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Revisiting Congressional Delegation of Interpretive Primacy as the Foundation for *Chevron* Deference

Mark Seidenfeld*

Although congressional delegation is the rationale used most often to justify the Chevron doctrine, most scholars who have written about this justification have recognized that it is a fiction, albeit, they claim, a useful one. In “Chevron’s Foundation,” I proposed an alternative foundation for the Chevron doctrine—a judicial self-limitation justification for Chevron deference—based on an implicit understanding of Article III that courts should not resolve cases by making policy choices where alternative means for deciding these cases exists. In this essay, I first revisit my original critique of the delegation rationale and explicitly respond to the arguments for that foundation that were published after my prior work on Chevron. Although I think that these arguments muddy the waters regarding congressional delegation by providing evidence that there are at least some cases in which Congress purposely means to grant agencies interpretive primacy, I conclude that this is still unlikely to be true with respect to most statutory ambiguities, and hence that in most cases such delegation is still a fiction. I then proceed to consider how the rejection of congressional intent to delegate interpretive primacy to agencies bears on the judicial developments in the application of Chevron that post-date my prior work.

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1. INTRODUCTION

The most commonly accepted justification for the *Chevron* doctrine hinges on congressional assignment to an agency of the function of interpreting a statute that the agency is authorized to implement (see Rodriguez, Stiglitz, and Weingast 2015).¹ *Chevron* itself indicated that when Congress leaves a gap in a statutory provision and authorizes the agency to take action to implement that provision, it has implicitly “delegated” interpretive primacy—the role of resolving the statutory ambiguity—to the agency (*Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 [1984]).² This part of the *Chevron* opinion suggests that the courts are to defer to the agency resolution of the ambiguity because that was the intention of Congress, as evidenced by the language and structure of the statute, canons of interpretation, and for non-textualists, perhaps its legislative history (see *Chevron*, 467 U.S. 837; see also *INS v. Cardoza-Fonseca*, 480 U.S. 421 [1987]). In *United States v. Mead Corp.*, (533 U.S. 218 [2001]), the Court further expounded on this notion of congressional delegation, stating that intent to delegate cannot be inferred unless the agency interprets the statute in exercise of statutory authorization to act with the force of law. In short, the Supreme Court has suggested that, by leaving a statutory provision ambiguous and granting the administering agency authority to take action with the force of law, Congress has implicitly delegated the job of

¹ See Rodriguez, Stiglitz, and Weingast (2015), who stated, “Doctrinally, the conceit underlying the *Chevron* doctrine is that an ambiguity in the statute represents an implicit delegation by Congress to agencies.” Gluck (2014) suggests, “[O]ne way to understand the march from *Chevron* to *Mead* is as an evolution from a broad and ambiguously justified approach to delegation to one focused on one particular justification—congressional intent to delegate—grounded in legislative reality.” See also Merrill (2004).

² The Court explained in *Chevron* (467 U.S. at 843–44) that “if Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation” (467 U.S. at 843–44). Many scholars mirror *Chevron*’s confounding of delegation of policymaking authority and interpretive primacy by describing this justification as congressional “delegation” of the interpretive function. For example, Gersen and Vermeule (2012) state that in “*Mead Corp.*,” the Supreme Court clarified that the *Chevron* doctrine rests on Congress’s implicit delegation of law interpreting authority to agencies.” Healy (2002) further describes *Mead* in terms of congressional delegation of interpretive primacy to the courts versus agencies. I dislike this term because one usually can only delegate a power one has, and Congress does not have interpretive authority with respect to statutes it has enacted. But, in its lawmaking function, it seems correct to say that Congress can assign primary responsibility to resolve statutory silence or ambiguity to particular institutions with the other branches of government, and this first justification for *Chevron* depends on the court finding an implicit assignment of that responsibility to the agency administering the statute. Despite my dislike for the term “delegation,” I refer to this justification as based on “delegation of interpretive primacy” to render this article consistent with the prevailing terminology in the literature.

resolving the statutory ambiguity to the agency acting pursuant to that statutory grant of authority (*Mead*, 533 U.S. 218 [2001]).

Although congressional delegation is the rationale used most often to justify the *Chevron* doctrine, most scholars who have written about this justification have recognized that it is a fiction, albeit, they claim, a useful one.³ As I pointed out in my earlier article on *Chevron's* foundation, in actuality, it is not true that authorizing the agency to act where such action requires resolution of the ambiguity necessarily implies an expectation that the agency resolution will bind a reviewing court (Seidenfeld 2011). For example, lower court judges interpret statutory provisions all the time, and if a particular case interpreting a statute is not appealed, that interpretation binds the parties to the case and sets precedent as to the meaning of the statutory provision at issue. Nonetheless, it is universally accepted that appellate courts are not to give deference to lower courts on interpretations of law (see Anderson 2012; Frisch 2003, 77; Gugliuzza 2013). Moreover, in most cases, there is no indication in the relevant statutory provisions or legislative history that anyone in Congress considered whether to delegate interpretive primacy to the agency that administers the statute.

