Chapman Law Review

Volume 24
Issue 3 *Symposium: A Discussion on the Nondelegation and Chevron Deference Doctrines*

Article 2

Spring 5-1-2021

# Attacking Chevron: A Guide for Practitioners

Anthony Caso
*Chapman University Dale E. Fowler School of Law*, chapmanlawreview@chapman.edu


CHAPMAN LAW REVIEW

Citation: Anthony Caso, *Attacking* Chevron*: A Guide for Practitioners*, 24 CHAP. L. REV. 633 (2021).

# Attacking *Chevron*: A Guide for Practitioners

*Anthony Caso**

## INTRODUCTION

This Article is meant to assist advocates who find themselves fighting against *Chevron* deference—the argument that courts should cede to the administrative agencies the task of "interpreting" the text of the Act of Congress that is claimed to support agency actions. After a brief discussion of how *Chevron* deference works, this Article examines the problem of separation of powers that is inherent in the deference doctrine. The Article then turns to how to attack the deference doctrine when it is asserted as a defense by agencies.

*Chevron* deference is employed when an agency regulation is attacked as inconsistent with or beyond the scope of the federal law the agency is enforcing.[1] Under *Chevron*, the courts first determine whether the statutory provision at issue is ambiguous and second whether the administrative agency's interpretation of that statute is "reasonable."[2] So long as the agency has rule-making authority and the interpretation at issue was not developed in the midst of litigation over the disputed statutory test, the courts will give binding deference to "reasonable" agency interpretations.[3] Under *Chevron*, when there is an ambiguity or gap in the legislative scheme, the court treats that ambiguity as a congressional delegation of power to the agency to fill the gaps and make policy to resolve the ambiguity.[4] In other words, the courts hand over their authority to interpret law to the agency and assume Congress handed over its authority to make law to the agency.

---

* Professor of Law, Dale E. Fowler School of Law and Director of the Constitutional Jurisprudence Clinic, Chapman University, J.D. 1979, University of the Pacific, McGeorge School of Law, M.B.A. 1999, Golden Gate University. I would like to thank the United States Justice Foundation, which sponsored the Separation of Powers Project of the Constitutional Jurisprudence Clinic, which made this conference and this Article possible. I would also like to thank Dr. John Eastman who worked so hard to recruit speakers for the conference and who, as Dean of the School of Law at Chapman invited me to come to Southern California to take over as the Director of the Clinic.

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

2 *See id.* at 843–44.

3 *See* United States v. Mead Corp., 533 U.S. 218, 226–27, 229 (2001); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988).

4 *Chevron*, 467 U.S. at 843–44.

The problem of *Chevron* deference was demonstrated in Justice Kagan's concurring opinion (joined by Justice Breyer) in the recent decision in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*.[5] The issue before the Court was whether the Department of Health and Human Services, the Department of Labor, and the Treasury Department ("Departments") had authority under the Affordable Care Act to promulgate a regulation exempting employers with religious or moral objections from providing no-cost contraceptive coverage in the group insurance policy.[6] Did Congress grant that authority to the Departments in the statute? Justice Kagan wrote that she could find no clarity in the statute on the question.[7]

> If I had to, I would of course decide which is the marginally better reading. But *Chevron* deference was built for cases like these. See *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); see also *Arlington v. FCC*, 569 U.S. 290, 301, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013) (holding that *Chevron* applies to questions about the scope of an agency's statutory authority). *Chevron* instructs that a court facing statutory ambiguity should accede to a reasonable interpretation by the implementing agency. The court should do so because the agency is the more politically accountable actor. See 467 U.S. at 865–866, 104 S.Ct. 2778. And it should do so because the agency's expertise often enables a sounder assessment of which reading best fits the statutory scheme. *See id.,* at 865, 104 S.Ct. 2778.[8]

The statute is not clear, in Justice Kagan's view. Indeed, the statute says nothing about a requirement to provide no-cost contraceptive coverage nor the Departments' authority, or requirement, to provide a religious exemption to such a requirement.[9] Thus she "would defer to the Departments' view of the scope of Congress's delegation."[10] In this view, *Chevron* deference both does the job that Congress did not do (writing a clear statute) and the job the judiciary should do (interpret legal texts). In both instances, *Chevron* deference departs from the scheme of separated powers embedded in the Constitution.

*Chevron* implements the vision of Woodrow Wilson, the father of modern administrative law. Wilson disputed the need for separation of powers and instead argued for administrative

---

5 140 S. Ct. 2367, 2397–400 (2020) (Kagan, J., concurring).
6 *Id.* at 2372–73 (majority opinion).
7 *Id.* at 2397 (Kagan, J., concurring).
8 *Id.*
9 *Id.* at 2373 (majority opinion).
10 *Id.* at 2400 (Kagan, J., concurring).

officials with "large powers and unhampered discretion."[11] *Chevron* deference takes us a long way down the road to Wilson's dream of administrators with "large powers and unhampered discretion."[12] *Chevron* deference, in Justice Kagan's view, gives the administrator the "large power" to write into the law that which Congress left out, and the seemingly "unhampered discretion" to do so by excluding the judiciary from its job of legal interpretation.[13]

First, this Article shows that the argument that Congress intended agencies to "interpret" the statute and "fill in the blanks" cannot be justified with reference to the text. Next, the Article demonstrates that separation of powers is a key structural element of the U.S. Constitution and that *Chevron* deference upends that structure of separated powers. The doctrine of deference allows administrative agencies to usurp the power of legislation, and it allows agencies to displace the courts as interpreters of congressional acts. Congress cannot delegate lawmaking any more than the courts can delegate their duty to decide cases or controversies.

Much of this is not new but is intended to give the advocate the necessary background to make the arguments. All of this is prelude to consideration of what an advocate should do in order to overturn or limit *Chevron*. This Article proposes two tactics. First, insist on the exceptions. Much like *Auer* deference to an agency's interpretation of its own regulations has been circumscribed by an ever-growing list of exceptions,[14] *Chevron* deference can also be limited—some limitations have already been imposed by judicial decision. Second, the advocate should insist that the courts return to their job of statutory construction.[15] *Chevron* only applies if the court finds the statute ambiguous after exhausting all of the tools of statutory interpretation. These tools of statutory construction do not allow deference to the agency where the meaning of a statute cannot be fixed.[16]

---

11 Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 213–14 (July 1887).

12 *Id.*

13 *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2397 (2020) (Kagan, J., concurring).

