. §§ 7401-7671 (1994 & Supp. III 1997).

10 Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified as amended in scattered sections of 42 U.S.C.).

following the Amendments, did not define the term "stationary source" for purposes of measuring pollutants. Prior to 1981, the Environmental Protection Agency (EPA), the agency charged with administering the Act, had promulgated a rule that defined "stationary source" as, in essence, a single pollution-emitting facility for this purpose. By contrast, the EPA applied a plantwide definition, or "bubble concept," of "stationary source" in the case of pollution sources located in states that generally had demonstrated progress in reducing air pollution emissions to the levels mandated by the Act. Under the bubble concept, the amount of pollution emitted by a particular facility within a plant could increase as long as the increase was offset by a concomitant reduction in pollution emitted by one or more other facilities in the same plant.

In 1981, the EPA promulgated a new rule that adopted the bubble concept of "stationary source" for all pollution sources, irrespective of whether the source was located in a non-attainment state. A number of environmental groups brought suit, challenging the EPA's new rule as violative of the Amendments. The Court of Appeals for the D.C. Circuit, sitting in review of the EPA, agreed with the plaintiffs and overturned the EPA's new rule.[11] The court first examined the Clean Air Act to determine whether it defined the technical term "stationary source." After concluding that the statutory language was unavailing and its legislative history was "at best contradictory," the court conducted an independent review of the purposes of the Act and found that the EPA's definition of "source" violated the statute's "*raison d'etre*," which was to improve air quality.[12]

The Supreme Court reversed. In a 6-0 opinion[13] authored by Justice Stevens, the Court ratified the EPA's rule as a reasonable interpretation of the statutory language. The Court also reproached the D.C. Circuit for substituting its own policy analysis for the EPA's, stating that "[t]he basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it decided that Congress itself had not commanded that definition."[14] The Court then enunciated its view of the task faced by a court reviewing any agency's interpretation of its governing statute:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at

11 *See* Natural Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982), *rev'd sub nom.* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

12 *See id.* at 726.

13 Justices Marshall, Rehnquist, and O'Connor did not participate in the decision. *See Chevron*, 467 U.S. at 837.

14 *Id.* at 842.

> issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[15]

Chevron, of course, worked something of a revolution in administrative law—at least at the level of perception.[16] As explained in greater detail below, one effect of *Chevron*'s replacement of the variable judicial deference that had been applied to agencies' legislative rules with a blanket rule of deference to reasonable agency interpretations of ambiguous or silent statutes has been to grant agencies vastly greater discretion in resolving statutory ambiguity.

A second effect of *Chevron* has been to call into question the vitality of the principle that final interpretive authority over federal law rests with the judiciary.[17] *Chevron* threatens this principle in at least two respects. First, to the extent it commits the task of statutory interpretation to non-judicial bodies that are not subject to plenary judicial review, *Chevron* places final interpretive authority outside of the judicial branch. As I argue below in Part II, this shift of interpretive authority takes place whenever the following conditions are met. First, the agency rule is accorded deference under *Chevron*; second, the rule represents an instance of

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15 *Id.* at 842-43 (footnotes omitted).

16 The jury is still out on the true extent of the *Chevron* "revolution." *See* Callahan, *supra* note 7, at 1281 (arguing that on a prudential reading, *Chevron* remains consistent with long-standing principles of judicial deference—no revolution); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 990-93 (noting the decline in the Supreme Court's reliance on *Chevron* and, within a set of cases that do rely on *Chevron*, the decline in the number reaching *Chevron*'s step two); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1058-59 (noting the weakening of the *Chevron* effect in post-1986 years). But the perception is common among commentators that *Chevron* represented a fundamental reworking of the distribution of powers among the three branches. *See, e.g.*, Caust-Ellenbogen, *supra* note 5, at 776 (stating that *Chevron* "redefined the terms of the judicial review debate"); Farina, *supra* note 5, at 456-57 (arguing that *Chevron* defined deference "in a way that . . . was far more extreme than earlier articulations of the model [of judicial deference] had been").

17 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). A number of commentators have suggested that *Chevron* may effect a re-allocation of power among the branches of the federal government. *See, e.g.*, Richard L. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2229 (1997) (noting that *Chevron* step two "reverses another part of the institutional hierarchy the Court had traditionally recognized"); *see also* Russell L. Weaver, *A Foolish Consistency Is the Hobgoblin of Little Minds*, 44 BAYLOR L. REV. 529, 540-41, 567 (1992) (suggesting that *Chevron* makes agency interpretations comparable to precedent but that agencies nonetheless are free to change their interpretations).

interpretation rather than of legislation; and third, the rule is one that a court would be precluded from announcing were it faced with the same question in the absence of any underlying agency interpretation. More commonly, however, the shift occurs simply because *Chevron* deprives the courts of the power to interpret statutes in step-two cases except where the agency's rule is unreasonable.

Second, *Chevron* deprives the courts of final interpretive authority by transforming questions of statutory interpretation into policy questions best suited to non-judicial resolution. This effect of *Chevron* is the direct result of the Court's striking equation of "legislative" rulemaking under *Chevron* with policymaking.[18] This characterization follows from the Court's tacit acceptance of the view that legislative rulemaking represents an exercise of delegated legislative authority. In general, "legislative" rules are those promulgated according to the notice and comment procedures of § 553 of the Administrative Procedure Act (APA).[19] These procedures require the agency to publish the rule in proposed form in the Federal Register, to invite oral and written comment on the rule by "interested persons" at a hearing, and to incorporate in the final rules "a concise general statement of their basis and purpose."[20] Such rules have the force and effect of law as long as they are authorized by statute.[21] Statutorily authorized and validly promulgated legislative rules are as insulated from judicial review as the statutes that authorize them.

By contrast, interpretative rules, which do not have the force and effect of law, generally need not be promulgated pursuant to the APA's notice and comment procedures[22] and do not have binding effect on the agencies issuing them or on the courts.[23] Interpretative rules may include general statements of policy or interpretations of particular statutory provisions in specific factual settings and may be issued in a wide variety of forms, including releases, announcements, notices, and similar documents.[24] Although not bound by validly issued interpretative rules, courts generally accord deference to such rules according to the same principles that courts formerly applied to agency rules generally.[25]

Under the view accepted by the Court in *Chevron*, an agency's rule would appear to qualify as an act of delegated legislative authority without

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18 *See Chevron*, 467 U.S. at 866.

19 5 U.S.C. § 553 (1994).

20 *Id.* § 553(c).

21 *See generally* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.2 (3d ed. 1994).

22 *See* 5 U.S.C. § 553(b).

23 *See* 1 DAVIS & PIERCE, *supra* note 21, § 6.3.

24 *See* 3 *id.* § 17.3 (listing the forms interpretative rules may take).

25 *See, e.g.*, Batterton v. Francis, 432 U.S. 416, 424 (1977) (stating that non-legislative rules typically receive "important but not controlling significance" from reviewing courts).

regard to whether resolving the problem posed by the statute calls for agency interpretation or legislation.[26] The consequence of this formalism is the aforementioned transformation of interpretive questions into policy questions, because the notice and comment procedures are more likely to employ the salient features of legislation than of interpretation. These features include political bargaining among interest groups and the comparative freedom to promulgate any rules that comport with statutory purposes.[27]

B. *Judicial Deference Prior to* Chevron

Prior to *Chevron*, *Skidmore v. Swift & Co.*[28] and its progeny controlled federal courts' review of agency rulemaking. *Skidmore* held that agency interpretations,

> while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case [depends] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give power to persuade, if lacking power to control.[29]

In addition to the *Skidmore* factors favoring deference, courts applying *Skidmore* considered a number of factors favoring heightened scrutiny of agency rules. Where, for instance, an agency's rule "flatly contradicted" its prior rule, was of recent of vintage, or concerned a non-technical area within the court's expertise, courts were less apt to defer to the rule.[30] In essence, the examination of each of these factors was designed to enable the court to determine the relative expertise of courts and agencies, the potential for agency bias, and the capacity of courts to familiarize themselves with the factual circumstances of the subject of agency

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26 *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984).

27 *See id.* at 865-66.

28 323 U.S. 134 (1944).

29 *Id.* at 140. *See also* Mitchell v. Budd, 350 U.S. 473, 480 (1956) (accepting the Secretary of Labor's definition of "area of production" in the Fair Labor Standards Act because the Secretary had conducted an extensive analysis of the statutory framework and had made a "reasoned decision" on the basis of analysis); NLRB v. Hearst, 322 U.S. 111, 130-31 (1944) (pre-*Skidmore*) (deferring to the NLRB's interpretation of "employee" after noting that the statute had not defined the term).

30 *See* Frank Diehl Farms v. Secretary of Labor, 696 F.2d 1325, 1330 (11th Cir. 1983). Similarly, the Supreme Court in *Packard Motor Co. v. NLRB*, 330 U.S. 485 (1947), refused to defer to an agency decision on the "naked" question of law of whether an employee can be a foreman.

regulations.[31]

The comparatively small body of case law dealing with the specific issue of agency reinterpretations confirmed the validity of the variable deference approach of *Skidmore*. In *American Trucking Ass'n, Inc. v. Atchison, Topeka & Santa Fe Railway*,[32] the Supreme Court faced the question whether the Interstate Commerce Commission (ICC) could require railroads to provide trailer-on-flatcar, or "piggy-back," service on equal terms to motor and water contract and to common carriers.[33] Although the ICC's requirement of similar treatment reversed its long-standing position, the Supreme Court sustained the new rule on the grounds that the circumstances of rail transport had changed dramatically and that "this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency."[34] The Court stressed that it made "no judgment as to the policy aspects of the Commission's action."[35]

In *General Electric Co. v. Gilbert*,[36] the Supreme Court applied the same factors to overturn an agency reinterpretation. *Gilbert* concerned an Equal Employment Opportunity Commission (EEOC) guideline interpreting Title VII.[37] The guideline stated that an employer's failure to provide insurance for long-term disabilities arising from pregnancy constituted a violation of Title VII.[38] In declining to defer, the Court observed that the guideline "flatly contradict[ed]" the agency's earlier position and for this reason "[did] not receive high marks when judged by the standards enunciated in *Skidmore*."[39]

Lower courts applied the *Skidmore* principles in a similar fashion. In *Hatch v. Federal Energy Regulatory Commission (FERC)*,[40] the D.C. Circuit declined to defer to a FERC rule that changed the burden of proof public utilities directors needed to meet to establish their independence; a director had to establish independence as a prerequisite to holding two

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31 *See* Weaver, *supra* note 17, at 531-32.

32 387 U.S. 397 (1967).

33 *See id.* at 400.

34 *Id.* at 416.

35 *Id.*; *see also* Andrus v. Sierra Club, 442 U.S. 347, 358 (1979) (granting substantial deference to an agency reversal that followed a "detailed and comprehensive process, ordered by the President," of the agency's administration of its governing statute).

36 429 U.S. 125 (1976).

37 *See id.* at 142.

38 *See id.* at 140-41.