In "*Chevron's* Foundation" (Seidenfeld 2011), I proposed an alternative foundation for the *Chevron* doctrine—a judicial self-limitation justification for *Chevron* deference—based on an implicit understanding of Article III that Courts should not resolve cases by making policy choices where alternative means for deciding these cases exists.⁴ With respect to review of agency interpretations of the statutes they administer, deferring to a reasonable agency interpretation provides such an alternative. Since I published "*Chevron's* Foundation," however, there has been some new scholarship that purports to bolster the congressional delegation justification by arguing that such delegation is generally not a fiction. In addition, there have been several judicial developments

³ See, for example, Merrill and Hickman (2001), stating, "Thus, *Chevron's* attribution of a general intention to Congress that agencies by the front line interpreters of regulatory statutes has been described by even its strongest defender as 'fictional.' In the end, however, we think that the congressional intent theory is the best." Merrill (1992) further explains, "*Chevron* in effect adopted a fiction that assimilated all cases involving statutory ambiguities or gaps into the express delegation or 'legislative rule' model." Scalia (1989) also touted *Chevron* because it "is unquestionably better than what preceded it. Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved within the bounds of permissible interpretation, not by the courts but by a particular agency."

⁴ John Manning (1996) has also rejected congressional delegation as the justification for *Chevron*, relying instead on Article III of the Constitution's vesting executive authority in the President. Both Manning and I essentially rely on the fact that interpreting statutory provisions that are silent or ambiguous essentially is making policy, for which the judiciary is not the ideal institution of government.

in applying *Chevron* that depend on whether congressional delegation of interpretive primacy actually justifies the doctrine.

In this essay, I first revisit my original critique of the delegation rationale as the foundation of *Chevron* deference and explicitly respond to the arguments for that foundation that were published after my prior work on *Chevron*. Although I think that these arguments muddy the waters regarding congressional delegation by providing evidence that there are at least some cases in which Congress purposely means to grant agencies interpretive primacy, I conclude that this is still unlikely to be true with respect to most statutory ambiguities, and hence in most cases, such delegation is still a fiction. I then proceed to consider how the rejection of congressional intent to delegate interpretive primacy to agencies bears on the judicial developments in the application of *Chevron* that post-date my prior work.

2. THE NEW CASE FOR CONGRESSIONAL DELEGATION OF INTERPRETIVE PRIMACY

For the typical agency-authorizing statute that creates an interpretive gap—that is, when the statute is silent or ambiguous with respect to some precise interpretive question—there is no explicit indication in the statute or its legislative history that Congress meant to grant the implementing agency interpretive primacy (see Seidenfeld 2011; Barron and Kagan 2001). Perhaps the most convincing argument that authorization of agency action that requires resolution of statutory ambiguity implicitly delegates interpretive primacy stems from the Court’s creation of the *Chevron* doctrine itself, and the universal acceptance of that doctrine by the lower courts and subsequent Supreme Court cases. Once the Court announced *Chevron*, one can argue that Congress should have known that any statutory ambiguity would be construed as imbuing the administering agency with interpretive primacy when acting with the force of law. Thus, the argument proceeds, at least for statutes enacted against the backdrop of the *Chevron* doctrine, that one can reasonably presume congressional knowledge that courts will grant agencies interpretive primacy and hence that Congress can be said to have intended to grant this primacy. This justification, however, is circular and cannot justify the *Chevron* doctrine in the first instance. Thus the justification only works for statutes enacted after the Supreme Court decided *Chevron*.

Even leaving aside this temporal limitation, however, for the delegation justification to have force, Congress must have been aware of the *Chevron* backdrop for a reviewing court to conclude that Congress expected the agency to resolve statutory ambiguity. When I wrote “*Chev-*

ron's Foundation" (Seidenfeld 2011), such congressional awareness was by no means obvious. Since then, however, Abbe Gluck and Lisa Bressman (2013; 2014) have conducted a massive survey of congressional staff members involved in drafting of legislation about how such staff members go about their task. Gluck and Bressman (2013; 2014) asked about the awareness of legislative staff with various judicial tools of statutory construction, such as linguistic and substantive canons. They reported that 88 percent of their respondents told them "that the authorization of notice-and-comment rulemaking . . . is always or often relevant to whether drafters intend for an agency to have gap-filling authority" (Gluck and Bressman 2013). Gluck and Bressman's results on this point suggest that at least by 2013, lack of congressional awareness of *Chevron* was not a persuasive criticism of the delegation justification for the *Chevron* doctrine.⁵

