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The Administrative State and Congressional Abrogation of the *Chevron* Doctrine

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Chairman Grassley, Ranking Member Leahy, and members of the Committee: thank you for providing me this opportunity to discuss the urgent need for Congress to reform and restrain the sweeping and largely unaccountable governmental powers exercised by administrative agencies.[1] As Chief Justice Roberts has recently lamented, "[t]he Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities."[2] The modern Administrative State has become a sovereign unto itself, a one-branch government whose regulatory grasp reaches into virtually every human activity.

The focus of my remarks will be on the Supreme Court's policy of deferring to agency interpretations of ambiguous statutes, known as the *Chevron* doctrine. In my view, this doctrine is of doubtful validity under both the Administrative Procedure Act ("APA") and the Constitution's separation of powers, and it exacerbates other constitutional concerns created by the rise of the modern Administrative State. My purpose today is to outline these serious problems with *Chevron* and to offer a few preliminary thoughts on actions that Congress can and should take to abrogate or at least restrain the doctrine.

I. The Rise of the Administrative State

As Justice Thomas observed in his concurring opinion in *Perez v. Mortgage Bankers Association* earlier this year, the modern Administrative State "has its root[s] in . . . the Progressive Era."[3] And the seeds from which those roots sprang were planted primarily by Woodrow Wilson, the Publius of the Administrative State. In his 1887 essay, "The Study of

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[2] *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting).

[3] 135 S. Ct. 1199, 1223 n.6 (2015) (Thomas, J., concurring in the judgment).

Administration,"[4] Wilson argued for broad delegations of regulatory authority to "expert" administrative agencies. Wilson believed that the economic and social transformations of the late-nineteenth century required a national government that could act with "the utmost possible efficiency."[5] But he lamented that our constitutional structure, with its carefully crafted system of separated powers and checks and balances, was not designed to be efficient;[6] to the contrary, it was designed to safeguard the People's liberty by making the exercise of Federal governmental power difficult.[7] Wilson complained that, under our system, "advance must be made through compromise, by a compounding of differences, by a trimming of plans and a suppression of too straightforward principles."[8] These inefficiencies were, to Wilson's mind, made even worse by the need to justify governmental reforms to the People, whom he regarded as "selfish, ignorant, timid, stubborn, or foolish."[9]

Wilson preferred to place governmental powers in the hands of those who could claim to have expertise relating to the policy issues under consideration. It was crucial to "discover the simplest arrangements by which responsibility can be unmistakably fixed upon officials," providing them with "large powers and unhampered discretion."[10] In Wilson's analogy, "[t]he cook[s] must be trusted with a large discretion as to the management of the fires and the ovens."[11] By conferring sweeping powers on the "experts," Wilson hoped to overcome the

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[4] Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 198 (1887).
[5] *Id.* at 197.
[6] *INS v. Chadha*, 462 U.S. 919, 944 (1983) ("By the same token, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . .").
[7] *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2597 (2014) (Scalia, J., concurring in the judgment) (describing "the folly of interpreting constitutional provisions designed to establish a structure of government that would protect liberty on the narrow-minded assumption that their only purpose is to make the government run as efficiently as possible" (quotation marks and citation omitted)).
[8] Wilson, *supra* note 4, at 207.
[9] *Id.* at 208.
[10] *Id.* at 213.
[11] *Id.* at 214.

inefficiencies of our constitutional system—that is, its checks and balances—and permit agencies to make policy swiftly, insulated from the political pressures faced by the People's elected representatives.

This vision of expansive bureaucratic power took hold in the Supreme Court's jurisprudence in the early twentieth century, particularly during the New Deal. As Wilson made clear, the key to the Progressives' vision of the Administrative State was the delegation of broad authority to agencies, and that meant that its greatest obstacle was the Constitution's exclusive, nondelegable grants of the three great powers of government to three separate branches of governments.

"[T]he Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government."[12] Article I vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States";[13] Article II vests "[t]he executive Power . . . in a President of the United States";[14] and Article III vests "[t]he judicial Power of the United States . . . in one supreme Court," and in congressionally established inferior courts.[15] "The declared purpose of separating and dividing the powers of government, of course, was to diffus[e] power the better to secure liberty."[16]

[12] *Department of Transp. v. Association of American R.R.*, 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring in the judgment).
[13] U.S. CONST. art. I, § 1.
[14] *Id.* art. II, § 1.
[15] *Id.* art. III, § 1.
[16] *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (alteration in original) (quotation marks omitted).