39 *Id.* at 143; *see also* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 n.12 (1982) (declining to treat the agency interpretation as a regulation where the agency had changed its position several times, including during pendency of the instant litigation); Morton v. Ruiz, 415 U.S. 199 (1974) (declining to defer to the Bureau of Indian Affairs' restrictive definition of "residency" where a prior, more expansive definition represented the Bureau's interpretation of statutory intent and Congress had not amended the statute).

40 654 F.2d 825 (D.C. Cir. 1981).

directorial positions simultaneously. The court stated that an "agency must provide a reasoned explanation for any failure to adhere to its own precedents," and held that the Commission's "sparse discussion of the new standard" and "fleeting reference" to two cases that had applied the new standard did not discharge its duty to explain the change of course.[41] Conversely, in *NAACP v. FCC*,[42] the court faced a challenge to the FCC's revocation of its rule requiring an evidentiary hearing for certain television station applications. Determining that it was "satisfied both that the agency was aware it was changing its views and ha[d] articulated permissible reasons for that change, and also that the new position [was] consistent with the law," the court upheld the new policy.[43]

C. Chevron *and After*

As suggested above, the Supreme Court's decision in *Chevron v. NRDC* transformed the relationship between reviewing courts and agencies interpreting their governing statutes; it "[s]wept aside [the] *Skidmore* criteria for determining the extent of deference in favor of a dramatic reformulation of the grounds for reviewing statutes."[44] In place of a context-sensitive inquiry into deference factors, courts now were required to fit the widely varying circumstances of agency rulemaking into *Chevron*'s rather rigid decision tree: Either Congress had spoken directly to the issue, or it had not. If it had, the court was to interpret the statute on its own; if not, then the court was to examine the agency's interpretation of the statute. If that interpretation was reasonable, the court was to defer; if not, the court would interpret on its own. In comparison with the *Skidmore* rule of variable deference, *Chevron*'s formalism vastly simplified the inquiry reviewing courts were to conduct.

Although *Chevron* purported to simplify the courts' task, it raised as many questions as it answered. *Chevron* itself involved a legislative rather than an interpretative rule, and, because it concerned the interpretation of a technical term, it addressed the case of statutory silence rather than ambiguity. But the text of Justice Stevens's opinion said nothing about these particulars, and *Chevron*'s sweeping language accordingly has occasioned a great deal of uncertainty as to the breadth of its application.

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41 *Id.* at 834.

42 682 F.2d 993 (D.C. Cir. 1982).

43 *Id.* at 998; *see also Hatch*, 654 F.2d at 834 (citing cases that hold that an agency may alter past rulings and policies provided that a reasoned explanation is given); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from tolerably terse to intolerably mute.").

44 Schuck & Elliott, *supra* note 16, at 1024.

Courts have struggled with such questions as what constitutes statutory ambiguity or silence,[45] whether *Chevron* applies if the rule is interpretative rather than legislative,[46] whether it extends to agencies' interpretations of their own jurisdiction,[47] and whether and how principles of stare decisis apply to administrative rules that conflict with pre-*Chevron* case law.[48]

Among the questions *Chevron* left open was the extent to which deference applied to agency reinterpretations of their governing statutes. *Chevron* itself was a reinterpretation case, but, because it involved a statutory gap, it did not raise many of the concerns courts typically express over deference to agency reinterpretations. These concerns include the increased likelihood of politicized or biased decision-making and the possibility that agencies reinterpreting a statute are covertly engaging in rulemaking that violates the statute.[49] However, lower courts facing the issue of deference to agency reinterpretations have tended to give *Chevron* broad effect. *Mesa Verde Construction Co. v. Northern California District Council of Laborers*[50] is illustrative.

Mesa Verde concerned the validity of National Labor Relations Board regulations interpreting section 8 of the National Labor Relations Act (NLRA) which governed the power of parties to labor contracts to rescind some or all of the terms of those contracts. The regulations in effect at the time of *Mesa Verde* contradicted prior NLRB regulations that had been approved by the Supreme Court as reasonable interpretations of section

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45 *Compare* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (refusing to defer to a "pure question of statutory construction"), *with id.* at 454-55 (Scalia, J., concurring) (noting that a pure question of law is inappropriate for *Chevron*'s step two).

46 *Compare* General Motors v. Ruckelshaus, 742 F.2d 1561, 1566-67 (D.C. Cir. 1984) (en banc) (relying on *Chevron* in a decision to defer to the EPA's interpretative rule), *with id.* at 1573 (Bazelon, J., dissenting) (noting that the EPA's rule was interpretative rather than legislative and applying the *Skidmore* factors). The fact that then-Judge Scalia joined Judge Wald's majority opinion in *Ruckelshaus* is noteworthy. *See also* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990) (arguing that deference under *Chevron* generally ought not extend to administrative rules not promulgated under the notice-and-comment procedure applicable to legislative rulemaking under the APA).

47 *Compare* New York Shipping Ass'n v. Federal Maritime Comm'n, 854 F.2d 1338 (D.C. Cir. 1988) (holding deference to an agency "inappropriate" when the question concerns the agency's interpretation of statutory provisions governing its jurisdiction), *with* Transpacific Westbound Rate Agreement v. Federal Maritime Comm'n, 951 F.2d 950, 952-54 (9th Cir. 1991) (deferring to the FMC's determination that its jurisdiction extended to "mixed agreements"). *See also* Quincy M. Crawford, Chevron *Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957, 968-83 (1994) (arguing in favor of deference).

48 *See generally* Pierce, *supra* note 17, at 2248-58 (identifying Supreme Court and circuit court cases addressing the relationship of administrative rules to conflicting judicial and administrative precedent).

49 *See, e.g.*, United Hous. Found., Inc. v. Foreman, 421 U.S. 837, 858-59 n.25 (1975) (according no special weight to an SEC guideline that conflicted with prior releases); *see also* Seidenfeld, *supra* note 5, at 104-11 (discussing the problem of agency capture by well-organized interest groups).

50 861 F.2d 1124 (9th Cir. 1988) (en banc).

8.[51] Nevertheless, an en banc panel of the Ninth Circuit upheld the new regulations because the prior Supreme Court approval had rested on deference to the NLRB's interpretation rather than on the Court's own, independent interpretation of the NLRA.[52]

In *Rust v. Sullivan*,[53] the so-called "gag rule" case, the Supreme Court confirmed that deference to agency reinterpretations was appropriate under *Chevron*. *Rust* concerned a Department of Health and Human Services (HHS) 1988 regulation interpreting Title X of the Public Health Service Act (PHSA).[54] Section 1008 of the PHSA provided that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."[55] HHS's 1988 regulation interpreted this language to preclude Title X recipients from providing counseling concerning the use of abortion as a method of family planning.[56] This interpretation contradicted a 1971 HHS regulation that had held section 1008 to apply only to the provision of abortion services, not to the dissemination of information about abortion as a method of family planning.[57] Over strong dissent,[58] the Court relied on *Chevron* and deferred to the later regulation. After "agree[ing] with every court to have addressed the issue that the language [of section 1008] is ambiguous,"[59] the Court observed that it "ha[d] rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question."[60] Rather, because HHS had changed its regulations based on a "reasoned analysis" indicating that they were "more in keeping with the original intent of the statute," the Court felt obliged to defer as long as the regulations themselves constituted a permissible construction of the statute.[61]

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51 *See id.* at 1129-31.

52 *See id.* at 1130; *accord* West Coast Truck Lines, Inc. v. Weyerhaueser, 893 F.2d 1016, 1025-26 (9th Cir. 1990). *But see* Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Comm'n, 775 F.2d 366, 375-76 (D.C. Cir. 1985) (declining to defer to an otherwise reasonable interpretation that contradicted a prior regulation and stating that "[a]gencies must use their interpretive discretion with some measure of consistency and reason"). It should be noted, however, that *Clark-Cowlitz* was decided shortly after *Chevron* at a time when *Chevron*'s reach may have been unclear.

53 500 U.S. 173 (1991).

54 42 U.S.C. §§ 300 to 300a-41 (1994).

55 *Id.* § 300a-6.

56 The regulation provided that a "title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." 42 C.F.R. § 59.8(a)(1) (1989).

57 *See Rust*, 500 U.S. at 220 (Stevens, J., dissenting).

58 Justices Blackmun, Stevens, and O'Connor each filed a separate dissent. *See id.* at 203 (Blackmun, J., dissenting); *id.* at 220 (Stevens, J., dissenting); *id.* at 223 (O'Connor, J., dissenting).

59 *Id.* at 184.

60 *Id.* at 186 (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 862 (1984)).

61 *Id.* at 187.

II. *Chevron*'s Doctrinal Basis and Justification

Commentators have proffered a variety of theoretical justifications of *Chevron*, but ultimately these justifications resolve themselves into three basic positions. *Chevron* deference is said to rest either on Congress's delegation to agencies of interpretive power,[62] on Congress's delegation to agencies of legislative power,[63] or on courts' independent decision to grant agencies interpretive power.[64] While the rule of uniform deference to reasonable agency rules is consistent with the first two of the positions, the positions themselves rest on questionable grounds. The third position is sound theoretically, but it does not support the rule of blanket deference to reasonable agency interpretations of ambiguous statutes. The third position also demonstrates why, in terms of the policies underlying judicial review of administrative rules, *Chevron* represents a regression from *Skidmore*.

A. *Congressional Delegation to Agencies of Final Interpretive Power*

The first, and most popular, interpretation of *Chevron* conceptualizes it as establishing a judicial presumption concerning Congress's delegation of ultimate interpretive power. Under this view, when a statute is silent or ambiguous with respect to the question presented, the agency has the last word on statutory meaning, so long as its interpretation is reasonable. Cass Sunstein, for example, has stated that, "[i]n *Chevron* itself, the Court quite rightly implied that any principle of deference is a product of Congress's explicit or implicit instructions on that question. The central point is this: *Courts must defer to agency interpretations if and when Congress has told them to do so.*"[65] Similarly, Justice Scalia considers *Chevron*'s doctrine of deference to rest on a presumption of congressional intent to delegate interpretive authority to agencies in the event of statutory ambiguity or silence.[66] It appears that neither Sunstein nor Scalia finds the notion of congressional delegation of final interpretive authority troubling, despite the settled principle, first articulated in *Marbury v. Madison*, that final

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62 *See, e.g.*, Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283 (1986).

63 *See, e.g.*, Seidenfeld, *supra* note 5.

64 *See, e.g.*, Callahan, *supra* note 7.