Congressional awareness of the *Chevron* doctrine, however, does not necessarily imply a desire for that doctrine to control review of statutory interpretation. Gluck and Bressman's own survey reveals that there are numerous reasons why Congress might enact an ambiguous statutory provision, and delegating interpretive primacy to the agency that administers the statute is not the reason most commonly given by survey respondents (Gluck and Bressman 2013). Legislators might have a particular meaning of the provision in mind and might be unaware of an alternative meaning that an agency or reviewing court might find (see Seidenfeld [2014], discussing hidden statutory ambiguity). Or one resolution of an ambiguous statutory provision might impose costs on a focused interest group, while alternative resolution might impose such costs on a different powerful group. In such a situation, resolution of the ambiguity will engender blame by some interest group, and legislators might prefer to punt on the issue, avoiding such blame by having a different institution such as the courts or the agency that administers the statute resolve the ambiguity (see Rodriguez 1992).⁶ It is possible that legislators who vote for the legislation might prefer resolution by the courts rather than by an administering agency, especially if government is divided. The party in con-

⁵ I would note, however, that Gluck and Bressman's conclusion is clouded by the fact that "gap filling authority" could be understood to mean authority to adopt rules to fill legislative gaps, rather than to fill such gaps by statutory interpretation.

⁶ Rodriguez (1992) explains, "[S]tatutory ambiguity . . . is but one facet of legislators' interests in claiming credit for addressing the demands of interest groups by enacting a statute . . . while simultaneously shifting blame for a future interpretation of the statute to another institution." See also Epstein and O'Halloran (1999) for a description of the costs and benefits to the legislator of delegating policymaking authority to agencies.

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trol of Congress often will wish not to provide leeway for the executive branch to implement the agenda of the opposition party.

Perhaps most significantly, the legislative process is noteworthy for its inertia. A majority of the members of Congress might prefer not to grant the agency interpretive primacy, and hence might have an incentive to clarify any ambiguous provision, but they might simply be unable to marshal support to overcome the procedural hurdles to enact a clarifying amendment to the bill. Inability to clarify ambiguous language alone, however, often will not result in the death of the bill during the legislative process. Congress might believe that the statute is worthwhile (however the ambiguity is resolved) and therefore might choose to roll the dice with the ambiguous provision. In other words, even if a majority of the members of each house of Congress would prefer that the courts resolve the ambiguity rather than the administering agency, they might nonetheless value passage of the bill sufficiently to warrant enacting it into law even though the agency will have interpretive primacy over the ambiguous provision. Therefore, the mere existence of statutory authority to act with the force of law when such action would require interpretation of the statutory provision at issue need not imply intent to delegate interpretive primacy to an agency.

Implied delegation of interpretive primacy, however, might follow from the generally accepted understanding that Congress can prescribe how courts should read statutes, which follows from Congress's general power to create law as it sees fit (see Rosenkranz 2002).⁷ This understanding frees Congress from having to choose between ambiguity, which might be preferred for some reason unrelated to the standard of judicial review, and triggering *Chevron* review. If Congress enacts an ambiguous statutory provision and does not intend to delegate interpretive primacy to the administering agency, it can substitute another standard of review for the *Chevron* doctrine or simply provide that *Chevron* does not apply. If Congress is aware that it can overrule the application of *Chevron*, then one might infer that its failure to do so even in the face of a statutory provision evidences an intent to have *Chevron* apply. Again, however, this argument only supports congressional delegation of interpretive primacy as the foundation of *Chevron* if Congress is aware of its ability to codify a different standard than *Chevron*. And, until 2010, Congress had never provided an exception to

⁷ Some have questioned whether Rosenkranz's position is consistent with the structure of our Constitution and separation of powers (Jellum 2009; see also Alexander and Prakash 2003). But as long as the courts are free to interpret provisions with the standards of judicial review for executive statutory interpretation, such provisions seem to fit comfortably within the legislative power to prescribe secondary rules of adjudication under Article II's necessary and proper clause.