The Supreme Court has recognized that "[t]hese grants are exclusive";[17] no branch can delegate its power to another branch. The constitutional text confirms this,[18] for its careful division of legislative, executive, and judicial powers would be senseless if those powers could be reallocated by the branches themselves.[19] Nor could the branches perform their task of checking and balancing each other if they delegated away their unique roles in the constitutional structure. As Madison said in *Federalist No. 51*: "[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others . . . ."[20] The Founders, accordingly, armed each branch with a variety of checking powers so that they could prevent encroachments and abuses by the other two. For these reasons, the Court once believed that the doctrine forbidding the delegation of

[17] *Association of American R.R.*, 135 S. Ct. at 1240–41 (Thomas, J., concurring in the judgment). *See Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011) ("Under the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government adopted in the Constitution, the 'judicial Power of the United States' . . . can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." (alterations in original) (quotation marks omitted)); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 496–97 (2010) ("[T]he President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch." (quotation marks omitted)); *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("Article I, § 1 . . . permits no delegation of those powers . . . .").

[18] *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 336–53 (2002). Notably, the Founders knew how to authorize delegations where they thought it necessary. Article II, section 2, clause 2 vests the power to appoint Executive officers in the President with the advice and consent of the Senate, but it also provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." This makes the absence of a broader authority to delegate all the more significant.

[19] *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow."); *see also Free Enter. Fund.*, 561 U.S. at 497 ("But the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment." (citation omitted) (quotation marks omitted)); *Wellness Int'l Network, Ltd. v. Sharif*, 2015 WL 2456619, at *25 (U.S. May 26, 2015) (Roberts, C.J., dissenting) ("In a Federal Government of limited powers, one branch's loss is another branch's gain, so whether a branch aims to 'arrogate power to itself' or to 'impair another in the performance of its constitutional duties,' the Constitution forbids the transgression all the same." (citation omitted) (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996))).

[20] THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961).

Congress' legislative power to the Executive Branch "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."[21]

Despite the nondelegation doctrine's firm foundation in the structure of the Constitution and in Supreme Court precedent, the Court "has abandoned all pretense of enforcing a qualitative distinction between legislative and executive power."[22] The Court's last decisions invalidating statutes delegating legislative power to the Executive Branch[23] date back to 1935. During the 80 years since then, numerous agencies have essentially been granted regulatory carte blanche—authorized to regulate, for example, "in the public interest"—and the Supreme Court has uniformly upheld such boundless delegations of legislative authority.[24] As a practical matter, the nondelegation doctrine was laid to rest in *Whitman v. American Trucking Associations*. In upholding the Clean Air Act's delegation to the EPA of power to set ambient air quality standards "requisite to protect the public health,"[25] the Court acknowledged that it had "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[26]

The Court has also permitted the judicial power, although vested by Article III exclusively in the federal courts, to be delegated to the Administrative State. The leading case is *Crowell v. Benson*, which upheld a Federal workman's compensation statute that made agency findings of fact final and binding upon Article III courts.[27] The Court held that this agency

[21] *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).
[22] *Association of American R.R.*, 135 S. Ct. at 1250 (Thomas, J., concurring in the judgment).
[23] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935).
[24] *American Trucking Ass'ns*, 531 U.S. at 474 (collecting cases).
[25] *Id.* at 472.
[26] *Id.* at 474–75.
[27] 285 U.S. 22, 46 (1932).

exercise of judicial power is constitutionally permissible so long as an Article III reviewing court is able to decide all questions of law *de novo*.[28] Since *Crowell*, it has been an unquestioned principle of the Supreme Court's jurisprudence that administrative agencies can adjudicate private rights and issue findings of fact that bind even Article III courts.[29]

Thus, by the time *Chevron* was decided in 1984, all three governmental powers had been united in the "expert" hands of the Administrative State, despite Madison's famous warning in *Federalist No. 47* that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[30] And it has exercised its government powers independent of control by the Congress or the courts. But the Wilsonian vision of the modern Administrative State could not be fully realized unless the experts in the agencies were also liberated from the control of the President. In *Humphrey's Executor v. United States*, the Court held that Congress has the authority to restrict the President's removal of executive branch officers who are empowered to exercise, in the words of the Court, "quasi legislative and quasi judicial" power.[31] Because the power to remove an officer is essential to the ability to control the officer,[32] the effect of *Humphrey's Executor* was to free many of the Federal Government's most powerful agencies from direct presidential control.