65 Sunstein, *supra* note 5, at 2084.

66 *See* Scalia, *supra* note 5, at 516. Others arguing for this interpretation of *Chevron* include Eric M. Braun, Note, *Coring the Seedless Grape: A Reinterpretation of* Chevron U.S.A., Inc. v. NRDC, 87 COLUM. L. REV. 986, 994-95 (1987) (contending that *Chevron* establishes a presumption of a delegation of interpretive power by Congress to administrative agencies and that such delegation poses no conflict with *Marbury v. Madison* or the Administrative Procedure Act); and Peter S. Heinecke, Chevron *and the Canon Favoring Indians*, 60 U. CHI. L. REV. 1015, 1020-22 (1993) (arguing that *Chevron* is best understood as a doctrine of presumptive delegation by Congress of interpretive power to agencies).

interpretive authority rests with the courts.[67] Rather, both point to the history of administrative interpretation since the New Deal as clear evidence of Congress's power to delegate interpretive authority. Congress, they observe, has often granted statutory authority to promulgate interpretative rules, and courts have long accorded deference to agencies acting pursuant to such authority.[68]

The fact that *Chevron* creates a presumption that Congress has delegated interpretive authority to agencies, however, does not support the proposition that Congress may deprive the courts of such authority. Moreover, it does not follow as a matter of either logic or policy that Congress's power to grant agencies authority to interpret statutes constitutes a withdrawal or limitation of the judiciary's plenary power to review agency interpretations.[69] Even under a regime of plenary judicial review of agency rulemaking, parties subject to those rules must come to court; they must be willing to bring suit in order for a court to exercise that power. Because of the high cost of bringing suit, many interpretative rules would remain (and in fact are) final merely because litigants do not wish to challenge them or lack the necessary resources to do so.[70] Congress, therefore, would have a reason to grant interpretive authority even if it believed courts would review all challenged interpretative rules de novo.

More fundamentally, no constitutional doctrine precludes Congress from according interpretive power to agencies. *Marbury* states merely that final authority to interpret the law rests with the judiciary, not that all such authority is judicial. For this reason, Congress would act rationally in granting agencies interpretative rulemaking authority even if every interpretative rule were in fact the subject of a lawsuit, because a statutory grant of authority to interpret a statute may be viewed by the courts as a factor in their independent decision whether or not to defer to an agency's interpretative rule. In practice courts have done this.[71] In any event, the

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67 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

68 *See* Scalia, *supra* note 5, at 514; Sunstein, *supra* note 5, at 2081-82.

69 *Cf., e.g.*, United States v. Morton, 467 U.S. 822, 834 (1984) (basing deference to Congress's express grant of interpretive authority on the fact that the agency was instructed to promulgate its interpretation by legislative rule; regulations are thus "give[n] legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute").

70 *See, e.g.*, JERRY L. MASHAW, BUREAUCRATIC JUSTICE 186 (1983) (observing that fewer than one percent of Social Security cases eligible for judicial review are in fact subjected to judicial review).

71 *Compare* Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35 (2d. Cir. 1976) (noting that little deference should be shown to administrative tribunals lacking interpretative rule- or policymaking power), *with* Massachusetts v. Morash, 490 U.S. 107, 116 (1989) (noting that deference should be shown where the agency had specific statutory authority to interpret a statute). *See also* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 152-53 (1991) (giving deference to the Secretary but not to OSHRC because only the former has lawmaking authority under the OHS Act).

fact of an express or implied congressional grant does not preclude a court from reviewing an agency's interpretative rule; the grant would simply be relevant to a court's independent decision to defer or not. Clearly that deference need not follow from Congress's limitation of the courts. It would follow instead from Congress's having given the agency the tools to promulgate rules in a manner that a court believed merited deference.

It is worth noting that this interpretation of Congress's power to confer interpretative rulemaking authority is consistent with both the language and the legislative history of the APA. Section 706 of the APA provides that "the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions."[72] The 1945 Senate Report confirmed that "interpretative rules . . . are subject to plenary judicial review . . . ."[73] Justice Scalia characterizes the Senate Report's assessment as "not categorically true,"[74] but it is difficult to see why. He suggests that Congress did have the power to limit judicial review by statute, despite § 706. Although he does not state the reason for this claim, presumably his evidence for it is that courts in fact deferred to agency interpretations, both before and after passage of the APA.[75] According to Scalia, then, a review of the actual circumstances of the APA's enactment would lead one to read § 706 as granting, in certain instances, only limited judicial review. One therefore could read § 706 as an attempt to channel burgeoning administrative control of statutory interpretation without reversing the established trend of permitting Congress to take interpretive power from judges and place it in the hands of bureaucrats.

Scalia's view faces at least two difficulties. As a preliminary matter, it is hard to see how the APA can be read as countenancing any such jurisdiction stripping. Section 706, read in conjunction with the Senate Report, could hardly be clearer on this point.[76] Together they state that Congress may grant interpretative rulemaking authority but that interpretative rules are subject to plenary judicial review. Further, it is not even necessary to reconcile § 706 with congressional grants to agencies of

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72 5 U.S.C. § 706 (1994). The fact of an express statutory grant of judicial review should not be read to support the negative inference that Congress could have withheld judicial review had it desired. As Sunstein observes, the APA represented a compromise under which Congress acknowledged the courts' prerogative to interpret the law but retained the power to confer interpretative rulemaking authority on agencies without judicial acquiescence. *See* Sunstein, *supra* note 5, at 2080-81.

73 S. DOC. NO. 248, at 18 (1946), *quoted in* Scalia, *supra* note 5, at 514.

74 Scalia, *supra* note 5, at 514.

75 *See, e.g.*, Mitchell v. Budd, 350 U.S. 473, 480 (1956) (post-APA deference); NLRB v. Hearst, 322 U.S. 111, 130-31 (1944) (pre-APA deference).

76 Even Sunstein, who supports the delegation of final interpretive authority view, recognizes that Scalia's treatment "overstates the extent to which deference to administrative interpretations was contemplated by the APA as evidenced by its text and underlying purposes." Sunstein, *supra* note 5, at 2081 n.46.

interpretative rulemaking power. The tension between the APA and such grants dissolves once one disaggregates Congress's power to grant interpretative rulemaking authority to agencies from its putative power to withdraw judicial review. As we have seen, Congress could have ample reasons to establish interpretative rulemaking authority even if it cannot make that authority final. Congress envisioned itself as one of at least two sources of interpretative rulemaking authority given the APA's obvious intent to permit congressional grants of interpretative rulemaking authority.[77] Consistent, however, with both the language and legislative history of the APA, and *Marbury*'s settled principle of the allocation of judicial power, Congress recognized that its delegation of interpretive authority cannot supplant the courts' ultimate power to expound the law.

B. *Implied Statutory Delegation to Agencies of Quasi-Legislative Rulemaking Authority*

Under a second interpretation of *Chevron* deference, statutory ambiguity or silence creates a presumptive delegation of legislative rulemaking power to interpret the statute to agencies.[78] Authority to promulgate such "interpretive-legislative rules"[79] is similar or identical to the authority Congress can confer by an express delegation of legislative rulemaking authority. In both instances, agencies promulgate rules that have "the force of law"[80] because the agency acts pursuant to a limited, congressionally granted power to create law: The agency legislates, and courts must defer to valid legislative enactments.

The attractiveness of this view derives in large measure from its apparent consonance with constitutional doctrine and its responsiveness to the perceived exigencies of the modern administrative state. Unlike the interpretive-delegation view, the proposition that Congress may delegate legislative authority to agencies does not offend long-settled separation of powers principles.[81] Further, legislation is not subject to the same constraints on judicial review as is interpretation. Statutory language,

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77 *See* 5 U.S.C. § 553(b)(3)(A) (exempting "interpretative rules, general statements of policy," and similar pronouncements from procedural requirements otherwise applicable to rulemaking).

78 *See, e.g.*, Weaver, *supra* note 17, at 558 (arguing for deference to agencies' reinterpretations on the ground that agencies may implement and change policies when changed circumstances warrant); *see also* Seidenfeld, *supra* note 5, at 133-38 (arguing that *Chevron* establishes a presumption of congressional delegation to agencies of power to promulgate controlling interpretative rules so long as agencies justify those rules on policy grounds).

79 I use the term "interpretive-legislative rule" to designate rules that are promulgated under an agency's legislative rulemaking authority but that establish an interpretation of statutory language rather than implement policy.

80 *See* Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979).

81 *See* Yakus v. United States, 321 U.S. 414 (1944).

legislative history, and related indicia of statutory meaning all constrain the interpreter, but legislation has force irrespective of whether it contradicts a prior rule or view about statutory meaning or intent, so long as the legislation is otherwise permissible.[82] Agencies acting within the confines of an implied but valid delegation of legislative rulemaking power are free to change rules as circumstances warrant; they are free from the constraint of maintaining consistency with prior interpretation.[83]

Accordingly, like the interpretive-delegation view, the interpretive-legislative-rule view is consistent with judicial deference to agency reinterpretations of their governing statutes. Further, it avoids the interpretive-delegation view's counter-*Marbury* reading of *Chevron* as it does not implicate Congress in any usurpation of judicial power.[84] Instead, statutory gaps and ambiguities are understood as Congress's delegation of its own core legislative power. Because this power is not confined in its exercise by prior interpretation, agencies can, within the limits of the delegation, override existing doctrine by promulgating "new law."

The interpretive-legislative view faces two principal difficulties. First, it assumes the agency's rule can be classified as "legislative" or "interpretive" solely by reference to the form of the agency's rulemaking. The occasion for or nature of the agency's exercise of its rulemaking authority is not examined when making this determination. In short, it assumes that because a rule is promulgated according to the APA's notice-and-comment provisions it qualifies as an exercise of delegated legislative authority. As the two succeeding sections will demonstrate, resolving a statutory ambiguity, as contrasted with filling a genuine gap, is not a legislative or quasi-legislative activity but an interpretive one, irrespective of the form in which the agency promulgates the rule. In the case of a formally interpretative rule the second difficulty appears: In that instance, there are substantial reasons to question the appropriateness of deference even if the substance of the agency's action is to fill a gap.

1. Statutory Gap Versus Statutory Ambiguity

Although the distinction between gaps and ambiguities has not played a prominent role in either the courts' application or commentators' discussion of *Chevron*,[85] as suggested immediately above, it is of critical importance for *Chevron* because it determines the source of agency authority in rulemaking. Accordingly, in this section I develop a basic

82 *See* 1 DAVIS & PIERCE, *supra* note 21, § 3.5 and cases cited therein.

83 *See id.*

84 For a view of *Chevron* as an unconstitutional usurpation of core judicial functions, see Merrill, *supra* note 16, at 995-96.

85 *See supra* Part I.

analysis of the distinction between gaps and ambiguities. The aim here is not to develop a comprehensive theory of what constitutes a gap and what constitutes an ambiguity, but simply to defend the distinction between the two phenomena at a conceptual level and to outline the fundamental differences between them.[86]

In general, gaps involve an absence of statutory language. The clearest case of a gap arises when Congress expressly creates a gap and delegates to an agency the power to "fill" it. Provisions of this sort abound in the Internal Revenue Code, in which Congress frequently establishes a general statutory framework and leaves to the Treasury Department the task of filling in specifics.[87] More generally, however, a gap arises any time there is no law that addresses a question purportedly covered by a statute. Cass Sunstein describes such a gap as an absence of statutory language to which an agency or court may refer in order to determine congressional intent.[88] Sunstein cites as an example the term "conspiracies in restraint of trade" in section 1 of the Sherman Antitrust Act.[89] The language of that act does not supply a ready definition of the term, and, because the act's very subject matter is restraint of trade, one cannot easily justify turning to the ordinary meaning of the term, to the extent it may be discerned, in order to divine its meaning in the act.[90]

The second, and related, instance of a gap occurs in the rare instance when a statute contains an undefined technical term. Arguably this was the case in *Chevron*, which presented the question of the meaning of "stationary source," a term not in common parlance or susceptible to interpretation by recourse to ordinary meaning. As in the case of a statutory directive to the agency to supply meaning through regulation, the presence of an undefined technical term in a statute invites regulatory definition and, at least arguably, redefinition as the circumstances giving

86 For an analysis which aligns with the distiction between gap and ambiguity developed here, see generally REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 13-33 (1975) (drawing a distinction between ascertainment of statutory meaning through interpretation and judicial assignment of statutory meaning through creation of law). *See also id.* at 213-16 (distinguishing various forms of statutory ambiguity from statutory gap).