Chevron, which probably means that it did not think about, let alone intend to impose, the *Chevron* doctrine on reviewing courts.⁸

Kent Barnett (2015) has noted, however, that in the Dodd-Frank Act, Congress enacted an unprecedented provision instructing courts essentially to apply *Skidmore* rather than *Chevron* deference when reviewing decisions of the Office of the Comptroller of the Currency (OCC) that preempt state law. “Congress first abrogated what it considered the OCC’s broader preemption standards by expressly codifying the narrower Barnett Bank standard for the preemption of state laws that directly regulate consumer-financial transactions” (Barnett 2015). Dodd-Frank then provided: “When reviewing the OCC’s preemption determinations, courts shall ‘assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision’” (Barnett 2015 [quoting 12 U.S.C. § 25b(b)(5)(A) (2012)]). From this provision, Barnett (2015) concludes that Congress does have an intent about granting interpretive primacy to agencies. He then goes on to analyze this single instance when Congress exercised its control over the standard of review of agency statutory interpretation to conclude that Congress often does not intend to grant agencies such primacy merely by leaving statutory language silent or ambiguous.⁹

Certainly Barnett is right that Congress’s exercise of its prerogative to specify the standard of review of agency interpretation muddies the argument that congressional intent about interpretive primacy is a fiction. At least with respect to the provisions in Dodd-Frank that addressed review of OCC interpretations regarding preemption, the text of the statute clearly indicates an “intent” to replace *Chevron* with *Skidmore* deference. But Barnett reads one instance of Congress exercising this prerogative for far more than it is worth. He assumes that because the

⁸ One might conclude that failure to override the *Chevron* standard supports that Congress preferred *Chevron* review so uniformly that it never felt the need to prescribe a deviation from that standard. But, given the controversy that surrounded the *Chevron* doctrine, Congress’s lack of awareness of its ability to override *Chevron* better explains this history.

⁹ Dodd Frank took effect on July 21, 2010 (Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111 203, 124 Stat. 1376, [July 21, 2010]). Barnett notes that Dodd Frank’s codification of the *Chevron* and *Skidmore* doctrines was unprecedented, and he seems to concede that that codification does not provide insight about Congress’s state of mind before 2010 (Barnett 2015). Although “*Chevron’s Foundation*” was published in early 2011, after Dodd Frank was enacted, it was written before that enactment, and I and many others were not aware of the statute’s explicit override of *Chevron* review.

legislature was aware that it could maintain statutory ambiguity without granting interpretive primacy in this one instance evidences that Congress is generally aware and concerned about such primacy whenever it legislates. Leaving review provisions unspecified, Barnett (2015) concludes, indicates congressional intent to delegate interpretive primacy to the agency.¹⁰

Congress, however, is not a monolithic institution for which awareness of the potential to specify a standard of review in one particular context indicates such an awareness for matters addressed by different staff members in different contexts. Again, the Gluck and Bressman survey is noteworthy for the variability of percentages of staff that were knowledgeable about different judicial tools of interpretation (Gluck and Bressman 2013). And Dodd-Frank itself was an outlier—a statute that in relevant parts reflected extreme distrust of the OCC implementation of preemption and perhaps of financial regulation generally. In such a situation, Congress was primed to find ways to restrict agency interpretive discretion, and hence for the first time it used an explicit override of *Chevron* deference.

The inclusion of an explicit override of *Chevron* deference in this situation says little about the awareness of congressional staff, let alone members of Congress, that it could provide such overrides generally. The fact that Congress not only had never utilized an explicit override before, but to the best of my knowledge has never proposed such an override or even discussed it as a possibility in legislative history either before or after enacting Dodd-Frank, suggests to me that members of Congress generally do not envision this approach to limiting the delegation of interpretive primacy courts infer from statutory ambiguity. Moreover, this is not a decision about how to word a statute to achieve its intended effects. Rather, whether to override *Chevron* would be a substantive decision rather than one of clarity and style that might be reflect the choice of the Office of Legislative Counsel. Congress's substantive committees generally will decide whether to include such a provision. And the core of statutes addressing different regulatory schemes are drafted by different committees with different staffs. Thus, the fact that some staff members of one committee were aware of Congress's ability to specify the standard of interpretive review says little about the

¹⁰ According to Barnett (2015), "Dodd Frank supports the delegation theory by suggesting that congressional delegation is not fictional and that Congress has acquiesced to the *Chevron* doctrines. More specifically, Dodd Frank suggests that Congress does in fact have intent as to interpretive primacy, generally accepts juridical deference to agency interpretations and the *Chevron* regimes, and uses *Chevron* as a background norm when drafting."

staffs of other committees, let alone the understanding of the members of Congress themselves.

Even if Congress were well aware of the possibility of explicitly overriding *Chevron* review, the fact that any particular statute does not do so often still would not reflect the intent of a majority of the legislature. The judiciary has set *Chevron* review as the default for statutory provisions that judges find silent or ambiguous. As Adrian Vermeule has noted, "Where the default rule is that Congress can only retaliate through positive action, the costs of collective action make the default of institutional inertia difficult to overcome" (Vermeule 2013).¹¹ Hence, even in the face of ambiguity, the failure to specify an alternative to *Chevron* might simply reflect an inability to overcome the *Chevron* default rule.¹² To put the point bluntly, if the Court had provided *Skidmore* rather than *Chevron* deference as the default rule for reviewing agency interpretations of their authorizing statutes, the same Congress that failed to replace *Chevron* with *Skidmore* review under current law most likely would have left the *Skidmore* default standard in place.