14 Kisor v. Wilke, 139 S. Ct. 2400, 2414–15 (2019).

15 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

16 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 134 (2012) ("There are sometimes statutes which no rule or canon of interpretation can make effective or applicable to the situations of fact which they purport to govern. In such cases the statute must simply fail." (citation omitted)).

Before discussing separation of powers, however, the Article discusses the question of whether Congress intended the courts to defer to executive agencies on questions of the meaning of legislative texts. That is, whether *Chevron* is a creature of legislative intent or one of judicial creation.

## I. THE MYTH THAT DEFERENCE FLOWS FROM CONGRESSIONAL INTENT

The Supreme Court has often repeated the claim that Congress intended for the courts to defer to the judgment of agencies when interpreting a statute.[17] This congressional intent is claimed to be found where Congress left a gap in the statutory scheme and gave rule-making authority to the agency.[18] The Court has even described this as an "express delegation of specific interpretive authority" to the agency.[19] The Court explained its thought process on the idea that *Chevron* deference was intended by Congress as follows:

> We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.[20]

The problem with this line of thought is that there is no reference to any actual statute or congressional text expressing such an intent.[21] Professor Hamburger observed: "As a result of *Chevron*'s presumption from ambiguity, the courts have ended up in the peculiar position of basing their deference on statutory authorization while presuming such authorization from what the statutes do not say."[22]

Further, this theory of implied congressional intent forces the courts to ignore the one clear statement from Congress on who should interpret the statute.[23] Section 706 of the Administrative Procedure Act provides: "To the extent necessary

---

17 *See Chevron*, 467 U.S. at 843–44.

18 *See* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 173–74 (2007); *see also* King v. Burwell, 576 U.S. 473, 485 (2015).

19 United States v. Mead Corp., 533 U.S. 218, 229 (2001).

20 Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996).

21 *See id.*; *see also* Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1192 n.15 (2016).

22 Hamburger, *supra* note 21.

23 *See id.*

to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[24] The phrase "decide all relevant questions of law" does not appear to be ambiguous.[25] "It is emphatically the province and duty of the judicial department to say what the law is."[26] But Congress, in the Administrative Procedure Act, decided to remove any doubt on the question by specifying that the reviewing court is tasked with the duty to "interpret constitutional and statutory provisions."[27]

Rulemaking authority granted in a statutory scheme is often specific and reveals no intent to set up agencies as the final arbiter of the meaning of federal law. For instance, the Clean Air Act orders the Administrator of the Environmental Protection Agency to issue regulations prescribing air quality standards for designated air pollutants.[28] Nothing is said about the EPA's authority to interpret the statute. Sometimes the statute grants a broad-ranging authority to an agency. One example is found in the Communications Act of 1934 where Congress granted the Federal Communications Commission the authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."[29] The rulemaking authority there is quite broad, but it says nothing about displacing the courts' traditional function of interpreting the law.

Congress did not leave much room for the courts to presume a contrary intent from statutory silence. If there was evidence of such an intent, there would be no basis for the courts to refuse to apply *Chevron* deference when an agency has failed to invoke the doctrine or has affirmatively waived it. But as Justice Gorsuch has noted,

> [the] Court has often declined to apply *Chevron* deference when the government fails to invoke it. *See* Eskridge & Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From Chevron to Hamdan, 96 Geo. L. J. 1083, 1121-1124 (2008) (collecting cases); Merrill, Judicial Deference to Executive Precedent, 101 Yale L. J. 969, 982-984 (1992) (same); *see BNSF R. Co. v. Loos*, 586 U. S. ——, 139 S.Ct. 893 (2019).[30]

---

24 5 U.S.C. § 706.

25 *Id.*

26 Marbury v. Madison, 5 U.S. 137, 177 (1803).

27 5 U.S.C. § 706; *see* Hamburger, *supra* note 21, at 1192 n.15 (citing Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 994–95 (1992)).

28 42 U.S.C. § 7409.

29 47 U.S.C. § 201(b).

30 Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 790

Nor can the courts base continued application of *Chevron* deference on a theory of congressional acquiescence. There have been instances where the courts have found "Congress' failure to disturb a consistent judicial interpretation of a statute" as some evidence of congressional intent.[31] However, with *Chevron* deference we are not talking about the consistent interpretation of a single statute. It is certainly not an interpretation of the judicial review provisions of the Administrative Procedures Act. Nothing in the Act permits the implication that issues of statutory interpretation are committed to agency discretion. Precisely the opposite is true. The Act expressly commits those questions to the courts. Further, *Chevron* deference is a doctrine that is applied to *every* statute conferring authority on an executive agency to make regulations.[32] *Chevron* deference may be the preferred policy of the judiciary. There is no evidence, however, that it represents the intent of Congress.

Finally, the Supreme Court in *Mead* ruled that *Chevron* deference was only available to regulations enacted pursuant to the notice and comment provisions of the Administrative Procedure Act (or Orders issued through APA adjudication).[33] Yet the courts have not explained how this is consistent with the theory that Congress intended to leave the question up to the agency. If Congress is relying on agency expertise, what is the purpose of notice and comment procedures? Under the notice and comment provisions of the APA, the agency must publish notice of proposed rulemaking and then allow the public a period of time to comment on the proposal.[34] The agency must then respond to the comments.[35] If the agency decides to alter the proposal significantly, it must publish a new notice of proposed rulemaking starting the process all over.[36] The procedure is intended to ensure that the public, and regulated parties, have fair notice of and opportunity to comment on the regulation.[37]

How does a requirement that the agency respond to public comments on a proposed regulation show that Congress desired to leave the policy up to the agency? The notice and comment procedural requirements are instead evidence that Congress does not entirely trust the agency's decisions on policymaking and gap-filling.

---

(2020) (mem.) (statement of Gorsuch, J.).

31 Monessen Sw. Ry. Co. v. Morgan, 486 U.S. 330, 338 (1988).

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

33 *See id.*

34 5 U.S.C. § 553; Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015).

35 *Perez*, 575 U.S. at 96.

36 *See* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 173 (2007).

37 *Id.* at 174.

These procedural requirements show that Congress did not leave the agency free to act on its own. Nothing in the APA demonstrates that Congress gave the agency the authority to regulate free of interference from the courts on the question of whether the regulation comports with the statute enacted by Congress.