The short of it is this: the Administrative State is now a *de facto* one-branch government, and most of the "experts" who run it are politically accountable to no one. They are not elected, nor are they controlled by those who are elected.

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[28] *Id.* at 54.
[29] *See, e.g.*, *CFTC v. Schor*, 478 U.S. 833, 853–57 (1986) (holding that an agency could adjudicate a private, state-law counterclaim).
[30] THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).
[31] 295 U.S. 602, 629 (1935).
[32] *Morrison v. Olson*, 487 U.S. 654, 726 (1988).

II. *Chevron* and Its Rationales

And so we arrive at *Chevron v. NRDC*,[33] which freed the Administrative State from meaningful judicial review. *Chevron* created a now-familiar two-step framework for federal courts to evaluate agency regulations and other decisions interpreting federal statutes. First, if the language of the statute is unambiguous, "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."[34] But if the statute is "silent or ambiguous with respect to the specific issue," the agency's interpretation will be upheld if it is "based on a permissible construction of the statute," even if it is not the construction that the court, using "traditional tools of statutory construction," would adopt.[35] Under *Chevron*, then, ambiguity in the text of a law is the source of the agency's interpretive authority—its jurisdiction—to resolve the ambiguity. And because statutory ambiguity is ubiquitous in the United States Code, *Chevron* grants administrative agencies interpretive discretion over virtually the entire sweep of federal statutory law.

In the three decades since *Chevron* was decided, the doctrine of judicial deference to agency interpretations of ambiguous laws has been extended to the full reach of its logic. For example, the Court held in *Auer v. Robbins* that an agency's interpretation of its own regulations is entitled to deference, thus compounding its insulation from meaningful judicial review.[36] The Court has even held, in the *Brand X* case, that an agency's interpretation of an ambiguous statute prevails over a federal court's prior contrary interpretation.[37] And, most recently, in *City of Arlington*, the Court extended *Chevron* to questions of agency *jurisdiction*, holding that, when a

[33] 467 U.S. 837 (1984).
[34] *Id.* at 842–43.
[35] *Id.* at 843 & n.9.
[36] 519 U.S. 452, 461 (1997).
[37] *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).

statute is ambiguous on whether the relevant agency has authority to interpret it, courts must defer to the agency's determination that it has such authority.[38] The bottom line is that *Chevron* and its progeny have transformed the Administrative State into a kind of Super Court, vested with the last word, *binding even on the Supreme Court*, on what ambiguous statutory and regulatory provisions mean, including on the jurisdictional question whether Congress actually authorized it to interpret the statute in the first place.

As Justice Scalia, perhaps the foremost proponent of *Chevron* on the Court, has acknowledged, *Chevron* is a "judge-made doctrine[ ] of deference."[39] It "did not purport to be based on statutory interpretation" of the Administrative Procedure Act.[40] Indeed, as discussed below, *Chevron* flies in the face of the plain text of Section 706 of the APA. Nor is it required by the Constitution.[41] To the contrary, as also discussed below, the constitutionality of *Chevron*'s rule of judicial deference to agency statutory interpretations is highly doubtful.

The rationale for *Chevron*'s judge-made rule of deference has proven elusive. Its most prominent justification is that Congress, by enacting an ambiguous provision, implicitly signals an intent to delegate power to resolve the ambiguity to the agency. But the Court has been schizophrenic about the *kind of power*—legislative or judicial—that Congress has supposedly delegated through ambiguous statutes. *Chevron* itself offers both answers. The rule of deference is at times framed in terms of judicial power: the Court speaks of "an agency's construction of

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[38] 133 S. Ct. at 1868–71.
[39] *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment).
[40] Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 785 (2010).
[41] *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2129–31 (2002); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514–16. Some scholars have argued, implausibly, that *Chevron* might be required by principles of judicial restraint and separation of powers, *see, e.g.*, Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 277–78, 283, 285 (1988); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 308–09, 312 (1986).

the statute which it administers,"[42] and the agency is described as offering an "interpretation" of an ambiguous statute's "meaning."[43] Yet elsewhere the Court states that the rule of deference is based on a "legislative delegation" that "involve[s] reconciling conflicting policies" and adopting "wise policy,"[44] quintessential exercises of legislative power.