3. THE MAJOR-QUESTION EXCEPTION TO *CHEVRON* DEFERENCE

One recent development of the *Chevron* doctrine is the "major question" exception to *Chevron* deference.¹³ Whether that exception is justified, and how it should operate, depends to a great extent on one's view of *Chevron's* foundation. The Supreme Court has suggested that it is inappropriate for courts to presume that Congress would have granted an agency interpretive primacy over questions that potentially could have huge effects on the nation or major statutory programs.¹⁴

¹¹ Seidenfeld (2004) also argues that leaving decisions for Congress under a penalty default canon will likely induce congressional inaction. For a general explanation of congressional inertia and its likely effects on promulgation of legislation, see Stephenson (2008).

¹² Ernie Young (2001) made a similar argument about why a presumption against federal preemption leads to fewer statutes that preempt state law, stating, "The presumption against preemption thus makes it harder to preempt state law [because] the burden of speaking clearly ex ante or, if necessary, overcoming legislative inertia to amend a statute ex post is born by the proponents of preemption."

¹³ Cass Sunstein (2006) seems to have first coined the term "major question exception."

¹⁴ Few if any scholars support the major questions exception as the Court has developed it, but some do support similar proposals based on the judicial role of interpreting the basic structure of administrative statutes (see, for example, Gifford 2007) or based on arguments that agencies should not interfere in the congressional resolution of salient political issues (see, for example, Moncrieff 2008). More recent scholarship has accepted the doctrine, but has sought to limit its applicability. For example,

3.1. Supreme Court Development of the Major-Question Exception to *Chevron*

The Supreme Court developed the doctrine in series of highly significant cases in which it reviewed agency interpretations of their authorizing statutes. The majority opinions in these cases uncritically accept the congressional delegation justification of *Chevron* deference. But as discussion of this development will make clear, a major-question exception to *Chevron* does not fit easily with the delegation justification without further, even less founded assumptions about the contours of congressional intent to assign interpretive primacy to agencies.

The first case to hint at the major-question exception, *MCI Telecommunications Corp. v. AT&T Co.* (512 U.S. 218 [1994]), involved a construction of a Federal Communication Act provision allowing the Federal Communications Commission to “modify” statutory requirements of Title II of the Act imposes on telecommunications providers. When the Act was enacted, telecommunication companies were natural monopolies because of the economics of laying telephone cable to tie users into the network. The structure of the Act generally treated such providers as common carriers and required that they file tariffs governing the rates and terms under which they provide service. The tariffs took effect only after Federal Communications Commission (FCC) approval.

In the 1980s it became clear with the long distance telephone offerings of MCI and Sprint that the assumption that long-distance telephone communication was a natural monopoly was no longer universally true.¹⁵ Nonetheless, AT&T still retained a monopoly over much of the market. To foster competition, the FCC used its authority to “modify” Title II of the FCA to exempt long distance providers with less than 50 percent market share from having to file tariffs and get them approved. Essentially, the FCC authorized competitors of AT&T to provide such service on an entirely deregulated basis, contrary to the long understood structure of the Act.

Emerson (forthcoming) stated that “[courts] should defer to the agency’s interpretation only if: (1) it was promulgated through notice and comment rulemaking, or an other procedure of comparable deliberative intensity; and (2) the relevant questions of economic and political significance the court identifies have been properly ‘ventilated’ and addressed in the deliberative process that precedes the promulgation of the interpretation.”

¹⁵ While this is true, the deregulation of even long distance telephone service was controversial because of the extent to which provision of such service was tied to local telephone service, which remained a natural monopoly (see Kahn 1986). In fact, the deregulation of long distance telephone service was prompted by an antitrust suit against AT&T for failing to interconnect with companies authorized only to carry long distance traffic for essentially private networks (see Kahn 1986).

Justice Scalia wrote the opinion of the Court reversing this FCC order (512 U.S. 218). The opinion applied the *Chevron* framework but reversed the agency at step one. For the most part the opinion relied on a textual reading of the word “modify” to mean a moderate change. It reasoned that the FCC change was such a departure from the original understanding of the Act’s regulatory provision that it did not constitute a “modification” of the Act but rather a wholesale change, and hence it was beyond the authority the Act delegated to the FCC (see Kahn 1986). After reaching that conclusion, which was sufficient to justify the holding of the Court, Scalia added, “It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements” (512 U.S. at 231). Thus, Scalia relied on the fundamental nature of the legal authority at issue to presume that Congress would not have left the agency free to relieve regulated entities of what previously had been fundamental requirements imposed by the statute.