In any event, Congress has no power to confer either law-making power or judicial power on executive agencies.[38]

## II. THE PROBLEM OF SEPARATION OF POWERS

*Chevron* deference has administrative agencies usurping the judicial role of interpreting legal texts and the congressional role of enacting legislation. If the legislation is so vague as to have multiple or no discernable meaning, the agency is effectively exercising Congress' lawmaking power when it "interprets" the legislation. Agencies are left to fill gaps in the statutory framework and to make policy.[39] This administrative action is further insulated from meaningful review when the judiciary defers to the agency interpretation. *Chevron* creates the perfect storm for destruction of separation of powers limits that are embedded in the structure of the Constitution.

Separation of the powers of government is a foundational principle of our constitutional system. There can be little debate that separation of powers was considered an essential component in the plan of government by the Framers. Even before a national constitution was ever considered, the founding generation made sure that newly formed state governments were based on separated powers.

In Virginia, the Fifth Revolutionary Convention approved the Declaration of Rights in June of 1776 that insisted that "legislative and executive powers . . . should be separate and distinct from the judiciary."[40] The new Virginia Constitution adopted that same month also required that the branches of government be "separate and distinct" and commanded that they not "exercise the powers properly belonging to the other."[41]

---

38 John C. Eastman, *The President's Pen and the Bureaucrat's Fiefdom*, 40 HARV. J.L. & PUB. POL'Y 639 (2017); *see* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); Panama Refin. Co. v. Ryan, 293 U.S. 388, 428–29 (1935).

39 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

40 VIR. DEC. OF RIGHTS (1776), *reprinted in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION 530 (John P. Kaminski et al. eds., 2009).

41 CONST. OF 1776, *reprinted in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION 533 (John P. Kaminski et al. eds., 2009).

The Massachusetts Constitution of 1780 contained a similar provision and added the purpose of separated powers "to the end it may be a government of laws and not of men."[42]

The denial of separated powers was among the complaints listed against the crown in the Declaration of Independence.[43] Justice Story notes that the first resolution adopted by the Constitutional Convention in 1787 was for a plan of government consisting of three separate branches of government.[44]

The Framers and Ratifiers of the Constitution understood that separation of powers was necessary to protect individual liberty. In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government.[45]

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government.[46] That design divided the power of the national government into three distinct branches, vesting the legislative authority in Congress, the executive power in the President, and the judicial responsibilities in the Supreme Court and lower federal courts.[47]

The ratification debates demonstrate the importance of this separation to the founding generation. The argument was not whether to separate power, but whether the proposed constitution separated power enough.[48] Fearing that the mere prohibition of one branch exercising the powers of another was insufficient, the Framers designed a system that vested each

---

42 MASS. CONST. OF 1780, *reprinted in* 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION 445 (John P. Kaminski et al. eds., 2009).

43 THE DECLARATION OF INDEPENDENCE paras. 9–10 (U.S. 1776) (noting obstruction of "the administration of justice" and the king's power to make "judges dependent on his will alone").

44 *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 519 (Melville M. Bigelow ed., Little, Brown, & Co., 5th ed. 1905) (1833).

45 *See, e.g.*, MONTESQUIEU, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed., Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 150–51 (William S. Hein & Co., Inc. 1992) (1765); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 82 (Thomas P. Peardon ed., Prentice-Hall, Inc. 1997) (1690).

46 *See* THE FEDERALIST NO. 51, at 267 (James Madison) (George W. Carey & James McClellan eds., 2001); THE FEDERALIST NO. 47, *supra*, at 249, 251 (James Madison); THE FEDERALIST NO. 9, *supra*, at 38 (Alexander Hamilton); *see also* Letter from Thomas Jefferson to John Adams (Sept. 28, 1787), *in* 1 THE ADAMS-JEFFERSON LETTERS 199, 199 (Lester J. Cappon ed., 1959).

47 Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983).

48 THE FEDERALIST NO. 48, *supra* note 46, at 256 (James Madison).

branch with the power necessary to resist encroachment by another.[49] Madison argued that what the anti-federalists saw as a violation of separation of powers was in fact the checks and balances necessary to enforce separation.[50]

James Madison explained that a mere prohibition on exercising the powers of another branch of government was not sufficient: such prohibitions were mere "parchment barriers."[51] Thus, the Constitution was designed to give each branch the power to protect its powers from the other branches.[52] Because the three powers of government were not equal, the constitutional design does not have a pure separation of powers. To accomplish an equilibration of power, the Constitution gives each branch some limited role in the operation of the other branches.[53] Thus, for example, the Executive wields the power to veto legislation, while the Judiciary wields the power to determine the meaning of laws and whether they comport with the Constitution.[54] Leaving interpretation of laws to the lawmaking branch, according to Blackstone, is an invitation to "partiality and oppression."[55] Sensible toMindful of this danger, the Framers vested these powers in the judicial branch.[56]

The Supreme Court has also recognized that Separation of Powers is the core structural principal of the Constitution.[57] As Justice Kennedy explained:

---

49 *Id.*

50 *Id.*; THE FEDERALIST NO. 51, *supra* note 46, at 268–69 (James Madison); *see also* Mistretta v. United States, 488 U.S. 361, 380 (1989).

51 THE FEDERALIST NO. 48, *supra* note 46, at 256 (James Madison).

52 THE FEDERALIST NO. 51, *supra* note 46, at 268–69 (James Madison).

53 *Id.* at 267–68.

54 At first blush, it appears that the checks and balances designed into the Constitution did not have the desired effect. However, then-Judge Kavanaugh noted that *Chevron* deference "encourages the Executive Branch . . . to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations . . . ." Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)). The adoption of the *Chevron* doctrine empowers the Executive at the expense of the Legislature. If there is a failure in the system of checks and balances, it is found in the refusal of the courts to enforce the separation of powers.

55 BLACKSTONE, *supra* note 45, at 58.

56 *See* FEDERALIST NO. 51, *supra* note 46 at 268–69 (James Madison).

57 Boumediene v. Bush, 553 U.S. 723, 797 (2008) ("[P]ersonal liberty . . . is secured by adherence to the separation of powers."); Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991) ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."); Mistretta v. United States, 488 U.S. 361, 380 (1989) ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.").