87 *See, e.g.*, 26 U.S.C. § 446(c)(4) (1994) (granting the Secretary authority to prescribe regulations defining permissible accounting methods in addition to those set forth in the statute); *id.* § 475(e) (granting the Secretary authority to "prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section," relating to the mark-to-market accounting method); *id.* § 3402(a)(1) (requiring employers to withhold "in accordance with tables or computational procedures prescribed by the Secretary").

88 *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421 (1989) ("[T]he problem [in the case of gap-filling] is not that words are susceptible to more than one construction, but instead that the words necessarily require courts to look to sources outside of the text.").

89 *Id.* at 421 (citing 15 U.S.C. § 1) (1982 & Supp. V 1997)).

90 *Cf.* Sunstein, *supra* note 88, at 422 (noting that the prohibition on "discrimination" in Title VII of the Civil Rights Act of 1964 provides little guidance on the meaning of that term in connection with basic questions about, among other things, discriminatory effect).

rise to regulation change.

By contrast, ambiguity, though routinely grouped with gap by *Chevron* commentators,[91] represents a substantially different phenomenon. Ambiguity does not involve an absence of statutory language so much as an absence of clear meaning in the statutory language. It is most clearly present in the case of language that admits of exactly two distinct and plausible meanings, but it may take other forms, such as multiplicity of meanings or vagueness of meaning.[92] All of these forms have in common the basic characteristic of a failed aspiration to resolve the "precise question in issue;" they involve instances in which the language purports to say something clearly but fails to do so.[93] Examples of ambiguity are discussed in the next section.

2. Legislative Rulemaking

The assumption that a legislative rule validly promulgated under the APA's notice and comment provisions represents an instance of agency legislation underlies the legislative view of *Chevron*.[94] *Chevron* so understood stands for the proposition that courts will interpret statutory silence on the question of delegation, without more, as Congress's implied delegation of legislative authority to the agency with respect to the point in question.[95] *Chevron* establishes a canon of statutory "interpretation," not of the language at issue, but of Congress's intent about how agencies are to deal with that language and what kind of authority they are to exercise in

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91 *See, e.g.*, Anthony, *supra* note 46, at 4 (grouping gap and ambiguity as a gap for purposes of describing *Chevron*); Starr, *supra* note 62, at 294 (describing *Chevron* deference as applying to instances in which "a court has determined that Congress had no intent with regard to the question before it, . . .").

92 *See* Note, *A Pragmatic Approach to* Chevron, 112 HARV. L. REV. 1723, 1732 (1999) (identifying various kinds of ambiguity, including dual or several meanings, vagueness, and contestability).

93 In what follows, I assume for purposes of developing the argument that statutory meaning is primarily a function of the language of the statute itself, and not of legislative history or other commonly accepted indicia of statutory meaning. *See* Sunstein, *supra* note 88, at 431 & n.95 (noting that the issue for courts is what statutes mean, not what legislatures "intend"). The purpose of employing this "textualist" approach, which has been adopted in this context by other commentators, *see, e.g.*, Note, *supra* note 92, at 1729-30 nn.44-45, is simply to keep separate the analytical difference between "gap" and "ambiguity" from the distinct question of determining what language—statutory or otherwise—one analyzes with a view to determining the presence of a gap or ambiguity.

94 *See, e.g.*, Anthony, *supra* note 46, at 36 (describing as the "[k]ey [i]nquiry" whether interpretation in the form provided by an agency is binding); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. 187, 244-47 (1992) (treating the question whether a legislative or interpretative rule was promulgated as dependent on the nature of agency action and not also on the features of the statute that the rule addresses).

95 "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

doing so.[96] *Chevron* says, in effect, that congressional silence or ambiguity is tantamount to an express congressional delegation of its legislative power.[97]

In the pure "gap" case this position is perfectly compatible with the circumstances of agency rulemaking. The absence of statutory language and congressional "intent" with respect to the question at issue is at least consistent with an imputed congressional command to delegate lawmaking power to an agency. Irrespective of whether policy or existing canons of statutory interpretation justify this presumption,[98] the presumption itself does not overstep any existing constitutional or statutory constraint. There are no logical or doctrinal obstacles to the presumption of a congressional intent to delegate rulemaking authority so long as the agency charged with administering the statute possesses legislative rulemaking authority.[99] Deference then follows as a matter of course, since a legislative rule that fills a gap is paradigmatic of legislative rulemaking that has "the force and effect of law."[100] Such a rule does not purport to interpret statutory language but to implement a statute's purpose or purposes in the absence of statutory language.

The situation is more complex, however, when the agency promulgates an interpretive-legislative rule. Such a rule does not fill a gap but instead interprets ambiguous statutory language. Apart from the reasonableness of inferring from statutory ambiguity a delegation of authority to promulgate legislative rules is the question of whether such a delegation, implied or express, is logically consistent with statutory

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96 On this point, see *id.* at 851-53, noting that the issue was whether Congress had an intent regarding the application of the bubble concept.

97 *See* Note, *supra* note 92, at 1731 (observing that ambiguity creates an inference of delegation to resolve it). The author identifies different types of statutory ambiguity and argues that the nature of the ambiguity ought to determine the level of judicial deference to the agency's rule. The author does not address the question whether ambiguity may be reconciled with delegation of legislative power.

98 For views of the policies that support and oppose *Chevron*, see, for example, Herz, *supra* note 94, at 189-90 (advocating deference limited to agency policy-setting pursuant to a congressional grant); Seidenfeld, *supra* note 5, at 125-32 (arguing that a model of political deliberation rather than interest group accommodation animates the policy of *Chevron* deference, and therefore that deference at *Chevron*'s step two should be contingent on evidence of agencies' having engaged in deliberation); and Weaver, *supra* note 17, at 554-64 (advocating broad deference on the ground that *Chevron* concerns policymaking and implementation and agencies are better suited than courts to these tasks).

99 Indeed, the presumption rests on just the sort of factors courts traditionally use to ascertain congressional "intent" in the face of statutory silence. These factors include both inferences about Congress's actual or hypothetical intent to delegate and policy arguments as to which body—the agency or a court—is better suited to decide policy questions. *See, e.g.*, Pauley v. Beth Energy Mines, 501 U.S. 680, 696 (1991) (holding that a delegation of policymaking authority, either expressly or through an "introduction of an interpretive gap in the statutory structure," limits judicial review); Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) (stating that a precondition to deference is congressional delegation of administrative authority). P. Monaghan articulated this view prior to *Chevron* in Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 31 (1983).

100 Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977).

ambiguity. In fact it is not. Although a delegation of genuine legislative power is not intrinsically suspect, Congress ought not be understood to grant that power as a way of resolving statutory ambiguity. For, as distinct from the case of a true gap, in the case of an ambiguity the statute does reflect an intent to settle the point at issue—even if the statute may fail to actually settle it.[101] The manifestation of that intent is inconsistent with the existence of an intent to grant to another body a mandate to implement policy through rules that may change as circumstances warrant. The problem, then, is not simply that statutory silence about delegation is less likely to support the inference of legislative rulemaking power, but that a statute's failed attempt to set policy is not consistent with a delegation of policy-implementing power. An infelicitous effort to set forth a rule is nevertheless an effort to set forth a rule.

Section 318 of the Internal Revenue Code,[102] which contains rules for the attribution of ownership of stock for certain federal income tax purposes, provides an illustration of the point. Subparagraph (a)(2)(B) of that section sets forth two rules for the attribution of stock from trusts. The first rule provides, subject to certain exceptions, that stock owned by or for a trust is considered as owned by its beneficiaries in proportion to their actuarial interest in the trust.[103] The second rule provides, also subject to certain exceptions, that in the case of stock owned by a grantor trust, all stock owned by the trust shall be considered as owned by the grantor of the trust.[104] A grantor trust is defined, in general, as any trust that is revocable by the grantor.[105] The ambiguity arises from the fact that the statute does not specify the relationship between the two provisions of § 318(a)(2)(B). As a result, it is unclear whether grantor trusts are subject to both attribution rules or just to the second. Read literally, it would appear that both rules apply, because the statute purports to list rules of general application and there is no specific exclusion of grantor trusts from the first rule. Policy considerations, however, suggest that only the second rule should apply to grantor trusts. In general, the purpose of the attribution rules is to treat individuals or entities that have beneficial ownership or control of stock as owners of the stock for certain federal income tax purposes.[106] Where a grantor retains the power to revoke, the benefits of

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101 In many instances, of course, infelicitous statutory language simply reflects Congress's desire that another body settle the issue. This fact in no way alters the fact that Congress has chosen to dodge the issue by giving interpretive authority to another body.

102 26 U.S.C. § 318 (1994).

103 *See id.* § 318(a)(2)(B)(i).

104 *See id.* § 318(a)(2)(B)(ii).

105 *See id.* § 676(a).

106 *See, e.g., id.* § 302(c)(1) (providing that, in general, the attribution rules of 26 U.S.C. § 318(a) shall apply for purposes of determining whether stock redemptions qualify for sale or exchange treatment or for dividend treatment); *see also* Reuven S. Avi-Yonah, *The Attribution Rules*, 554 TAX MGMT. PORTFOLIO, A-1 (1996) (stating that the attribution rules "operate to prevent taxpayers from

stock ownership that the trust's beneficiaries enjoy would appear to flow more from the grantor than from the trust itself.

There can be little doubt that either interpretation is plausible. That is, the Treasury Department could issue a valid regulation that subjected grantor trusts to both of the attribution rules, or just to the second. Of significance for present purposes, however, is what effect any such rule would have on a future rule that Treasury might issue in the absence of an intervening change in the statute. In particular, it is far from clear that a subsequent, contrary regulation ought to merit the same kind of deference that the Supreme Court accorded the EPA's second interpretation of "stationary source" in *Chevron*. Unlike the provision at issue there, § 318(a)(2)(B) does not contain undefined technical terms; rather, the statute clearly purports to set forth a comprehensive set of rules regarding attribution, but it fails because it does not specify the relationship between clauses (i) and (ii). The statute's evident aspiration to comprehensiveness implies that Treasury's preliminary decision about that relationship, in the form of a validly promulgated regulation, would not be a decision pursuant to an implied congressional mandate to implement policy but rather an interpretive decision about what Congress intended but did not say, or about what Congress would have said had it addressed the precise point in issue.[107] Having settled on that interpretation, there would be no basis to reverse it on the ground that, for example, circumstances changed while the statute itself remained unchanged.

A contrast of § 318 as written with a hypothetical § 318 that contained a gap on the same issue illustrates the very different nature of the rulemaking activity in the gap case. If, for instance, § 318(a)(2) contained no rules whatsoever about trust attribution but was still titled "Attribution from partnership, estates, trusts, and corporations.—", a permissible construction of the statute (though perhaps not the best one) would be that Congress had intended to delegate to Treasury the power to set policy by creating rules for trusts. In that event, Treasury would be authorized not only to set such rules, but also to change them in light of changing circumstances, in both instances under an implied delegation of genuine legislative authority.