In the second “majority question” case, *FDA v. Brown & Williamson, Corp.* (529 U.S. 120 [2000]), the Supreme Court reversed the agency interpretation of the Food Drug and Cosmetic Act (FDCA) to cover cigarettes and smokeless tobacco as drug delivery devices to deliver nicotine. Again, the agency applied the *Chevron* doctrine and reversed at step one. The plain meaning of the statute seems to cover nicotine as drug, and the question on which the agency determination of whether cigarettes and smokeless tobacco were delivery devices hinged on whether they were “intended to affect the structure or any function of the body.” The Food and Drug Administration (FDA) had determined that these companies manipulated the nicotine content of tobacco to deliver a specific dose of that drug and thus were subject to the Act.¹⁶

The Court relied on the presumption announced in *MCI* as the central basis of its determination that Congress did not intend to FDCA to cover tobacco products. The Court noted that prior to the decision under review, the FDA had consistently denied authority to regulate tobacco products, and Congress had repeatedly provided for regulation of them by the Surgeon General warnings, rather than having granted the FDA such authority. The majority stated, “Contrary to its representations before Congress, the FDA has now asserted jurisdiction to regulate a significant portion of the American economy. . . . 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

¹⁶ For a fascinating account of how the FDA decided to issue the regulations of tobacco products that were reviewed in *Brown & Williamson*, see generally Kessler (2001).

fashion" (529 U.S. at 158). Thus because of the significance of the interpretation at issue, the Court presumed that the statute did not grant the agency the authority to regulate tobacco, denying the agency the *Chevron* deference that would ordinarily apply in the face of a statute that, on its face, seemed to support the agency interpretation.

The third major-question case, *King v. Burwell* (135 S. Ct. 2480 [2015]), involved whether the Patient Protection and Affordable Care Act (ACA) authorized tax credits to individuals who purchased health insurance on state exchanges that had been established and that were operated by the federal government. The Internal Revenue Service interpreted the statute (77 Fed. Reg. 30,378 [2012]) to authorize such credits. The ACA section on how to calculate these credits, however, indicated that they were to be calculated based on the cost of benchmark plans on an insurance "Exchange established by a State" (26 U.S.C. §§ 36(b)–(c)). Although this seems to provide a straightforward answer to the question of whether subsidies were available on federally established exchanges, the text of the statute also provided that if a state did not establish an exchange, the federal government was to establish "such Exchange" within the state, suggesting that a federally created exchange within a state essentially was an "Exchange established by a State" for all purposes under ACA (see Seidenfeld 2014).

The majority stated that "[w]hether those credits are available on Federal Exchanges is thus a question of deep economic and political significance that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly" (135 S. Ct. at 2489). The Court thus held, at the outset of the opinion, that the matter was not subject to the *Chevron* doctrine at all. The Court went on to determine denying tax credits on federally created exchanges would potentially undermine the operation of insurance markets in those states that did not establish their own exchanges and that the overall structure and language of the statute did not indicate that Congress intended such a perverse outcome.¹⁷ The *King* majority thus interpreted the statute in the same manner as the agency—reading "Exchange established by a State" to include those established by the federal government, albeit paying no regard to the agency's interpretation.¹⁸

¹⁷ In the words of the Court, "the statutory scheme compels the Court to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid" (*King*, 135 S. Ct. at 2484).

¹⁸ The Court invoked a major question exception to the usual operation in a fourth case, *Utility Regulatory Air Group v. EPA* (134 S. Ct. 2427 [2014]). In that case, despite the language of the Clean Air Act seeming to include greenhouse gasses as pollution that should trigger regulation as a criteria pollutant, the Court held that the term air pollu

3.2. The Major-Question Exception and Congressional Interpretive Delegation

The language of all of the Supreme Court's major-question-exception opinions rely on the supposition that Congress would not have intended to give the relevant agency the authority to read the statute to trigger regulation that would affect the national economy in such fundamental ways. Implicit in the opinions is the assumption that Congress would prefer to make decisions of great national significance itself. That assumption, however, is flawed because when a case arises involving the meaning of a statute, Congress's role is long done. Congress generally cannot amend the statute in time to decide the case. If the statute does not clearly resolve the issue raised by the case, interpreting the meaning of the statute will fall either on an agency implementing the statute by adopting a rule or adjudicating a particular matter or on the courts (see Sunstein 2006; Moncrieff 2008; Emerson, forthcoming).¹⁹

Viewed from this perspective, the Court's assertion that Congress would not leave interpretations that involve major questions to agencies is hard to justify. At the outset, it bears emphasizing that the Court cites nothing indicating that Congress harbors such intent. Moreover, the institutional relationship of Congress to the courts relative to its relationship with the executive branch, would suggest that Congress would prefer that agencies have primary responsibilities for such interpretations.