> In recent years, perhaps, we have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights. The conception of liberty embraced by the Framers was not so confined. They used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts. The idea and the promise were that when the people delegate some degree of control to a remote central authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands limits on the ability of any one branch to influence basic political decisions.[58]

The doctrine of *Chevron* deference, however, breaches this core doctrine of separation of powers in two fundamental ways. First, it allows executive agencies to exercise Congress's power to legislate Constitution vests the power to make laws solely in Congress and strictly limits how those laws can be made. Second, *Chevron* deference impermissibly allows executive agencies to exercise the Judiciary's well-settled power "to say what the law is."[59]

## III. *CHEVRON* DEFERENCE ALLOWS THE EXECUTIVE TO EXERCISE LEGISLATIVE POWER

*Chevron* deference involves an explicit recognition that administrative agencies make "law"—that is to say, agencies promulgate substantive legal obligations (or prohibitions) that bind individuals. Pursuant to the doctrine, courts may not interfere with agency lawmaking so long as the congressional enactment is ambiguous, the agency has both expertise and rulemaking authority, and the agency's interpretation is at least a possible interpretation of the law.[60] The courts have recognized that agencies are clearly involved in lawmaking when they enact substantive rules that are subject to *Chevron* deference.[61] There are two problems with deference in this regard. First, the Constitution assigns lawmaking exclusively to Congress. Second, reflecting the Founders' fears over the power of legislative branch, the Constitution specifies a particular procedure through

---

58 Clinton v. City of New York, 524 U.S. 417, 450–51 (1998) (Kennedy, J., concurring).

59 Marbury v. Madison, 1 Cranch 137, 177 (1803).

60 There is no requirement for the agency construction of the statute to be the best interpretation. Indeed, under *Chevron* the agency is even empowered to subsequently change its mind about what the statute means. *See* Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–83 (2005).

61 *See* United States v. Mead Corp., 533 U.S. 218, 233 (2001).

which laws are to be made.[62] Agencies do not follow that procedure when promulgating regulations.[63]

Article I, section 1, clause 1 of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[64] This is the first of the three "vesting clauses"[65] that sets out the basic plan of government under the Constitution and that provide the framework for the scheme of separated powers. Powers vested in one branch under the vesting clause cannot be ceded to or usurped by another.[66]

The legislative power is the power to alter "the legal rights, duties and relations of persons."[67] This is the same definition given to "substantive rules" adopted by administrative agencies. Section 551 of the Administrative Procedure Act defines the term "rule" as an agency statement that prescribes "law or policy."[68] These are "laws" that impose "legally binding obligations or prohibitions" on individuals.[69] It is difficult to see much space between agency "rules" and the "legislation" that Article I of the Constitution reserved exclusively to Congress.[70] Responding to the point that "some administrative agency action—rulemaking, for example—may resemble 'lawmaking,'" the Supreme Court noted that agency action will always be limited to mere executive administration of the laws "because . . . [the agency's] administrative activity cannot reach beyond the limits of the statute that created it."[71] If the question is whether Congress has delegated a power reserved exclusively to Congress, the *Chadha* Court noted that the courts were available to ensure that administrative agencies adhered to "the will of Congress."[72]

Those checks were largely illusory before *Chadha* was decided. The idea of ensuring that agency activity "cannot reach beyond the limits of the statute that created it" requires a statute with definable limits. If courts cannot determine the limits of

---

62 U.S. CONST. art. I, § 7, cl. 2.

63 *See* Administrative Procedural Act, 5 U.S.C. § 553 et seq.

64 U.S. CONST. art. I, § 1, cl. 1.

65 U.S. CONST. art. II, § 1, cl. 1; U.S. Const. Art. III, § 1, cl. 1.

66 *E.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 67–68 (2015) (Thomas, J., concurring).

67 *See* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 952 (1983).

68 The Administrative Procedure Act, 5 U.S.C. § 551 et seq.

69 Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 123 n.4 (2015) (Thomas, J., concurring).

70 *See* Hamburger, *supra* note 21, at 1194 n.21, 1196; Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 5 (1983).

71 *Chadha*, 462 U.S. at 953 n.16.

72 *Id.*

congressional will, there is no standard for them to enforce.[73] In *J.W. Hampton, Jr., & Co. v. United States*[74] the Supreme Court came up with a theory that so long as Congress set down an "intelligible principle" for agency action, that was sufficient to avoid a conclusion that the Congress had impermissibly delegated its lawmaking power to the executive branch.[75] However, the idea that this doctrine requiring an "intelligible principle" would actually provide an enforceable norm was very short lived. Just four years after the *J.W. Hampton* decision, the Supreme Court ruled that a requirement for the agency to regulate in the "public interest" was a sufficient intelligible principle.[76] These decisions stripped both "intelligible" and "principle" from the standard, leaving Congress free to delegate that which the Constitution explicitly vests in Congress and Congress alone.

In any event, neither of the checks touted by the *Chadha* Court continue to exist under *Chevron*. Under *Chevron*, it is the agency that has the last word on whether the agency's action reaches beyond the limits of the statute. The most the courts will do is determine whether the agency interpretation of the statute is "reasonable"—that is, whether the agency's interpretation is a *possible* construction of the statute, though not necessarily the best reading. Further, the courts no longer ensure that agencies adhere to the will of Congress, since *Chevron* deference requires courts to defer to the agency's determination of Congress's will.[77]

By taking the courts out of the role that the *Chadha* Court thought critical, *Chevron* deference invites the administrative agency to usurp Congress's power to make law.[78] Further, it

---

73 *Id.*

74 276 U.S. 394 (1928).

75 *Id.* at 409.

76 *See* N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943).

77 Of course, the courts are only supposed to defer once they determine that the statute is ambiguous. This requires the courts to use all of the tools of statutory construction to determine the meaning of the law. *See* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000); Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984). If the statute remains ambiguous once all the tools of statutory interpretation have been exhausted, a different problem is presented. *See* Michigan v. EPA, 576 U.S. 743, 762–63 (2015) (Thomas, J., concurring) ("For if we give the 'force of law' to agency pronouncements on matters of private conduct as to which '"Congress did not actually have an intent,"' we permit a body other than Congress to perform a function that requires an exercise of the legislative power. . . . It is the power to decide—without any particular fidelity to the text—which policy goals EPA wishes to pursue.") (internal citations omitted).