Chevron's conflation of "legislative" and "interpretive" power has persisted in the caselaw. Most recently, for example, in *City of Arlington v. FCC*, the Court described *Chevron* deference as follows: "Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency."[45] Here we see *Chevron* couched in terms of statutory interpretation binding on the parties and the courts, a plainly judicial power. But in the same opinion the Court said that "*Chevron* prevents" judges from "substituting their own interstitial lawmaking for that of an agency,"[46] which leaves no doubt that the agency is exercising legislative power. Indeed, in one telling sentence, the Court described "archetypal *Chevron* questions" as involving agency "*interpretive decisions* . . . about how best to *construe* an ambiguous term in light of competing *policy interests*."[47] The Court here seems to be describing the offspring of an illicit affair between the legislative and judicial branches—an agency whose job description is to reconcile competing policy interests (a legislative act) through binding interpretations of ambiguous statutory terms (a judicial act).

The dissent in *City of Arlington* likewise blurred the constitutionally critical line between lawmaking and binding interpretation. Chief Justice Roberts described *Chevron* as requiring courts to "defer to an agency's *interpretation of law* when and because Congress has conferred

[42] *Chevron*, 467 U.S. at 842.
[43] *Id.* at 844–45.
[44] *Id.* at 865.
[45] 133 S. Ct. at 1868.
[46] *Id.* at 1873 (quotation marks omitted).
[47] *Id.* (emphases added)

on the agency interpretive authority over the question at issue."[48] But elsewhere the Chief Justice said, "[B]efore a court may grant such deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency *lawmaking power* over the ambiguity at issue."[49] Finally, the Chief Justice melded into a single sentence delegations of both judicial and legislative powers: "An agency's *interpretive authority*, entitling the agency to judicial deference, acquires its legitimacy from a delegation of *lawmaking power* from Congress to the Executive."[50]

Chevron's delegation rationale, then, is completely indifferent to whether the agency action at issue is *making* law or *interpreting* law, or both. Either way, however, *Chevron* deference raises serious constitutional questions, for it was precisely to keep these fundamentally different government powers *separate*, and to also separate them from the executive power, that the Framers vested them in *separate* branches. And the constitutional problem is not ameliorated by describing the powers delegated to the Administrative State as "*quasi*-legislative" or "*quasi*-judicial."

The Court has also justified *Chevron* deference on a rationale of agency expertise, in keeping with the Wilsonian emphasis on the rule of experts:

> Judges are not experts in the field, and are not part of either political branch of the Government . . . . In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.[51]

Relatedly, by requiring deference to agency expertise, it follows that *Chevron* requires courts to accept changes in agency interpretations reflecting new facts or changes in administration policy.

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[48] *Id.* at 1877 (Roberts, C.J., dissenting) (emphasis added).
[49] *Id.* at 1880 (emphasis added).
[50] *Id.* at 1886 (emphases added).
[51] 467 U.S. at 865. *See, e.g.*, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990) ("This practical agency expertise is one of the principal justifications behind *Chevron* deference.").

It is true, of course, that allowing agencies to continuously revise their statutory interpretation avoids the "ossification of large portions of our statutory law" that would occur if courts provided a definitive interpretation of the statute.[52] But a fundamental precept of the rule of law is (or at least once was) that the meaning of a statute enacted by Congress does not change unless *Congress* changes it. In any event, this rationale makes no pretense of providing a statutory or constitutional justification for *Chevron*, and it does not answer the serious statutory and constitutional objections to the validity of the doctrine.[53]

The Court's final justification for *Chevron* rests on the idea of political accountability:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[54]