Young v. Community Nutrition Institute[108] provides a second illustration of how the delegation question differs in the ambiguity and gap

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artificially splitting their share ownership so as to avoid the bright lines set in the [Internal Revenue] Code, while maintaining de facto control by virtue of the special relationship between the persons who own the shares").

107 The fact that Treasury's first rule might be based, in whole or part, on policy considerations does not change the analysis. The relevance of policy to determining statutory meaning does not equate to or imply a power to alter statutory meaning through administrative rule, even if the alteration is based on consistent policy considerations.

108 476 U.S. 974 (1986).

cases. In *Young*, the issue was the Department of Health and Human Services' (HHS) interpretation of its statutory mandate to issue regulations governing poisonous substances in food. The statute provided in part that the secretary "shall promulgate regulations limiting the quantity of [poisonous substances] to such extent as he finds necessary for the protection of public health."[109] The question for the Supreme Court concerned the proper interpretation of the phrase "to such extent as he finds necessary." HHS had promulgated a legislative rule that interpreted this language as giving the secretary discretion to issue regulations. The D.C. Circuit disagreed, ruling that the phrase "to such extent" qualified only "limiting the quantity" and therefore that the secretary did not have discretion to refrain from issuing rules; he had discretion merely to limit the regulation of the various substances that fell under the rules.[110] The Supreme Court reversed and upheld the HHS rule. The Court noted that although Congress might have attempted to address the precise question at issue, it had failed to do so. The Court accordingly found itself governed by *Chevron*'s step two and determined that HHS's rule was a permissible construction of the statute.[111]

Again, it is instructive to compare *Young* as it was actually decided with a hypothetical *Young* involving gap-filling. Let us suppose that the statute in *Young* had simply said, "the secretary shall promulgate regulations governing the quantity of poisonous substances in food," but that the remaining facts of *Young* were unchanged. In that case, the statute would not have been ambiguous with respect to the extent of the secretary's duty to promulgate regulations; it instead would have contained a gap with respect to the scope of that duty. It seems clear that faced with such a gap, the Supreme Court would have deferred to HHS's rule, just as it did in the actual case, but that the rationale for deference would have been different in the hypothetical case. In deferring in the case where the statute was silent, a court could reasonably determine that silence supported a presumption that Congress wanted the secretary to give effect to statutory purposes by creating law. That presumption would have been reasonable given Congress's manifest desire to have the agency fill gaps and given that the language of the statute could not be interpreted as attempting to speak to the issue in question.[112] In effect, statutory silence

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109 21 U.S.C. § 346 (1994).

110 *See* Community Nutrition Inst. v. Young, 757 F.2d 354, 357-61 (D.C. Cir. 1985).

111 *See Young*, 476 U.S. at 980. Justice Stevens, the lone dissenter, objected that the Court was "merely inventing an ambiguity and invoking administrative deference." *Id.* at 988 (Stevens, J., dissenting).

112 This hypothetical case thus would have provided an occasion for deference similar to that in *Chevron* itself. The *Chevron* Court expressly found that Congress had not spoken to the question of the proper definition of "stationary source." On the basis of that finding, it was reasonable for the Court to hold that Congress had granted the EPA authority to legislate the definition, since it was at

would have made plausible[113] the presumption that, had Congress been aware of the gap, Congress would have expressly granted the agency authority to issue regulations to "fill" it. Accordingly, a subsequent reversal of position by HHS under the hypothetical statute, in the form of a rule directing the secretary to regulate the quantity of poisonous substances in all foods, would be valid as a permitted exercise of delegated legislative authority.

By contrast, in the actual scenario of *Young* the Court gave effect to the secretary's interpretation of what the statute tried to say or said poorly. That administrative interpretation and not legislation was at issue is reflected in the fact that the statutory language reasonably could be viewed only as saying either what the D.C. Circuit ruled it said, or what HHS stated in its rule. The Court recognized as much by conceding that the language attempted, however infelicitously, to address the precise question at issue.[114] In effect the Court held that, between HHS and the courts, HHS was better equipped to clarify the statute's imprecise language; the Court did not find, nor would it have been reasonable to find, that the language did not attempt to limit the secretary in one way or the other. The statute did not have a gap. It therefore would not be reasonable to interpret the ambiguity as delegating power to the agency to legislate a rule rather than merely to interpret the statute. It will not do to treat the statute as simultaneously purporting to reach an issue and not purporting to do so. If the Court legitimately could defer to HHS's actual rule, it could not do so on the ground that Congress had delegated final authority to set policy to HHS.[115]

The preceding analysis demonstrates that courts face fundamentally different issues depending on whether a statute is ambiguous or silent. If it is silent, *Chevron* may be read to hold that the agency has legislative rulemaking power to fill the gap. Such a power would enable the agency both to promulgate an initial rule and later to "reinterpret" the statute in a

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least plausible to think Congress had not understood the statute to define the term. Moreover, befitting its review of an exercise of delegated policy-setting power, the Court was properly unimpressed with the objection to deference based on the EPA's reversal of its prior rules. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 864 (1984). In the context of law making, a "flexible rather than rigid definition of the term 'source'" was appropriate. *Id.* at 856.

113 For present purposes, it is not important whether the presumption is the best one, or even reasonable; the argument here concerns merely the logical coherence of the rule that ambiguity supports a presumption of delegated power to implement policy rather than merely to interpret the statute. Objections to *Chevron* deference on policy grounds are taken up in Part III.

114 *See Young*, 476 U.S. at 980. Similarly, the Court could not reasonably have suggested that the phrase "limited to" was a technical term.

115 The distinction developed here between gap and ambiguity bears some similarity to that between vagueness and ambiguity suggested by Professors Eskridge and Frickey. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 839 (1988) ("Ambiguity creates an 'either/or' situation, while vagueness creates a variety of possible meanings.").

contrary fashion if the agency deemed such a change necessary to give effect to the policies underlying the statute. In this case, the only question for the court is whether the agency has acted in a manner consistent with the terms of its delegation. Consistency turns on the rule's consonance not with statutory language, of which there is none, but with statutory policy.

Statutory ambiguity, by contrast, cannot support a presumption of delegated policymaking authority, because the statute addresses the question raised, even though it does not in fact answer it. Because the statute purports to answer the question, it cannot simultaneously be read to support a grant to the agency of power not merely to clarify the statute but further to use the ambiguity as an occasion to implement policy through legislation. Ambiguity, in other words, presents an issue of interpretive, not legislative, power, and its presence supports at most a presumption that Congress wanted another body to resolve the ambiguity.[116]

The proposition that Congress may not require judicial deference to legislative rules that resolve statutory ambiguity is likely to meet opposition on at least two grounds. First, while the view that *Chevron* deference ought to apply only to statutory silence but not to ambiguity is not new,[117] a troubling notion is that what precludes deference to ambiguity is Congress's impotence to require it. It is by now axiomatic that legislative rules promulgated pursuant to an express statutory grant of rulemaking power carry the force of law.[118] Such rules receive judicial deference irrespective of their purport, so long as they remain within the confines of the delegation. In other words, courts do not distinguish between legislative rules that legislate and those that interpret. Most commentators who are critical of *Chevron*'s rule of deference accordingly operate within the established framework of deference to legislative rulemaking. They do not object to express congressional grants of authority to agencies to treat ambiguity as a license to legislate, but only to

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116 One might object that *Chevron* itself couched the agency's rulemaking activity as a policy decision, *see Chevron*, 467 U.S. at 865-66, and therefore that the very rationale of *Chevron* is to enable informed policy-based decision-making in place of the often uninformed judicial resolution of interpretive issues that had formerly taken place. This objection confuses the relevance of statutory policy to determining statutory meaning with a putative agency power to establish and to change rules as policy dictates. Agencies and courts alike often advert to policy in order to decide upon statutory meaning, but the propriety of doing so is not equivalent to a license to legislate in order to give effect to statutory purposes.

117 *See, e.g.*, Herz, *supra* note 94, at 207 (arguing that ambiguity arising only from Congress's "intent to express nothing" merits deference under *Chevron*); Sunstein, *supra* note 5, at 2090 ("[A]mbiguity is simply not a delegation of law-interpreting power, and it would be a major error to treat all ambiguities as delegations."); *cf.* Farina, *supra* note 5, at 468-76, (arguing against *Chevron* deference both where Congress has left a gap in a statute and where a statute is ambiguous).

118 *See* Batterton v. Francis, 432 U.S. 416, 425 (1977); *accord* United States v. Morton, 467 U.S. 822, 834 (1984); *see also* 1 DAVIS & PIERCE, *supra* note 21, § 6.3 (arguing that the primary distinction between "substantive" rules meriting judicial deference and interpretive rules subject to heightened judicial scrutiny is the procedure under which substantive, but not interpretive, rules are promulgated).

the presumption that ambiguity represents an implied delegation of that authority.[119]

Similarly, it is in relation to express versus implied delegation that defenders of *Chevron* deference to agency interpretations of statutory ambiguity typically make their case. Professor Herz claims, for example, that a "greater includes the lesser" argument applies to interpretive-legislative rules.[120] He reasons that "[i]f Congress can hand over legislative authority, it surely can make an initial attempt at legislation and then assign an agency the task of figuring out what it did, subject to judicial review to ensure that the agency's conclusion is 'permissible.'"[121] In short, whenever Congress creates an ambiguity subject to deference under *Chevron*, Congress also could have created a gap and left to the agency the task of filling it. Since, therefore, the gap case subsumes the case of statutory ambiguity, deference appears to follow as a matter of course for both cases. Viewed in this light, the distinction between gap and ambiguity verges on the meaningless, and an insistence on different treatment of the two cases appears merely pedantic.

The surface plausibility of Herz's position should not, however, blind one to its failure to take account of the specific difference between a statutory gap and an ambiguity. In the first place, we should recall that Congress has not, in fact, exercised its "greater" power in the case of statutory ambiguity. It has not left a gap in the statute or, much less, expressly delegated rulemaking authority on the issue in question. If the fact that Congress could have done either of these is supposed to permit courts to act as though it had, then the argument proves too much. Congress typically does not act at the limit of its powers, and courts ordinarily will not presume an implied exercise of congressional power to the maximum extent constitutionally permitted from statutory silence with regard to the reach of a congressional enactment.[122]

More significantly, this argument erroneously assumes that the difference between resolving statutory ambiguity and filling a statutory gap is purely quantitative. That is, it assumes that an agency's interpretive-legislative rule that resolves ambiguous statutory language does not perform a different kind of role from the legislative rule that fills a statutory gap; it is merely "lesser." But, as we have seen, the two activities

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119 *See, e.g.*, Herz, *supra* note 94, at 192; Sunstein, *supra* note 5, at 2085-86. Of course, in many cases, the failure to make this distinction makes little practical difference because an independent judicial basis for deference exists. Where, however, agency reinterpretation is at issue, that independent basis may not exist. *See supra* Part I.C.