78 Kavanaugh, *supra* note 54 at 2151.

invites Congress to increasingly delegate its lawmaking power to administrative agencies.[79] The result in either instance is that agencies in the Executive branch of government combine lawmaking with law execution in a single office. This is something that the structure of the Constitution was designed to prevent.[80] As the Supreme Court has noted on many occasions, this combination of powers in a single office is a threat to individual liberty.[81]

To that end, Congress cannot delegate its lawmaking power. The text of the Constitution is clear that the power of legislation—at least as far as the Constitution permits legislation at all—is reserved exclusively to Congress.[82] The Constitution further limits how legislation can be made. Congress's power to make law can only be exercised by following a specific procedure.[83] According to the text, Congress can *only* act pursuant to "a single, finely wrought and exhaustively considered, procedure"[84] that includes bicameralism (the requirement that a measure be approved by both houses of Congress) and presentment (allowing the President the opportunity to veto the legislation).[85] The Supreme Court recognized that these provisions might prevent Congress from acting in an efficient manner. However, "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ."[86]

The system built by the founding generation was purposefully inefficient. Under the Constitution, the legislative branch is divided into two houses, each selected by a different manner.[87] No bill can become law until it has been enacted by both houses of the Legislature and then presented to the President for approval.[88] This is a cumbersome process but one that those who framed and ratified the Constitution thought necessary to preserve liberty.[89]

---

79 *Michigan*, 576 U.S. at 762–63 (Thomas, J., concurring).

80 Clinton v. City of New York, 524 U.S. 417, 450–51 (1998) (Kennedy, J., concurring).

81 *See* THE FEDERALIST NO. 51, *supra* note 46 at 268–69 (James Madison); *see also Boumediene v. Bush*, 533 U.S. 723, 172–43 (2008).

82 *See* U.S. CONST. art I, § 1, cl. 1.

83 *See* Rapanos v. United States, 547 U.S. 715, 750 (2006); Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983).

84 *Chadha*, 462 U.S. at 951.

85 *Id.* at 946–51.

86 *Id.* at 944.

87 U.S. CONST. art. I, §§ 2, 3.

88 U.S. CONST. art. I, § 7, cl. 2.

89 JAMES MCCLELLAN, LIBERTY, ORDER, AND JUSTICE 339 (Liberty Fund, Inc. 3d ed.,

A unicameral legislative body would certainly have been more efficient, but most of the colonial governments had moved to a bicameral legislature by the time the Constitution was being drafted.[90] The Framers were concerned that a powerful legislative branch at the federal level would be a threat to liberty.[91] They had learned that it was nearly impossible to restrain the legislative power when vested in only one body.[92] As James Wilson would later remark: "A single legislature is calculated to unite in it all the pernicious qualities of the different extremes of bad government."[93]

James Madison explained, "[i]n republican government, the legislative authority necessarily predominates."[94] The remedy was to split the legislative branch into two houses.[95] This fit into the scheme of divided power meant to preserve liberty.[96] By the time of the framing of the Constitution, the idea that the legislature had to be divided was a view held by "most persons of sound reflection."[97] It was for these reasons that the Constitution specified a "single, finely wrought and exhaustively considered, procedure" for enactment of federal law.[98]

Deferring to agency "gap-filling" and "policy making," however, allows executive branch agencies to "make law" without following this single, finely wrought procedure. There is no need of political compromise or consensus building. There is no procedure for deliberation and there is certainly no element of republican government. Law is not proposed by representatives, it is imposed by executive branch employees.

---

2000) (1989) ("Speed, however, is not a virtue in the political process crafted by the Framers. The system is intended to promote careful deliberation, which is time-consuming, to be sure, but necessary to build a consensus so that the decision finally made has broad support.").

90 *See* FEDERAL FARMER: AN ADDITIONAL NUMBER OF LETTERS TO THE REPUBLICAN, (New York, May 2, 1788) *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION 985–86 (John P. Kaminski et al. eds., 2009).

91 *See* JAMES WILSON, OF GOVERNMENT, THE LEGISLATIVE DEPARTMENT, LECTURES ON LAW 1791, *reprinted in* 1 THE FOUNDERS' CONSTITUTION 377, 377 (Philip B. Kurland & Ralph Lerner eds., 1987).

92 *Id.*

93 *Id.*

94 THE FEDERALIST NO. 51, *supra* note 46, at 269 (James Madison).

95 *Id.*

96 *See* ST. GEORGE TUCKER, *Of the Several Forms of Government*, *in* VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 21, 48 (1999); *see also* THE FEDERALIST NO. 51, *supra* note 46, at 268–69 (James Madison).

97 JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION, § 547 (1833), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 378, 378 (Philip B. Kurland & Ralph Lerner eds., 1987).

98 Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983).

One argument for *Chevron* deference is that executive branch agencies are more politically accountable than the courts.[99] There are two responses. First, the courts are not supposed to be politically accountable. They are supposed to operate outside of politics and render judgment on the matters brought before them.[100] Second, executive agencies are not politically accountable. Rules cannot be changed simply because the individual occupying the Office of President has changed.[101] Further, it is unlikely that the President could control the behavior of administrative agencies at that fine of a level.[102] Even if one were to assume that the President had direct, day-to-day control over all of the executive agencies (including the so-called "independent agencies" which are designed to operate outside of the three branches of government), that does not alter the fact that the agencies are making law outside of the Constitutional procedure.

## IV. *CHEVRON* DEFERENCE ALLOWS THE EXECUTIVE TO EXERCISE JUDICIAL POWER

Article III, § 1 of the Constitution vests the "judicial power" in the "Supreme Court and in such inferior Courts as the Congress may . . . establish."[103] In a scheme of separated powers, the key to judicial power is the "interpretation of the law."[104] This is a power that must be separated from both execution and legislation. Quoting Montesquieu, Justice Story notes "there is no liberty, if the judiciary power be not separated from the legislative and executive powers."[105] The purpose of the judiciary is to stand as a neutral arbiter between the legislative and executive branches—a necessary check on the political branches of government.[106] The separate judicial power allows the courts to

---

99 *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2397 (2020) (Kagan, J., concurring).

100 *See* THE FEDERALIST NO. 78, *supra* note 46, at 405–06 (Alexander Hamilton).

101 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42, 48 (1983).

102 *See* City of Arlington v. FCC, 569 U.S. 290, 313–14 (2013) (Roberts, C.J., dissenting).

103 U.S. CONST. art. III, § 1.

104 THE FEDERALIST NO. 78, *supra* note 46, at 404 (Alexander Hamilton); Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 119–20 (2015) (Thomas, J., concurring).

105 JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION, § 1568 (1833), *reprinted in* 4 THE FOUNDERS' CONSTITUTION 200, 200 (Philip B. Kurland & Ralph Lerner eds., 1987).