The political accountability rationale has several problems. First, it fails to grapple with the constitutional objections to *Chevron* discussed below.[55] In fact, this rationale for *Chevron* is in the teeth of the Framer's purpose in vesting "all the legislative power" exclusively in Congress: to make the People's locally elected representatives in Congress politically accountable for any policy choices that would govern them *as law*. Second, the notion that agencies are overseen and controlled by a democratically elected President is highly suspect in the case of many agencies and clearly wrong in the case of independent agencies. As noted earlier, the Court in *Humphrey's Executor* largely freed independent agencies from presidential oversight, and "with hundreds of federal agencies poking into every nook and cranny of daily life, th[e] citizen

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[52] *United States v. Mead Corp.*, 533 U.S. 218, 247–48 (2001) (Scalia, J., dissenting); *see also United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1852 (2012) (Kennedy, J., dissenting) ("Agencies with the responsibility and expertise necessary to administer ongoing regulatory schemes should have the latitude and discretion to implement their interpretation of provisions reenacted in a new statutory framework.").
[53] *See infra* at 14–16.
[54] *Chevron*, 467 U.S. at 865–66.
[55] *See infra* at 14–16.

might . . . understandably question whether Presidential oversight—a critical part of the Constitutional plan—is always an effective safeguard against agency overreaching."[56] Third, experience since *Chevron* has shown that the evil of unelected bureaucrats abusing their interpretive power is even worse than unelected judges abusing theirs.

In sum, *Chevron* does not purport to establish a rule required by the Constitution or by statute. Its status as a judge-made fiction is largely uncontested among scholars, both defenders and critics of *Chevron*.[57] Any analysis of *Chevron*'s continuing viability, then, should begin by acknowledging its status as a doctrine without basis in any source of written law. But the central problem with *Chevron* is not just that it is made-up; the problem is that *Chevron* is at war with the clear text of the APA and the basic structural principles of our Constitution.

III. *Chevron* and the APA

Section 706 of the APA provides, "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[58] As Justice Scalia recently observed, "[Section 706] thus contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations."[59] After all, the statute says that the reviewing court "*shall* decide *all relevant questions of law*." The language is imperative, commanding that courts are not to permit *anyone else* to decide questions of law.

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[56] *Id.* at 1879 (Roberts, C.J., dissenting).
[57] *See, e.g.*, Thomas W. Merrill, *Step Zero After* City of Arlington, 83 FORDHAM L. REV. 753, 759 (2014) ("Even *Chevron*'s most enthusiastic champions admit that the idea of an 'implied delegation' is a fiction."); Cass R. Sunstein, *Beyond* Marbury: *The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2590 (2006) (stating that "*Chevron* rests on a fiction" that is "not at all easy to defend"); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 192 (1998) ("*Chevron* is actually an aggressive fashioning of judge-made law by the Court."); Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("For the most part courts have used 'legislative intent to delegate the law-interpreting function' as a kind of legal fiction.").
[58] 5 U.S.C. § 706.
[59] *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring).

The interpretation of a statute is indisputably a question of law.[60] To make this point even more explicit, the statute specifically requires courts to "interpret constitutional and statutory provisions."

This language cannot be squared with *Chevron*'s rule of deferring to agency interpretations of federal statutes. When a court defers to an agency interpretation, the agency, not the court, is deciding the relevant "question[] of law" and "interpret[ing]" the "statutory provision[]." "So long as the agency does not stray beyond the ambiguity in the text being interpreted, deference compels the reviewing court to 'decide' that the text means what the agency says."[61] Indeed, the Supreme Court has expressly stated that when a court defers under Step 2 of *Chevron*, it is *not* deciding the meaning of the statute; rather, it is acknowledging the *agency's* authority as the "authoritative interpreter" of the statute.[62] In this way, *Chevron* is "[h]eedless of the original design of the APA."[63]

Some scholars have pointed out that *Chevron* conflicts with Section 706 only if the agency is understood to be exercising *interpretive* authority. If the agency is instead understood to be exercising delegated *legislative* power to "fill any gap left" in the statute,[64] then the agency's rule—within the boundaries of reasonableness—is the equivalent of a statute. Under that view, the agency is not deciding any questions of law or interpreting any statutes: it is

[60] *See, e.g., Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995) ("Because statutory terms are at issue, their interpretation is a question of law and it is the court's duty to define the appropriate standard.").
[61] *Perez*, 135 S. Ct. at 1212.
[62] *Brand X*, 545 U.S. at, 983 ("Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.").
[63] *Perez*, 135 S. Ct. at 1211.
[64] *Chevron*, 467 U.S. at 843.

legislating, and the courts at *Chevron* Step 2 are simply acknowledging that the agency had authority to legislate as it did, not "deferring" to an agency's interpretation.