The means by which agencies can influence courts are few and weak; the means by which Congress can influence agency action are more numerous and stronger.²⁰ First, Congress can override interpretations

tion for regulation of stationary sources was not the same as the air pollution under the general regulatory authority of the EPA (Environmental Protection Agency). The case is very similar to *Brown v Williamson* in that the majority interpreted the statute contrary to the seeming plain meaning of the text because that would have triggered an enormous increase in the scope of the Clean Air Act and the EPA's regulatory authority under that Act. Even the EPA recognized that regulating CO₂ as a criteria pollutant using the statute's triggers for when sources would have to obtain pollution emission permits would be impracticable. The agency tried to solve this impracticality by adopting the "tailoring rule," increasing the level of pollution that would trigger permitting requirements for CO₂ by a factor of about 1,000. The Court held that the EPA could not simply replace the numerical limits specified by the statute with those the agency thought more sensible. The Court further held that Congress would not have meant to increase the EPA's regulatory authority to the extent that would occur if greenhouse gasses were criteria pollutants without providing clear language of that intent (134 S. Ct. at 2443).

¹⁹ Lemos (2008) also notes that by not delegating interpretive authority to an agency, Congress essentially delegates such authority to the courts.

²⁰ Pierce (2012) states, "Congress has more power over agencies than any other institution."

with which it disagrees by enacting legislation.²¹ But the Constitution's requirement of bicameralism and presentment purposely creates significant inertia opposing statutory change.²² The same process, of course, limits congressional override of an agency interpretation by statutory enactment (see Seidenfeld [2001], for a description of why statutory overrides of agency rules are difficult and uncommon). And one might reason that such override is a less meaningful check on agency decisions because usually the decisions are supported by the White House, and hence the threat of a presidential veto of an override of administrative interpretation is great. To illustrate this, assume for simplicity that arguments on the merits for alternative interpretations of a particular statutory matter are of equal weight. Judicial interpretation in such a case is equally likely to come out contrary to the president's preferred position as consistent with that position. Thus the likelihood of presidential veto of an override of a judicial interpretation is 50 : 50, which for the reason just given is less than that for an administrative interpretation. That reasoning, however, is flawed. Assuming that Congress is not interested in an interpretation merely because it is opposite to that preferred by the president,²³ the only situations in which Congress would be concerned about a presidential veto is when the Capitol and the White House differ on their preferred interpretations. And within this universe of interpretations, a "rational" president would be just as likely to veto an override of an interpretation that comes from the courts as from an administrative agency.²⁴

²¹ Hasen (2013) notes that congressional overrides of Supreme Court interpretations have greatly decreased recently. Christiansen and Eskridge (2014, 131) find that the number of congressional overrides of judicial interpretations varies greatly over various time periods.

²² Rick Hasen (2013) has postulated that, today, overrides are partisan in nature and are more likely to occur when a party controls both Congress and the presidency, but judges are more aligned with the opposing party.

²³ In the current era of hyper partisanship and divided government, it may be that Congress opposes an interpretation that its members believe to further the public interest simply to deny the president the ability to claim a policy achievement. See Mann and Ornstein (2013) who explain, "[T]he single minded focus on scoring political points over solving problems, escalating over the last several decades, has reached a level of such intensity and bitterness that the government seems incapable of taking and sustaining public decisions responsive to the existential challenges facing the country." Although that may be the reality in our current era of a dysfunctional Congress, I consider opposition purely for the sake of promoting a legislator's party illegitimate, and hence celebrate the potential for greater space for *Chevron* deference to undermine this hyper partisan legislative interest.

²⁴ I use the term "rational" to limit my consideration to actions that promote the policy outcomes the president prefers. I therefore discount the possibility that the president will support an agency position with which he disagrees as a matter of policy merely to show support for members of his administrative team. I do not deny that a president may

Under current legislative rules, override of an agency interpretation may actually be easier than override of a judicial one. In addition to the bicameralism and presentment, the rules of the House and Senate create potential veto gates through which a bill must pass, and one of the most significant veto gate (especially in the Senate) is committee control over legislation (see Galle and Seidenfeld 2007). For major rules, however, Congress enacted the Congressional Review Act (CRA) (5 U.S.C. §§ 801–808 [2012]), which allows members of either house sixty legislative days from a rule’s publication to introduce a bill to override the rule. Under the CRA, once a bill is introduced, it bypasses the committee system and potential filibuster, and it automatically gets considered by the full body of each legislative chamber (5 U.S.C. § 801(a)(3)(b)). Although one should not overstate the impact of the CRA because the threat of presidential veto still looms large for overrides of major agency rules, the CRA does make statutory override of a major agency interpretation a bit more likely than override of a judicial one.²⁵