120 *See* Herz, *supra* note 94, at 202.

121 *Id.*

122 *See, e.g.*, United States v. Bass, 404 U.S. 336, 349 (1971) (holding that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance").

differ because of the specific difference in the statutory deficiencies they remedy. The existence of a gap may support an inference of agency power to fill it and to change the way in which it is filled as circumstances dictate if necessary to fulfill the statutory purpose or purposes. Ambiguity, by contrast, implies a consideration of the very issue that has not been resolved. Such consideration is not consistent with a decision to allow another body to implement statutory purposes through its own legislative activity.[123]

A second ground of opposition to the view developed here is a practical one. The preceding argument concluded that a blanket rule of judicial deference to reasonable interpretive-legislative rules cannot rest on an implied legislative delegation because such rules are the product of interpretive, not legislative, activity, and Congress lacks the power to require judicial deference to agencies' interpretations. The argument was not a critique of the view that agencies should be understood to have exercised their legislative rulemaking power where Congress has not expressly provided for such exercise.[124] It thus might appear that courts have no business deferring to the innumerable "interpretations" that agencies routinely generate in the form of legislative rules. One might argue that if a reading of *Chevron* that is consistent with *Marbury* demands this much, then perhaps it is time to jettison *Marbury* rather than *Chevron* and its progeny. Given the necessity of agency interpretation and the difficulty of competent de novo judicial resolution of the countless issues agencies resolve through this kind of interpretive "legislation," an insistence on adhering to *Marbury*'s perceived requirement of final judicial resolution seems perverse. It ignores the exigencies of the modern administrative state and insists instead on a form of adjudication suited only to the outdated model of the passive, non-administrative state.

This argument from administrative exigency fails to recognize that the denial of Congress's power to require deference does not imply the absence of courts' power to employ it—an observation that appears to have escaped a number of commentators.[125] Congress is not the only possible source of a deference requirement, and *Marbury*, as a separation of powers case, says nothing about the limits courts may place upon themselves when they engage in statutory interpretation. As argued below in Part II.B.3, courts do retain the power to defer to agencies' interpretive-

123 *See, e.g.*, Note, *supra* note 92, at 1736 (arguing that ambiguities of an either/or nature, as contrasted with those that admit of gradations, ordinarily do not support an inference of delegation).

124 *See, e.g.*, United States v. Morton, 467 U.S. 822, 834 (1984) (granting regulations "legislative and hence controlling weight" on the ground that "Congress explicitly delegated authority to construe the statute by regulation").

125 *See, e.g.*, Farina, *supra* note 5, at 464 (characterizing the "power-shifting" of *Chevron* as a choice between deference to the agency and de novo review); Weaver, *supra* note 17, at 558-60 (framing the *Chevron* debate as a choice between deference to the agency and de novo judicial review).

legislative rules, and there is no reason why *Chevron* cannot be read as commanding this kind of deference.

3. Interpretative Rulemaking

The Supreme Court has not definitively resolved whether interpretative rules merit *Chevron* deference, though it has suggested they do not.[126] Lower federal courts are divided on the subject.[127] In any event, the case for deference to interpretative rules is clearly more tenuous than it is for legislative rules, which are promulgated with greater procedural safeguards and are more likely to reflect the agency's informed and considered judgment.[128] For this reason, if Congress lacks the power to require judicial deference to an agency's legislative (in form) clarification of an ambiguous statute, it would seem clear that Congress may not require deference to an interpretative rule performing the same role. Interpretative rules, which are not promulgated under the APA's notice and comment procedure, do not have the force and effect of law.[129] In addition, wholly apart from the procedural failure to comply with the APA's notice and comment provisions, interpretative rules merit less deference simply because they tend to be the product of a less formal, less rigorous process.

The situation is different in the case of interpretative rules that fill statutory gaps. As argued above, a statutory gap is the one case in which we may assume Congress to have delegated genuine legislative power to an agency charged with administering the statute. But that argument presupposed that the agency had been the beneficiary of a grant of legislative rulemaking power, even if implied and general rather than

126 In *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991), the Court stated that interpretive rules and enforcement guidelines are entitled to "some deference" but not "to the same deference" that legislative rules receive. In *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), the Court cited *Skidmore* and not *Chevron* in refusing to defer to an EEOC interpretative rule. Justice Scalia disagreed with this approach, arguing for deference under *Chevron* but concurring in the judgment because he found the interpretation unreasonable. *See id.* at 259 (Scalia, J., concurring in part and concurring in the judgment). The Court has never expressly stated that *Chevron* is inapplicable to interpretative rules.

127 *Compare* Bethlehem Steel Corp. v. Bush, 918 F.2d 1323, 1327 n.3 (7th Cir. 1990) (deferring to the agency's interpretative rule), *and* General Motors v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (same), *with* Capitano v. Secretary of Health and Human Servs., 732 F.2d 1066, 1076 (2d Cir. 1984) (declining to defer under *Chevron* because the regulation was not legislative).

128 Legislative rules may be promulgated only following either notice and comment or trial-type hearings on the record. *See* 5 U.S.C. § 553 (1994) (notice and comment rulemaking); *id.* § 556 (trial-type hearing on the record).

129 *See, e.g.*, Bureau of Alcohol, Tobacco, & Firearms v. Federal Labor Relations Auth., 464 U.S. 89, 98 n.8 (1983) (noting the significance of the procedural characteristics of rulemaking in the determination whether to defer to the agency's interpretative rule); *see generally* Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346 (discussing the differences between legislative and interpretative rules).

express and focused, and it assumed that the agency had filled the gap by legislative rule. Agency action by interpretative rule raises different barriers to a presumption of a congressionally imposed requirement of judicial deference. In the first place, one must be able to justify the presumption of congressional intent to give legislative effect to a rule that does not comply with legally mandated legislative rulemaking procedures. Secondly, and more significantly, it must be possible to show that Congress may require the courts to treat an agency's procedurally interpretative rule as though it were legislative.

With respect to congressional intent, the presumption of a grant of the power to make new law through interpretative rulemaking is questionable. As an initial matter, the presumption seems counterintuitive as a canon of statutory construction. As even *Chevron*'s proponents recognize,[130] *Chevron*'s step two typically is reached because the reviewing court has determined that Congress failed to consider the question at issue. In the event of such a failure, *Chevron* prevents Congress, in the absence of an express retention of legislative power, from controlling an agency's exercise of that same power by legislative rule. *Chevron* thus sets up the counterintuitive presumption that Congress's failure to foresee an issue represents a decision to delegate the maximum authority possible to resolve it. But where Congress has failed to foresee an issue, one would expect Congress to cede less power to address it, especially where legislative rulemaking authority is absent. That is, one would expect Congress to have ceded, at most, interpretive power to construe the statute, rather than legislative power to supplement or change it.[131] This more limited grant of authority would permit agency resolution of the issue without placing Congress in the awkward position of having constantly to safeguard its plenary legislative power against agency usurpation. It also would leave intact the presumption that Congress exercises federal legislative authority absent strong indications of an intent to delegate that authority to another body. Finally, it is consonant with the established reading of the non-delegation doctrine, according to which agency exercise of legislative power requires a clear and circumscribed delegation of the power from Congress.[132]

It is true that in those instances in which statutory ambiguity or silence is intentional, the assumption of an intent to delegate the decision

130 *See* Scalia, *supra* note 5, at 516.

131 *See* Herz, *supra* note 94, at 195 (observing that "Congress should prefer relatively stringent judicial review of agency interpretations" because of its interest in withholding power from the executive branch).

132 *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928); Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (observing that courts' willingness to uphold congressional delegation is predicated on plenary judicial review of agency rules promulgated pursuant to an intelligible principle of delegation).

to resolve the question arguably makes sense. When Congress is unable to reach agreement on an issue, or chooses to dodge it, its members presumably recognize that resolution will have to be forthcoming from some body.[133] But that recognition does not support an inference of delegated legislative, as opposed to interpretative, rulemaking authority. The requirement for a decision does not entail that the decision be legislative: A decision will be reached irrespective of the nature of the power exercised to reach it.[134] More importantly, even if *Chevron* ambiguity or silence did support such a presumption, without more, that presumption would conflict with relevant provisions of the APA. Section 553 of the APA provides for notice and comment proceedings in the case of formal legislative rulemaking. It further directs agencies to provide the formal trial-type proceedings of § 556 where the governing statute requires a decision "on the record after opportunity for agency hearing."[135] Disregarding the policy reasons that support notice and comment or trial-type formal hearings as prerequisites to legislative rulemaking,[136] it remains difficult simply as a matter of statutory interpretation to see how step-two ambiguity or silence in an agency's governing statute negates these provisions of the APA. This difficulty is compounded by the long-settled rule that the APA is a default statute applicable where the governing statute does not expressly override it.[137]

Finally, constitutional due process or its legislative analog might preclude the exercise of interpretative rulemaking power that had the effect of legislative rulemaking where agencies acted without any input from potentially affected parties and the rulemaking process was entirely closed off from public scrutiny. While the Supreme Court has been disinclined to hold rulemaking to due process standards,[138] the Court has never squarely addressed a constitutional challenge to a de facto legislative rule that afforded parties vastly diminished access to the agency's decision-making procedures.[139] Instead, the Court typically has addressed the narrower issue of a right to participation in rulemaking.[140] This issue is the hallmark of

133 *See* Note, *supra* note 92, at 1723 n.2.

134 *See* Herz, *supra* note 94, at 195-96.

135 5 U.S.C. § 553(c), (d) (1994).

136 *See* discussion *infra* Part III.

137 A court will hold an agency to the APA's legislative rulemaking requirements once the court has determined that the agency has promulgated what is in effect a legislative rule—one that intends to create new law, rights or duties. *See* General Motors v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc).

138 No due process right to a hearing exists for parties affected by legislative rules. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).

139 The absence of a constitutional challenge on this point doubtless is due in large measure to the fact that parties typically raise procedural challenges to legislative rulemaking under the APA's provisions governing agency lawmaking. These provisions have been held to satisfy constitutional due process requirements. *See* Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519 (1978).

140 *See, e.g.*, Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984)

due process in administrative adjudication, but it is not the only constitutional question relevant to agency legislation. In particular, it is not clear whether constitutional protections would require greater openness in legislative rulemaking than is often present when agencies promulgate interpretative rules. After all, Congress may not pass legislation by secret ballot, nor may it conduct legislative business behind closed doors. If Congress is limited in this respect, it is unclear why an agency exercising congressionally delegated power would not be as well.[141]

Consistent with this analysis, the Supreme Court has suggested that concerns of fundamental fairness could, in the extreme case, place limits on agencies' legislative rulemaking even when the requirements of the APA did not apply.[142] Rules evaluated under *Chevron* step two could pose such an extreme case, since agencies often are free to, and often do, promulgate interpretative rules or guidelines without any warning to or input from outside parties.[143]

C. Chevron *as a Doctrine of Independent Judicial Deference to Agencies*

A third position understands *Chevron* deference as, in part, a prudential doctrine that the courts have elected to apply independent of congressional or statutory mandates.[144] On this view, except in the case of a legislative rule that fills a statutory gap, *Chevron* represents an independent decision by the courts to permit agencies to exercise final interpretive authority. Often the power to exercise interpretive authority

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(denying a due process right to a hearing on a legislative rule on the ground that affording such rights to all affected by legislative rules would be impractical).