106 THE FEDERALIST NO. 78, *supra* note 46, at 405 (Alexander Hamilton).

serve as "bulwarks" for liberty.[107] This requires that judges have the power to "declare the sense of the law."[108]

The scheme for balancing power between the branches of government depends on each branch exercising the full extent of its power.[109] In order to keep the political branches in check, the courts may not surrender their power to interpret the law to either of the political branches. The failure to exercise this duty would be an invitation to "partiality and oppression."[110] Each branch of government must support and defend the Constitution and thus must interpret the Constitution.[111] The Courts may not, however, cede their judicial power to interpret the laws to the Executive.[112] The judicial branch accomplishes its role by ruling on the legality of the actions of the executive and giving "binding and conclusive" interpretations to acts of Congress.[113] Had the Constitution not assigned such a role to the judiciary as a separate branch, the plan of government "could not be successfully carried into effect."[114]

*Chevron* deference, however, alters this framework in a way that the separation of judicial from executive power is no longer enforced. It is no longer the exclusive province of the courts to interpret congressional enactments. Instead, the court now treats the existence of an "ambiguity" as meaning that Congress intended the agency, and only the agency, to interpret the statute. So long as the agency interpretation is "reasonable," *Chevron* requires the courts to cede their judicial power to the executive and approve the agency interpretation.

The Supreme Court took this line of argument to its logical extreme in *National Cable & Telecommunications Association v. Brand X Internet Services*.[115] There, the court ruled that *Chevron* deference applied to the FCCs decision that cable internet providers did not provide "telecommunications service" as defined by the Communications Act, and thus were exempt from common carrier regulation.[116] That part of the decision is not surprising. The

---

107 *Id.*

108 *Id.*; *see* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 944 (1983).

109 THE FEDERALIST NO. 51, *supra* note 46, at 269 (James Madison).

110 BLACKSTONE, *supra* note 45, at 58.

111 United States v. Nixon, 418 U.S. 683, 704 (1974).

112 *See id.*

113 WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES, *reprinted in* 4 THE FOUNDERS' CONSTITUTION 195, 195 (Philip B. Kurland & Ralph Lerner eds., 1987).

114 *Id.*

115 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

116 *Id.* at 977, 981.

Communications Act is a model of ambiguity, its provisions not anticipating the rapid evolution of broadband internet. The court was even willing to grant *Chevron* deference for a changed interpretation of the statute by the agency.[117] The statute had not changed, the agency's policy had changed. That, however, is more a problem of agency lawmaking as discussed in the prior section. The innovation introduced by *Brand X* is that the agency interpretation of Communications Act ran contrary to a Court of Appeals interpretation of the same provision in a prior case.[118] The Supreme Court ruled that *Chevron* required the Court of Appeals to ignore its prior ruling interpreting the Communications Act and instead defer to the Commission's new interpretation.[119] In effect, the Supreme Court ruled that the agency had the power to overrule an Article III court on a question of statutory interpretation.[120] The Court justified this by asserting that the agency was not engaged in statutory interpretation but rather "gap-filling."[121]

The Supreme Court had the opportunity to limit or overrule *Brand X* in *United States v. Home Concrete & Supply, LLC*.[122] At issue there was whether a subsequent regulation by the IRS could overrule a long-standing Supreme Court interpretation of the statute.[123] The Court ruled no—but not because it amounted to interference with the judicial power. Nor was the problem that the prior ruling was from the Supreme Court, as opposed to the Circuit Court of Appeals, as was the case in *Brand X.* Although the Supreme Court had noted in its prior ruling that the statute at issue was "ambiguous," that ruling was several decades before the *Chevron* ruling.[124] It seems that the court was saying that "ambiguous" may mean something different in the *Chevron* era. Further, the court argued that the interpretation set by the Supreme Court in the prior ruling "had the better side of the textual argument."[125] However, *Chevron* deference rulings consistently note that the agency's interpretation need not be the "best" reading of the statute.[126] So long as the agency's reading is "reasonable" the court must defer.[127] Thus, it is hard to say what impact, if any, *Concrete Home* will have on *Brand X.* A close read

117 *Id.* at 981.
118 *Id.* at 982.
119 *Id.* at 982–83.
120 *See id.*
121 *Id.*
122 United States. v. Home Concrete & Supply, LLC, 566 U.S. 478 (2012).
123 *Id.* at 481–82.
124 *Id.* at 488–89.
125 *Id.* at 489.
126 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).
127 *Id.*

of the case reveals that there is nothing in the majority opinion that challenges the *Brand X* holding that administrative agencies have the power to overrule prior court decisions.

A legislature cannot overrule a court, although it can enact a new law to avoid the effect of a ruling.[128] Similarly, prior rulings have held that the executive branch was bound to follow a final judgment of a court.[129] But *Brand X* holds that the executive is not bound at all by a judicial ruling on the interpretation of an Act of Congress.[130] Under *Brand X*, if it is a statute dealing with agency power and the court can find an ambiguity, the agency is free to come to a conclusion different from that reached by the court and the court must accept the agency's interpretation.[131]

The *Brand X* decision makes Montesquieu's worst fears of combined power a reality. An executive agency now has the power to make law (substantive rules that obligate individuals), enforce those laws, and to interpret its own authority to make those laws, free from judicial interference. The judicial, legislative, and executive powers are firmly held in a single hand.

Under *Chevron* deference, the regime of separated powers has come to an end. The agency now makes law, is the ultimate interpreter of its authority to make law, and executes the law it makes. Whatever the Supreme Court's motivation for developing this deference doctrine, it is clearly a doctrine that stands in opposition to the fundamental structure of the Constitution.

Those who seek to resurrect the rule of separated powers have their work cut out for them. *Chevron* has been in place for a long time and some members of the Supreme Court are unwilling to overturn precedent—even in cases that they believe were wrongly decided.[132] Still, there are two specific grounds of attack that can help rebuild the separation of powers structure of the Constitution. First, advocates can work on building exceptions to the *Chevron* deference doctrine so that deference becomes the exception rather than the rule. Second, advocates can focus on Step 1 of the *Chevron* analysis and insist that the courts actually use all of the tools of statutory interpretation before concluding that the law is ambiguous. Finally, if after all the tools of statutory construction have been used the law is still ambiguous,

---

128 *See* Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 218–19 (1995).

129 *See, e.g.*, Zivotofsky v. Clinton, 566 U.S. 189, 197 (2012).

130 *Brand X*, 545 U.S. at 983–84.

131 *Id.*

132 *See, e.g.*, June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2133–35 (2020) (Roberts, C.J., concurring); Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019).

the advocate should argue that Congress has failed to enact a law at all but has instead attempted an unconstitutional delegation of its lawmaking power to the Executive branch.