This rationale, however, runs squarely into Article I and the nondelegation doctrine, which is discussed in the following section.

IV. *Chevron* and the Constitution

A. Article III. To the extent that *Chevron* rests on an implicit delegation of *judicial* power to administrative agencies, it is at war with Article III. It is indisputable that Congress does not have the power "to issue a judicially binding interpretation of the Constitution or its laws."[65] Nowhere does the Constitution assign that power to Congress. Rather, it is inherent in the judicial power to "say what the law is."[66] As Alexander Hamilton wrote in *Federalist No. 78*, "[t]he interpretation of the laws is the proper and peculiar province of the courts."[67] And Congress, "[l]acking the power itself, cannot delegate that power to an agency."[68] Therefore, the notion that Congress can make an agency the "authoritative interpreter"[69] of a federal statute not only is contrary to the text and structure of the Constitution; it is incoherent. Congress surely cannot delegate a power that it does not possess.[70]

There is also a strong argument that *Chevron* violates Article III even apart from nondelegation concerns. This view was first articulated by Professor Philip Hamburger[71] and has been embraced recently by Justice Thomas. "Those who ratified the Constitution knew that legal texts would often contain ambiguities," and "[t]he judicial power was understood to include the

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[65] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment).
[66] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).
[67] THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
[68] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment).
[69] *Brand X*, 545 U.S. at 983.
[70] In addition to the Article III violation, any attempted delegation along these lines would violate Article I as well, since Congress is limited to its enumerated powers.
[71] *See* Philip Hamburger, *Chevron Bias*, GEO. WASH. L. REV. (forthcoming).

power to resolve these ambiguities over time."[72] But along with the judicial power came a duty to exercise independent judgment, "to decide cases in accordance with the law of the land, not in accordance with pressures placed upon them . . . from the political branches, the public, or other interested parties."[73] And to preserve judges' independent and impartial judgment, the Constitution gives the federal judiciary life tenure and salary protection, as Hamilton noted in *Federalist No. 79*.[74]

Under this view of Article III, *Chevron* is an impermissible abdication of judicial duty. When a judge defers to an agency at Step 2, the judge relinquishes his independent judgment and subordinates his views to those of the agency, which does not have the protections required by Article III—life tenure and salary protection—for the exercise of judicial power. As Justice Thomas has concluded, "[b]ecause the agency is thus not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns."[75]

B. Article I. To the extent that *Chevron*'s rule of deference is based on a supposed implicit congressional delegation of legislative power to agencies, its validity under Article I's exclusive grant of *all* legislative power must be assessed. To be sure, the nondelegation has lain dormant since the 1930s and, as discussed above, the Supreme Court's repeated acquiescence in broad delegations of legislative power to administrative agencies has been one of the principle contributing factors to the rise of the Administrative State and the sweeping power it wields today. The Supreme Court has never formally overruled the nondelegation doctrine, however,

[72] *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment).
[73] *Id.* at 1218.
[74] *Id.* ("Because 'power over a man's subsistence amounts to a power over his will,' [Hamilton] argued that Article III's structural protections would help ensure that judges fulfilled their constitutional role.").
[75] *Perez*, 135 S. Ct. at 1220.

nor could it strike the clear language of Article I from the Constitution. Indeed, at least some Justices have expressed the desire to breathe new life into the nondelegation doctrine,[76] and I would welcome this development. But regardless of whether the *Supreme Court* chooses to revisit its reluctance to enforce the distinction between executive and legislative power, *Congress*, of course, retains the power—and, I believe, the obligation—to recognize the constitutional problem posed by agencies wielding legislative power and to itself maintain the distinction, and the constitutional boundaries, between legislative and executive power. Thus, regardless of whether *Chevron* is understood to be based on a delegation of legislative or judicial power, Congress remains free to adopt reforms to enforce the Constitutional design.