141 This argument may be viewed as the converse of the argument sometimes used to deny a due process right to a hearing when agencies promulgate legislative rules. The argument reasons from the absence of right to a congressional hearing to the absence of a right to appear before an agency that is engaged in rulemaking. *See* 2 DAVIS & PIERCE, *supra* note 21, § 9.2 (outlining objections to due process arguments to hearing rights in non-individualized contexts). But the same reasoning would appear to hold that limitations on congressional secrecy and the requirement of congressional accountability extend to administrative rulemaking proceedings also.

For objections to granting interpretative rules legislative effect, see Herz, *supra* note 94, at 210-11 (discussing rationales supporting reduced deference).

142 *See, e.g.*, United States v. Florida East Coast Ry., 410 U.S. 224, 243 (1979) (holding that the ICC's procedures in the rulemaking context are not covered by the APA because they offered potentially affected parties ample access to the rulemaking process); *Vermont Yankee*, 435 U.S. at 524 (recognizing the possibility of "extremely rare" circumstances in which agency procedures under the governing statute might afford insufficient process to parties potentially affected by legislative rulemaking).

143 For example, agencies often provide only general guidelines, or they set policy merely by stating that certain standards or rules shall govern. *See, e.g.*, Community Nutrition Inst. v. Young, 818 F.2d 943 (D.C. Cir. 1987) (holding that the FDA's "action letters" were not binding rules because they were not formally promulgated); *see generally* Internal Revenue Bulletin 1998-1 (stating that Internal Revenue Service (IRS) revenue rulings and revenue procedures represent the IRS's interpretation of the tax law).

144 *See, e.g.*, Callahan, *supra* note 7, at 1289-94 (arguing that *Chevron* deference is an instance of the judiciary's self-imposed limitation on its own jurisdiction).

also has been the subject of an express grant by Congress.

To a certain extent, the contours of the independent judicial deference position have been stated in the two preceding sections. As we have seen, reading *Chevron* as an implied grant by Congress to agencies of the power to interpret statutes, even if by formally legislative rule, poses no constitutional or statutory problems as long as that grant is not construed as either exclusive or final. Nor does the APA establish any procedural hurdles analogous to those an administrative rule must clear in order to count as a valid exercise of interpretative rulemaking authority. Congress may grant the authority to interpret statutes and leave the determination of the best procedure for promulgating interpretative rules to individual agencies.[145]

Indeed, the doctrinal questions relevant to judicial deference center not on its constitutionality, but on the specific nature and jurisdictional sweep of the deference. There are two reasons for this narrower focus. First, the tradition of judicial deference to agencies has become well entrenched in the last forty years. Agencies now enjoy judicial deference as a matter of course, and it is inconceivable that courts could abandon deference without wreaking havoc on their own dockets particularly and on administration generally.[146] More importantly, it is clear that federal courts have a general prudential power to decline to adjudicate cases they are statutorily or constitutionally empowered to hear. For example, federal courts may determine that an otherwise adjudicable case presents a political question[147] that is best left to resolution by the other branches of the federal government. Or, under any of several abstention doctrines, federal courts may decline to exercise their jurisdiction in favor of resolution in a state tribunal.[148]

In administrative law, the doctrine of primary jurisdiction presents the closest parallel to independent judicial deference to agency rulemaking. Primary jurisdiction permits federal courts to grant administrative agencies original jurisdiction to adjudicate claims within their distinctive competence or where a need for national uniformity is present.[149] This grant of adjudicative power is a kind of referral. Courts then may review

145 *See* 5 U.S.C. § 553(b)(3)(A) (1994).

146 *See* Sunstein, *supra* note 5, at 2079-82.

147 *Baker v. Carr*, 369 U.S. 186, 217 (1962), contains a "definitive," though probably not exhaustive, statement of the circumstances in which a case presents a nonjusticiable political question.

148 For example, the doctrine of *Pullman* abstention permits federal courts to decline to adjudicate cases raising a constitutional question if the case also presents a question of state law adjudicable in state court and adjudication of the state law question will resolve the controversy. *See* Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 500 (1941).

149 *See, e.g.*, United States v. Western Pacific R.R., 352 U.S. 59 (1956) (discussing issues beyond the conventional competence of judges); Texas & Pacific R.R. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) (requiring uniformity in federal programs).

agency decisions on appeal,[150] though typically that review is deferential.[151] Unlike statutory jurisdiction, primary jurisdiction "is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency."[152] For this reason, primary jurisdiction "involves a more pragmatic evaluation of the advantages and disadvantages of allowing the agency to resolve an issue in the first instance."[153]

The principal difference between primary jurisdiction and *Chevron* deference consists in the formal roles the agency and the court play in the two instances. Under the doctrine of primary jurisdiction the agency reaches a quasi-judicial decision, and the court typically functions as a court of appeal, though its review may be de novo. It reviews a prior adjudication that itself has the salient features of a trial. By contrast, courts deferring to agency rules do not function as reviewing bodies, but as tribunals of original jurisdiction. Although the agency rule in most instances predates the court's adjudication, the court is the first forum to address and resolve the concrete controversy that has arisen between the parties. Accordingly, the questions raised by the independent judicial deference view center on the nature of the power courts and agencies exercise under *Chevron*. Although such values as agency expertise and national uniformity may animate both primary jurisdiction and *Chevron*, it appears that agencies play an ancillary role when courts defer to agency rules rather than to agency adjudication.[154]

As I have suggested above, to argue that *Chevron* deference to reasonable agency interpretations is a prudential doctrine does not settle all questions concerning the legitimate scope of that deference. Different doctrinal results follow depending upon its basis. For instance, one might understand *Chevron* as representing a kind of justiciability doctrine akin to the political question doctrine.[155] So read, *Chevron* effectively stands for

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150 *See* Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481 (1958) (reversing the rate scheme earlier held to fall under the FMB's primary jurisdiction).

151 *See* 2 DAVIS & PIERCE, *supra* note 21, § 14.1; *see also* American Auto. Mfrs.' Ass'n v. Massachusetts Dep't of Envtl. Protection, 163 F.3d 74 (1st Cir. 1998) (invoking primary jurisdiction to defer to the EPA's reasonable interpretation of an ambiguous statute).

152 Reiter v. Cooper, 507 U.S. 258, 268 (1993); *see also American Auto. Mfrs.' Ass'n*, 163 F.3d at 81 ("When the matter at issue is primarily one of statutory interpretation, referral of that matter to the agency with primary jurisdiction may also be generally advisable in precisely those circumstances in which a court would defer to the agency's interpretation pursuant to *Chevron* . . . .").

153 2 DAVIS & PIERCE, *supra* note 21, § 14.1.

154 For an instance of the application of the doctrine of primary jurisdiction in the context of *Chevron* deference, see *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir. 1989), in which the court invoked primary jurisdiction of the Department of Transportation (DOT) and then deferred to DOT's rule on *Chevron* grounds. *Chevron* was directly implicated because the adjudicative fact resolved by DOT related exclusively to "legal conclusions" reached by the Secretary of the DOT. *See id.* at 167-68.

155 Callahan aptly describes justiciability as "look[ing] to the appropriateness of providing a judicial response to a given problem." Callahan, *supra* note 7, at 1290.

the proposition that reasonable agency rules present nonjusticiable questions—questions the courts are constitutionally and statutorily empowered to reach but that are inappropriate for judicial resolution.[156] Or, *Chevron* might be "understood as having established what is essentially a rule of abstention in favor of another governmental decisionmaker."[157] On this abstention view, *Chevron* deference would rest on the idea that judicial resolution of statutory ambiguity or silence represents an invasion into agency decision-making processes that deserve to remain sacrosanct. In either case, *Chevron* deference would amount to a judicial refusal, on prudential grounds of comity, expertise, or political expedience to decide a case falling under the court's jurisdiction.

The greatest difficulty facing the justiciability analysis is its incompatibility with courts' actual conduct in cases of *Chevron* deference. Justiciability questions typically concern the propriety of federal judicial decision, not the grounds for decision. In this respect, justiciability is a doctrine of federal court jurisdiction rather than of source of law.[158] By contrast, courts exercising *Chevron* deference actually decide the cases before them.[159] Bringing *Chevron* within the ambit of justiciability doctrines thus would require a reading of that doctrine that is fundamentally at odds with its purpose of controlling federal court jurisdiction.

In fact, the judicial expertise model furnishes a much more apposite description of most instances of *Chevron* deference to agencies' interpretations. In particular, this model accurately describes *Chevron* deference except where courts defer to agencies' legislative rules that fill statutory gaps. It also supplies a theoretical foundation for *Chevron* deference for all cases that does not offend established constitutional doctrine. At bottom, the judicial expertise view rests on the principle that

156 In particular, *Chevron* might appear to qualify as an instance of *Baker v. Carr's* second kind of political question, presenting "a lack of judicially discoverable and manageable standards." Baker v. Carr, 369 U.S. 186, 217 (1962).

157 Callahan, *supra* note 7, at 1289.

158 *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 67-69 (2d ed. 1988). Tribe characterizes justiciability rules as a "self-regarding" jurisdictional doctrine created by the federal courts. *See id.*

159 Indeed, courts do not merely leave *Chevron* deference cases to agency resolution; they adopt as their own the views that agencies provide in their rules. There is no other way to explain the binding character of prior adjudication on future litigants where the court earlier deferred to an agency's interpretative rule. In such a case, future litigants may not appeal to the absence of judicial precedent on the point in question should they wish to contest the rule before a reviewing court. Rather, the earlier case binds them no differently than if the court had reached a decision de novo in the first adjudication. Indeed, even the agency will be bound where its interpretative rule has been the subject of *Chevron* deference and the agency has not in the interim supplanted the old rule with a new one. If *Chevron* deference consisted in substituting agency rulemaking for court adjudication, this result would not follow. In particular, agencies would be able to abandon the agency rule earlier accepted by a court on the ground that the court had not "reached" the question and so had not decided it.

in most instances a court's deference is purely substantive and has nothing to do with a judgment about who has the authority to decide. The court might accept the agency's interpretation, but in doing so the court simply elects to adopt the agency's judgment as its own; it does not give the agency authority to render the judgment. In this respect, deference is akin to a court's independent reliance on an expert called at trial, and the Supreme Court's admonition to defer is essentially a rule about whose expertise the court must rely on where a statute is ambiguous or the agency has not promulgated a legislative rule. But under *Chevron*, just as in the case of a court's reliance on a court-appointed expert, the fact of judicial deference in no way deprives the court's decision of its full judicial import.[160] The court makes a decision about who has more expertise, not about who has statutory or constitutional authority to decide.