## V. ATTACKING CHEVRON – LIMITING EXCEPTIONS

One way to limit a rule is build a fence of exceptions around its application. An example of this is another type of deference in Administrative Law that also raised serious separation of powers concerns—*Auer* deference. Under *Auer* deference, courts are required to give controlling deference to an agency's interpretation of its own rules.[133] With *Auer* deference, the entity that wrote the rule was also the only entity that could interpret the rule.[134] Justice Scalia, author of the court's opinion in *Auer*, later came to criticize the rule as a violation of separation of powers and called for overturning that deference doctrine.[135] As the critiques mounted, the court began consciously cataloging the exceptions to the doctrine that had been noted in prior decisions.[136] Finally, in the 2019 Term, it looked like there were enough votes to overturn *Auer*. In *Kisor v. Wilkie*, however, the majority narrowed *Auer* and reemphasized the requirement that reviewing courts exhaust the traditional tools of statutory interpretation before finding a sufficient ambiguity that might raise the issue of deference to the agency interpretation.[137] Even then, the agency interpretation must be a reasonable one.[138]

Advocates should explore a similar approach for limiting the scope of *Chevron* deference. The Supreme Court has already ruled that *Chevron* deference is not available when the agency interpretation of the statute is contained in an opinion letter.[139] The court expanded this limitation in *United States v. Mead Corporation*[140] to rule that *Chevron* can only apply if Congress has granted rulemaking (or adjudicatory) authority to the agency.[141] There must be evidence that Congress granted the authority to issue rules on the subject at issue that carry the force of law.[142] Under these cases, an agency is not granted

---

133 Christopher v. Smithkline Beecham Corp., 567 U.S. 142, 155 (2012); Auer v. Robbins, 519 U.S. 452, 461–63 (1997).

134 *Auer*, 519 U.S. at 461.

135 Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68–69 (2011) (Scalia, J., concurring).

136 *See Kisor*, 139 S. Ct. at 2414–18.

137 *See id.* at 2423.

138 *Id.* at 2422.

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

140 *See* United States v. Mead Corp., 533 U.S. 218, 254–56 (2001).

141 *See id.* at 229.

142 *See id.* at 231–32; *see also* Adams Fruit Co. v. Barrett, 494 U.S. 638, 649–50

*Chevron* deference if it does not have authority to issue rules (or binding legal rulings through adjudication) on the specific question for which it is seeking deference. Further, an argument can be made that deference should not be granted if the interpretation in question was not adopted as part of notice and comment rulemaking or adjudication under the APA.

The Supreme Court has also shown reluctance to grant deference where the rule is one of "vast 'economic and political significance'" in the absence of clear authority from Congress for the rule.[143] Then Judge Kavanaugh framed this as the "major rules doctrine," which denies *Chevron* deference for significant rules in the absence of *clear* congressional authorization.[144] Justice Breyer referred to these as "important . . . question[s]" that Congress was more likely to answer itself rather than leave to an administrative agency.[145]

The "major rules doctrine" appears to have started with a case that should have been decided on the question of whether the agency interpretation was a reasonable one. In *MCI Telecommunications Corp v. AT&T*,[146] the question was whether the FCC could interpret the term "modify any requirement" to allow the Commission to render voluntary a filing that the statute made mandatory. The Court held that the term "modify" in the statute could not be read to permit the FCC to eliminate a statutory requirement.[147] As such, no deference was owed because the interpretation went "beyond the meaning that the statute can bear."[148] Although cited by the "major rules doctrine" cases, *MCI* is better situated as a case where the agency's interpretation was not reasonable. Still, advocates can certainly use this case where the agency strays too far from the apparent meaning of the statute.

A better case for the beginning of the "major rules doctrine" is *FDA v. Brown & Williamson Tobacco*.[149] There, the Food and

---

(1990). *But see* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (finding an interpretation by an agency subject to *Chevron* deference even where it was not adopted through notice and comment rulemaking where it was a long-standing interpretation).

143 Util. Air Regul. Grp., v. EPA, 573 U.S., 302, 321, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

144 U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

145 Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370, 383 (1986).

146 512 U.S. 218 (1994).

147 *Id.* at 231–32.

148 *Id.* at 229.

149 529 U.S. 120 (2000).

Drug Administration claimed authority to regulate tobacco products under the Food Drug and Cosmetic Act.[150] That law was enacted in 1938,[151] but the FDA did not discover its authority to regulate tobacco under the Act until 1996.[152] Since Congress had adopted other regulatory programs to cover tobacco products, the court ruled that tobacco products were not within the agency's regulatory authority.[153] The court noted, "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[154]

This reasoning was also employed by the court in rejecting EPA's attempt to use existing authority under the Clean Air Act to issue air pollutant standards in order to regulate greenhouse gases. The court noted that EPA's interpretation of its authority under the Clean Air Act "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[155]

*King v. Burwell*[156] is another case that can be included in the "major rules doctrine." The Patient Protection and Affordable Care Act requires the establishment of an "exchange" (an insurance marketplace for the purchase of health insurance) in each state.[157] If the state failed to create an exchange, the Act required the federal government to create the exchange for that state.[158] Tax credits were available under the Act for the purchase of health insurance through "an Exchange established by the State."[159] The question before the Court was whether an exchange created by the federal government was "an Exchange established by the State" for purposes of the tax credit.[160] The Internal Revenue Service promulgated a rule interpreting the statute as providing tax credits for purchase of insurance through a federally created exchange.[161]

The Supreme Court declined to apply *Chevron* deference to the IRS rule because it raised a question of "deep 'economic and

150 *Id.* at 125.
151 *Id.* at 131.
152 *Id.* at 125.
153 *Id.* at 161.
154 *Id.* at 160–61.
155 Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).
156 576 U.S. 473 (2015).
157 *Id.* at 483.
158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.* at 484.

political significance.'"[162] In such cases, the Court is hesitant to rely on an implied delegation to the administrative agency to resolve the issue.[163] Here, the deciding factor for the Court was its finding that it was unlikely that Congress would delegate to the IRS a question regarding health insurance policy.[164] Thus, where the question raises a question of "deep 'economic and political significance,'"[165] the advocate should explore whether the agency claiming the benefit of *Chevron* deference is in fact an expert on the particular question involved. While the IRS may have been expert on issues of tax policy and tax credits, it had no expertise on the program the tax credits were enacted to support. Without that policy background, the courts are unwilling to simply to defer to the agency. Even if the agency has expertise on the issue, the courts require a greater degree of clarity from showing that Congress intended to delegate resolution of the question to the agency.