V. Reforming *Chevron*

Judicial deference to the Administrative State has always been controversial. Even before *Chevron*, Congress debated proposals that would have directed courts to review agency statutory interpretations without deference.[77] Among scholars and jurists alike, there has been sustained criticism of *Chevron*'s legitimacy,[78] and that criticism has now reached the point where even

[76] *See, e.g.*, *Association of Am. R.R.*, 135 S. Ct. at 1237 (Alito, J., concurring); *id.* at 1251–52 (Thomas, J., concurring in the judgment); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672–688 (1980) (Rehnquist, J., concurring in the judgment)

[77] The Bumpers Amendment, sponsored by Senator Dale Bumpers (D-AR), was debated in Congress from 1975–1985. The amendment's language changed over time, but its initial draft would have amended § 706 to, among other things, make clear that "the reviewing court shall decide ***de novo*** all relevant questions of law." 123 CONG. REC. S639 (daily ed. Jan. 10, 1977) (statement of Sen. Bumpers) (amendment in bold). Senator Bumpers explained that the amendment was necessary because "much of the power customarily exercised by these three original branches has been taken over by what in truth amounts to a fourth branch of government, the administrative branch, a branch that is not elected by anyone, and unlike the judiciary, is not insulated from political influence." 121 CONG. REC. S29,956 (daily ed. Sept. 24, 1975) (statement of Sen. Bumpers). The amendment was also introduced in the House by then-Congressman Chuck Grassley (R-IA), who later became a Senate co-sponsor. The House Judiciary Committee favorably reported the amendment in 1980, and the Senate passed a version of the amendment in 1981 as part of the Regulatory Reform Act. *See* Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 5–9 & n.10 (1985). But the amendment was never enacted into law.

[78] *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

Chevron's proponents have begun to acknowledge its questionable underpinnings.[79] The time is ripe for congressional action to restore the constitutional boundary between courts and administrative agencies.

Of course, any proposal to abrogate *Chevron* must be part of a broader effort to reform the Administrative State. Congress is currently considering several worthy proposals to do just that. The SCRUB Act has the important goal of eliminating all *current* unnecessary and harmful regulations,[80] while the REINS Act would require congressional approval of all *future* regulations that have a major impact on the economy.[81] In addition, the House version of the Regulatory Accountability Act, by seeking to eliminate *Seminole Rock* deference,[82] would complement congressional legislation to do away with *Chevron*. These proposals deserve Congress's careful consideration.

But no reform of the Administrative State would be adequate without addressing *Chevron*. It is *Chevron* that exacerbates all of the Administrative State's pathologies and enables its worst excesses. Congress can and should abrogate it by statute.

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[79] *See, e.g.*, *Perez*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment); *cf. id.* at 1213–25 (Thomas, J., concurring in the judgment) (arguing that *Seminole Rock* deference might be unconstitutional using many arguments that would also apply to *Chevron*).

[80] S. 3011, 113th Cong. (2014). The SCRUB Act would create the Retrospective Regulatory Review Commission to review all existing federal regulations with a goal of eliminating 15% in their total cost. *Id.* §§ 101(a), (h). The Commission would end after five years, whereupon it would submit final recommendations to Congress. *Id.* §§ 101(a), (i). If Congress approved the recommendations by joint resolution, the agencies would have to eliminate the regulations identified by the Commission. *Id.* § 101(j). Some of these regulations would be eliminated by the Act's "cut-go" procedure, which would require offsetting the costs of new regulations by cutting existing regulations. *Id.* §§ 101(i), 201(a). Finally, the Act would require all new agency rules to include a plan for a review of that rule's necessity ten years after the rule's promulgation. *Id.* § 301.

[81] S. 226, 114th Cong. (2015). The REINS Act would forbid all major agency rules from going into effect unless approved by a congressional joint resolution. *Id.* § 801(b). A "major rule" includes all rules that would have an annual effect of $100,000,000 or more on the U.S. economy. *Id.* § 804(2). The Act establishes procedures for expedited review of joint resolutions to approve major rules, including immunizing such resolutions from amendment and limiting the amount of time to debate a resolution in the Senate. *Id.* § 802.

[82] H.R. 185, 114th Cong. (2015). The House version of the Act would amend § 706 to provide that "[t]he court shall not defer" to an agency's interpretation of its own rules unless the interpretation has gone through the rulemaking procedures of § 553 or §§ 556–57. *Id.* § 7.