The most important consequence of the judicial deference view is that deference to agency interpretations must be consistent with the exercise of judicial power. If the practice of deference does not diminish the judicial exercise of power, then courts remain no less circumscribed when deferring than when fashioning a rule de novo. The contrary view would have to explain how a court's mere "consultation" with an agency in aid of judicial power would permit an expansion or transformation of that power. This feature of specifically judicial deference again would serve to distinguish a case like *Young* from *Chevron*. Despite the functional similarity of the agency rules in the two settings, the Court's deference in *Chevron* rested on Congress's valid delegation of legislative rulemaking authority; in contrast, according to the reading of *Young* developed in this Article, there the FDA merely promulgated an interpretation. Accordingly, although a redefinition by the EPA of the technical term "stationary source" should merit judicial deference under *Chevron*, a court reviewing the FDA's reinterpretation of the statutory language at issue in *Young* should be only as deferential to the reinterpretation as it would be had the *Young* interpretation been fashioned by a court rather than by the FDA.[161]

Finally, the fact that *Chevron* deference typically is only "substantive" explains why courts should be especially hesitant to defer to an agency's reinterpretation of its governing statute, especially where a court has ratified the agency's prior view. Simply put, the principle of stare decisis—arguably no less foundational than the express provisions of

160 *Chevron* deference is thus like the doctrine of primary jurisdiction stripped of the procedural deference characteristic of deference to another adjudicative body.

161 In *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990), the Court held that deference to a reinterpretation depended on whether the prior interpretation had been deferred to or had been reviewed de novo by the court. Under the interpretation of *Chevron* advanced here, "review" by the prior court should be understood to include all prior judicial deference except deference to legislative, gap-filling rules.

Article III[162]—applies where courts defer to agency rules that are interpretative or that do not fill gaps in the same way it applies to courts engaged in de novo review. Although that principle does not bar a court from overruling prior adjudication, it does place substantial limits on judicial "reinterpretation." These limits are inconsistent with a blanket rule of deference to reasonable interpretations. Absent unusual circumstances, it is only for the legislature or one of its delegates to change law through new enactment. Judicial overruling of prior decisions is an extraordinary measure reserved for instances in which a patently unjust, undesired, or unforeseen outcome justifies a change of course, and legislative action cannot timely respond to the difficulty.[163] Since deference typically involves the same exercise of judicial authority as does scrutiny de novo, courts are no more free to ignore the restraints on their power when they defer than when they do not. Thus, while a proper reading of *Chevron* might support the Court's deference to the EPA's reinterpretation in *Chevron*, such a reading cannot support the Court's deference in *Rust*—at least not without an independent inquiry into whether there existed conditions supporting an overturning of precedent. *Rust*, after all, presented a reinterpretation of settled law concerning the meaning of "method of family planning." Had the Court rather than HHS initially determined that term's meaning in 1971, it is unlikely that the Court would have been willing to revisit and overrule that interpretation twenty years later. One is hard pressed to assume that such factors as the permissibility of HHS's new construction of the statute or the fact that the new construction now appeared to be a "better" interpretation would have outweighed the strong policy in favor of upholding prior judicial interpretations.[164] Notwithstanding the cogency of these arguments, the effect of *Rust* is to achieve precisely the same result—a diminution of the power of precedent and a consequent increase in unauthorized and non-accountable agency legislation.

III. Policy

Up to this point, the argument in favor of a narrow reading of *Chevron* has rested on the premise that *Chevron* must remain within existing constitutional and statutory limits on agency power. But one

162 *See* Merrill, *supra* note 16, at 1005-06; *see also id.* at 1006 n.152 ("There can be no doubt that the Framers of the Constitution understood that the norm of following precedent was an integral element of the functioning of courts.").

163 *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 162-69 (1982) (discussing circumstances in which judicial overruling of statutes is permissible); RONALD DWORKIN, LAW'S EMPIRE 244 (1986) (arguing courts possess power to overturn existing law on the basis of principle, not policy).

164 *See* Rust v. Sullivan, 500 U.S. 173, 184-85 (1991).

might just as easily read *Chevron* as a partial rethinking of either or both of these limits in light of the exigencies of the modern bureaucratic state. In that event, the evaluation of *Chevron* would turn not upon its incompatibility with existing doctrine, but instead upon the question of whether the circumstances of modern governance supported *Chevron*'s revision of longstanding principles of legislative delegation and separation of powers.

A number of commentators have argued that *Chevron* does effect a break with prior doctrine and that this break indeed represents an advance over that doctrine.[165] Professor Weaver contends that considerations of agency expertise and flexibility favor administrative rather than judicial interpretation of ambiguous or silent governing statutes.[166] Other commentators ground the policy of deference in agencies' greater political accountability. For example, Kenneth Starr has argued that because *Chevron* deference typically involves the settlement of policy questions, "democratically accountable officials" rather than unelected judges should interpret ambiguous statutes.[167] Indeed, Starr goes so far as to suggest that *Chevron*'s transfer of policy oriented questions to agency decision-makers does not undermine the separation of powers, but actually furthers it: Since policy setting is the province of the political branches, they, rather than the courts, should shoulder responsibility for resolving questions that bare interpretation of statutory language cannot.[168]

A closer analysis of deference to interpretation suggests, however, that its disadvantages often outweigh its benefits. While agency rulemaking may emphasize such factors as technical expertise, flexibility, and political accountability, it lacks the features of concreteness, independence, and interpretive expertise that mark judicial resolution of a fact-bound, individualized controversy. These attributes of judicial resolution do not decisively weigh in favor of de novo review, but they do weigh against any policy that decisively rules it out. Indeed, it is the variability of the factors supporting deference that suggests that *Chevron*'s all-or-nothing approach to agency rulemaking review is inappropriate.[169]

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165 *See supra* notes 163-164.

166 Faced with a "choice between competing interpretative alternatives" concerning a "policy choice, . . . there are compelling reasons to allow the responsible agency to make that choice. Its expertise, and its authority, give it a greater claim of authority." Weaver, *supra* note 17, at 558.

167 Starr, *supra* note 62, at 312.

168 *See id.* at 308. *See also* Pierce, *supra* note 17, at 2229 ("[T]he Court [in *Chevron*] recognized that the process of adopting a construction of an ambiguous statute is the process of resolving a policy dispute."). Other commentators arguing for an expansive reading of *Chevron* include Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 569 (1985); and Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 277-86 (1988).

169 *See* Recommendations and Statement of the Administrative Conference of the United States (ACUS) Regarding Practice and Procedure, 54 Fed. Reg. 28,972-73 (1989) (recommending judicial deference to agencies' legislative rules but stricter scrutiny of agencies' interpretative rules,

More importantly, this variability indicates the fundamentally judicial nature of most instances of deference under *Chevron*. Where an agency does not fill a gap, its activity is genuinely one of interpretation. But the relative capacity of different institutions to engage in interpretation is contextually variable. A rule that assigns that task to one body whenever a circumscribed set of conditions is met ignores the context-sensitive nature of the inquiry that must be made in order to determine who is best able to fashion a rule giving effect to statutory purposes. I suspect that much of the reported non-compliance with *Chevron* takes place in just those cases in which courts sense a particularly pressing need for a context-sensitive inquiry but where *Chevron* precludes the inquiry.[170]

Moreover, the factors relied upon by *Chevron* to support the presumption in favor of agency interpretations are themselves suspect where *Chevron* provides a rule of statutory interpretation rather than presumed legislative delegation. Justice Stevens identified as one of *Chevron*'s principal justifications the fact that agencies are accountable but courts are not.[171] Whereas courts are not permitted to reach decisions "on the basis of the judges' personal policy preferences," an agency "may, within the limits of [congressionally delegated policymaking responsibilities], properly rely upon the incumbent administration's views of wise policy to inform its judgments."[172]

As applied to agency interpretations, this reasoning is ill considered. Recall that where an agency resolves ambiguity, it provides meaning to statutory language and does not act on a mandate to legislate. But the meaning of language is not determined by the extent to which an agency must be responsive to political forces; it is determined through a consideration of statutory language, policy, and more generally the sorts of factors courts typically look to when they interpret statutes.[173] At most, an agency can aid in the analysis of these matters by virtue of its knowledge of these factors; an agency does not further the effort to ascertain meaning by making the interpretive process itself the subject of political debate. By joining the effort to subject all decision-making to the political process, *Chevron* forgets that the task of interpretation is one for the judiciary, one of the virtues of which is that it is shielded from popular will. If political accountability is permitted to form the basis of interpretation, it is likely that policy has invaded the interpretive process; it is likely, that is, that

guidelines, and other informal rules).

170 The argument suggests that court decisions are more likely to fail to cite or properly follow *Chevron* when the agency rule interprets statutory ambiguity than when it fills a legislative gap.

171 *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984).

172 *Id.*

173 *See generally* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (discussing models of statutory interpretation generally applied by courts).

legislation is taking place under the guise of interpretation.

The effects of surreptitious agency policymaking are especially pernicious in the case of agency reinterpretation, as *Rust* itself indicates. I suggested earlier that had *Rust* involved review of a judicial interpretation, the Court would have been much more hard pressed to overrule that interpretation. Comparing the effects of *Rust* to those of that hypothetical case, it becomes apparent why a judicial willingness to overturn precedent is more likely to subvert than to advance political accountability. Had *Rust* come out the other way, Congress could have changed the HHS rule through amending legislation only. Congress thus would have had to answer for legislation that it clearly considered to be controversial. One might counter that Congress could have given HHS this authority anyway merely by leaving a gap in the PHSA. But at a minimum such authority would have placed the public on notice of Congress's decision to delegate a politically sensitive issue to another body—if not when the legislation was passed, then at least when the agency first promulgated a rule to fill the gap. One also might argue that HHS could have provided the 1991 interpretation in 1971. Since such an interpretation would have been permissible under *Chevron* as an instance of independent judicial deference, it is not clear why the same result after a prior interpretation is impermissible. But this argument fails to recognize that the problem is the reversal of the policy, not the policy itself. That reversal upsets settled expectations about the meaning of the statute and calls into question the actual statutory meaning. In contrast to the first rule, which the agency promulgates against the backdrop of statutory ambiguity, a "reinterpretation" of previously clarified language reverses course where there is no reason to assume a change of course is necessary. It is one thing to give a meaning to statutory language that lacks a meaning; it is another to give statutory language meaning and then say the meaning is in fact different.

Conclusion

Chevron establishes a formal test for the validity of agency rules, although a substantive one focusing on the circumstances of rulemaking should apply. The test is formal in that validity does not depend on whether it is a good idea for the court to defer to the rule, but on whether Congress has satisfied, implicitly or otherwise, the conditions for a valid delegation and the agency has promulgated a legislative rule in accordance with statutory requirements. That *Chevron* establishes a formal inquiry is not surprising given the Court's tacit conceptualization of agency rules as emanating from Congress's implied delegation of legislative authority. In any such case, the question of whether deference is a good idea rests with

Congress—with its decision in the first place whether or not to delegate—not with the courts.

The *Chevron* inquiry is misplaced, however, because agency interpretation in the non-gap-filling case is by its nature a judicial activity, regardless of whether Congress and the agency have satisfied the procedural requirements for delegation and legislative rulemaking, respectively. For this reason, the existence of the agency's authority to interpret statutory ambiguity can and should be a substantive one for the court, just as the decision to delegate genuine legislative authority is a substantive one for Congress. In both instances, the question is not one of agency authority, but of agency competence. In the case of administrative interpretation, the answer to this question depends on the individualized circumstances of agency rulemaking; it depends on the inherently variable factors that *Chevron* requires reviewing courts to disregard.