A related doctrine is constitutional avoidance. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."[166] The question in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* was whether the Corps of Engineers could regulate an isolated body of water (not connected to any other body of water and completely within the boundaries of a single state)—a question that pushes the limits of the Congress's powers under the Commerce Clause.[167] The agency argued that migratory birds could view the body of water as a potential spot to stop (the "glancing duck test")[168], and that was sufficient to come within the Commerce Clause.[169] The Court refused to resolve the question without a clear signal from Congress that it was pushing such a claim of jurisdiction.[170]

The advocate can use these existing exceptions as a starting point for arguing for new exceptions and further limitations on

---

162 *Id.* at 485–86 (quoting 573 U.S. at 324).

163 *Id.* at 486.

164 *Id.*

165 *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. at 324).

166 Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172 (2001).

167 *Id.* at 162–64.

168 Larry R. Bianucci & Rew R. Goodenow, *The Impact of Section 404 of the Clean Water Act on Agricultural Land Use*, 10 UCLA J. ENV'T. L. & POL'Y 41, 65 (1991).

169 *Id.* at 164.

170 *Id.* at 173–74.

deference. The real battle, however, ought to be over the issue of statutory interpretation.

## VI. ATTACKING CHEVRON—A RETURN TO STATUTORY INTERPRETATION

*Chevron* deference only applies "if the statute is silent or ambiguous with respect to the specific issue."[171] Before a court can conclude a statute is ambiguous, however, it must first employ all the tools of statutory interpretation in an attempt to discern Congress's intent.[172] This requires the court to search for the statute's meaning, rather than just attempting to find an ambiguity. While "clever lawyers - and clever judges - will always be capable of perceiving *some* ambiguity in any statute,"[173] Justice Scalia noted, "Chevron is . . . not a declaration that, when statutory construction becomes difficult, we will throw up our hands and let regulatory agencies do it for us."[174]

Statutory interpretation may be the most effective attack against an agency claiming the benefit of *Chevron* deference. However, such a strategy will require the advocate to master not only the statutory scheme at issue in the case, but also the major canons of statutory construction.

Then Judge Kavanaugh argued that courts, when faced with a statutory construction question, should start off with the "best reading of the text" and then apply the canons of statutory construction.[175]

When faced with such a question, one should start with the text of the specific statute at issue.[176] The controlling presumption is "that a legislature says in a statute what it means and means in a statute what it says there."[177] Here, you need to look at the statutory scheme as a whole, and place the specific statute at issue in context.[178] The "best reading" is arrived at by starting with the words of the statute, the context

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

172 *See* Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581, 600 (2004); Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 446–48 (1987).

173 Abbott Lab'ys v. Young, 920 F.2d 984, 995 (D.C. Cir. 1990) (Edwards, J., dissenting) (emphasis in original).

174 Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 707 (1991) (Scalia, J., dissenting).

175 Kavanaugh, *supra* note 54, at 2121.

176 *See* Cmty. for Creative Non–Violence v. Reid, 490 U.S. 730, 739 (1989); United States v. Great N. Ry. Co., 287 U.S. 144, 154–55 (1932).

177 Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992).

178 *See* King v. Burwell, 576 U.S. 473, 492 (2015); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 320 (2014).

of the statute in the statutory scheme, and the general rules of the English language.[179]

A good resource for understanding the canons of statutory construction is Justice Scalia and Bryan Garner's book, *Reading Law*.[180] In addition to explaining the standard canons, the book provides an extensive bibliography of books and articles on interpretation of legal texts. For the advocate who needs to research statutory interpretation, this resource is a good starting point.

There is one rule of statutory interpretation that is particularly relevant to the issue of *Chevron* deference. *Chevron* only applies when, after exhausting all of the tools of statutory construction, the statute remains ambiguous. Under *Chevron*, the courts give the agency the power to fix the meaning of a genuinely ambiguous statute; however, "[t]o give meaning to what is meaningless is to create a text rather than to interpret one."[181]

The Supreme Court, in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*,[182] was confronted with a question of what exactly Congress authorized the Occupational Safety and Health Administration to do to protect workers from toxic substances. The statute at issue authorized the Secretary to promulgate health standards "which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard . . . for the period of his working life."[183] Did the statute authorize OSHA to regulate for a "risk free" workplace or was the agency required to conduct a cost-benefit analysis on the regulation? If it is required to make a decision on the basis of a cost-benefit analysis, then how is the agency to draw the line? What cost is too high, and what benefit is too low?

Then Justice Rehnquist, in his concurring opinion, noted that Congress "improperly delegated" to the Secretary of Labor how to balance costs and benefits of the regulation.[184] As he explained, the statute was "completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but

---

179 *See Util. Air Regul. Grp.*, 573 U.S. at 327.

180 *See* SCALIA, *supra* note 16; *see also* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

181 *See* SCALIA, *supra* note 16, at 134.

182 448 U.S. 607 (1980).

183 *Id.* at 612.

184 *Id.* at 672 (Rehnquist, J., concurring).

excusing him from that duty if he cannot."[185] According to Justice Rehnquist, the statute could not stand because it was a delegation that failed to provide an intelligible principle, failed to establish ascertainable limits on the agency's power under the statute, and failed to provide congressional decisions on the "important policy choices" involved with the regulation.[186]

No other member of the Court joined Justice Rehnquist's opinion, but there is increased interest among some of the current justices in the nondelegation doctrine. The advocate should not shy away from including these arguments as part of his or her presentation to the court, especially when the statutory text is not amenable to clear interpretation after exhausting all of the tools of statutory construction.

## VII. CONCLUSION

*Chevron* deference is a judicially created doctrine. Although it purports to be based on implied delegations by Congress, there is nothing in the text of statutes that agencies implement or the Administrative Procedure Act that provides support for the deference doctrine. Indeed, the Administrative Procedure Act expressly calls on the courts, not the executive, to interpret statutes and resolve issues of law.

Aside from its creation out of whole cloth, the deference doctrine upends the structure of separated powers that lies at the foundation of the Constitution. It allows executive agencies to exercise the lawmaking power that belongs exclusively to Congress as well as the judicial power that belongs exclusively to the judiciary. But advocates need not treat application of deference as a fait accompli. The purpose of this article is to give advocates the foundation in the arguments that can be made to attack deference and ultimately overturn *Chevron*.

185 *Id*. at 675.
186 *Id*. at 685–86.