As noted earlier, *Chevron* is a "judge-made doctrine[] of deference."[83] And regardless of one's views about its validity under the APA or the Constitution, it is certainly not *required* by any statute or constitutional provision.[84] It can therefore be abrogated or otherwise modified by Congress.

Chevron is sometimes characterized as a standard of judicial review,[85] and, if so, Congress has power to prescribe a different standard of review as a necessary and proper means of carrying into execution both its own statutes and the judicial power.[86] Alternatively, *Chevron* can be viewed as a rule of statutory interpretation.[87] But because *Chevron*, by its own terms, is "rooted in a background presumption of congressional intent,"[88] Congress has power to rebut any presumed implicit delegation of interpretive discretion by declaring its contrary intent explicitly by statute. There can be little dispute, then, that "[i]f Congress wanted to repudiate *Chevron*, it could do precisely that."[89]

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[83] *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment).
[84] *See supra* note 40.
[85] *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 58 (2011) (describing *Chevron* as a standard of review).
[86] Michael Stokes Paulsen, *Abrogating* Stare Decisis *by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1590–91 (2000) ("At a minimum, the Necessary and Proper Clause permits Congress to proscribe any procedure or practice of courts that impairs the faithful exercise of '[t]he judicial Power' and to prescribe rules and procedures conducive to the faithful exercise of that power.").
[87] Rosenkranz, *supra* note 41, at 2129–31.
[88] *City of Arlington*, 133 S. Ct. at 1868.
[89] Sunstein, *supra* note 57, at 2589; *see also Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) (describing the conflict between § 706 and *Chevron* and stating that "[t]he problem is bad enough, and perhaps insoluble if *Chevron* is not to be uprooted"); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 884 (7th Cir. 2002) (Easterbrook, J., concurring in part and concurring in the judgment) ("Congress can choose to delegate, or not, statute-by-statute or through framework laws such as the APA; it could undo *Chevron* across the board if the doctrine functioned as kryptonite to its enactments."); Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1031 (1992) ("As previously indicated, I think that Congress has the constitutional power to direct courts to abandon the *Chevron* approach."); Laurence H. Silberman, Chevron—*the Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 824 (1990) ("Congress could reverse *Chevron*'s presumption generically by amending the Administrative Procedure Act (APA).").

Should Congress wish to abrogate *Chevron*, it could do so by simply amending Section 706 to specify that federal courts are to review agency interpretations without deference. One possible approach would be to amend Section 706 to include the following bolded language:

> To the extent necessary to decision and when presented, the reviewing court**—without according any deference to an agency—**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. **The reviewing court shall not, on the basis of ambiguity or vagueness, construe a statute as delegating to an agency the power or authority to select among possible interpretations of the statute.**

The amendment thus has two components. The first simply makes explicit (rather, even more explicit) what Section 706 originally was intended to require: that judicial review of agency interpretations be *de novo*. But the first component, standing alone, leaves open the possibility of circumvention. To the extent that *Chevron* Step 2 is premised on a delegation of legislative—rather than judicial—power (as some have argued in seeking to reconcile *Chevron* with Section 706[90]), courts do not "defer" to an agency when they sustain agency action at Step 2. Rather, because the agency is exercising lawmaking power, the agency action is binding on the courts (in the same way that a congressional statute is) unless the agency has exceeded its delegated authority, and because the courts determine the reasonableness of the agency rule (and thus whether it has exceeded its delegated authority) *without* deference, *Chevron* does not accord deference to an agency at all.

The second component of the suggested amendment is necessary to foreclose this argument. It instructs courts that ambiguities in a statute do not constitute implicit delegations of authority to the agency to select among possible interpretations.

[90] *See supra* note 57 and accompanying text.

A statute combining an explicit instruction to review agency statutory interpretations *de novo* and an express refutation of *Chevron*'s presumption of legislative delegation should suffice to abrogate *Chevron*.

CONCLUSION

Chevron is contrary to law. It is at war with the APA and the structure of the Constitution, and makes the Administrative State the authoritative judge of its own powers. Congress should exercise its constitutional authority to abrogate *Chevron* and, thus, to reaffirm this nation's basic constitutional principles.