The other constitutionally specified mechanism for congressional influence on both the judiciary and the agencies is the requirement that appointments be made with the advice and consent of the Senate. Senate approval of a nomination applies to every federal judge and principal officer of the United States,²⁶ but is not a particularly strong means of congressional influence because it is episodic and, except possibly for unique controversial interpretive issues under consideration when the appointee is nominated, does not allow influence over specific interpretive questions. Each judge or official is approved only once—when appointed. While such approval may be a meaningful check imposed by the current majority of the Senate, it is not one that allows Congress to monitor and influence decisions as the ideology of the majority of the legislature changes and as issues unforeseen at the time of appointment arise. The one-time nature of approval of appointees especially weakens the influence over judges, who are appointed for life. Con-

take support of his team into account in deciding policy positions he takes publicly, but I doubt that a president is likely to do so with respect to an interpretation of any statutory question a court is likely to deem major—that is, an interpretation that will have substantial and salient ramifications for the nation.

²⁵ From its enactment in 1996 until the inauguration of President Trump, on January 21, 2017, the Congressional Review Act had only been used once successfully to fast track an override of an agency rule (see Nou and Stiglitz 2016). But there is every indication that the Republican Congress will use it heavily to override several bills adopted by agencies during the end of Obama’s presidency.

²⁶ U.S. Const. art. II, § 2 says, “He shall have power, by and with the advice and consent of the Senate, to make treaties . . . nominate ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided.”

gress may be a bit more apt to trust administrative officers than judges to interpret major statutory questions because the Senate is more likely to have recently approved the official charged with interpretive responsibility and to have ensured, to the extent possible, that the official does not interpret statutes contrary to the Senate's preferences.

The Court's implicit assertion that Congress would prefer courts to interpret major questions is even more suspect when one considers non-constitutionally specified mechanisms for congressional influence. The two most significant informal mechanisms are funding and direct committee oversight.

Although statutory overrides of agency interpretations by legislation aimed exclusively at agency policy are rare, Congress not infrequently uses the appropriation process to limit agency authority and sometimes to enact riders that directly override agency policies reflected in rules.²⁷ From Congress's perspective, omnibus appropriations bills may be preferable vehicles for constraining agency policies to stand alone substantive bills because they present a dilemma for a president who does not agree with the statutory limitation on the agency policy but who generally approves of the remainder of the appropriations bill.²⁸ The president must either veto the entire bill, sacrificing those provisions with which he agrees and potentially threatening a shutdown of government, or acquiesce in the limitation on the agency interpretation with which he disagrees. The most common provision in an appropriation bill that limits an agency rule (which may encompass an interpretation with which Congress disagrees) specifies that the agency may not spend any of its appropriation on implementing the offending interpretation.²⁹ It would be unfathomable for Congress to include a similar proviso in appropriations for the federal courts. The closest analogy would be for Congress

²⁷ See Osofsky (2015), who argues, "Congress has tools at its disposal to respond to categorical nonenforcement it dislikes". Obviously, one mechanism by which agencies create and implement policy is by interpretation of the statutes that create and define the extent of agency authority. Thus, the appropriations process offers the same advantages from Congress's perspective for overriding agency interpretations as it does for policy more generally.

²⁸ McGarity (2012a) argues that riders allow Congress to extort concessions out of the executive branch because must pass legislation, such as appropriation bills, is too important to veto, and this limits the president's ability to exercise independent judgment concerning the substantive policies effectuated by the rider.

²⁹ See Lazarus (2006), who explains, "The classic appropriation rider is negative in its thrust and strictly pertains to the expenditure of funds. It declares that the agency may not spend any of the monies Congress is appropriating to engage in a specific activity described in the legislation". Devins (1987) also argues that Congress often uses limitation riders to appropriation bills to accomplish policy directives on many topics including public funding of abortion, air bags for automobiles, tax exemptions for discriminatory schools, religious activities in schools, and many other areas.

to withdraw from federal jurisdiction the authority to address issues within some substantive area in order to prevent the courts from applying an interpretation that offends Congress. It is questionable whether such substantive limits on jurisdiction are valid under Article III, at least as applied to the Supreme Court (see Grove 2011; Hart 1953; Ratner 1960). And such jurisdictional limitations are so controversial that Congress rarely tries to use them.³⁰ Politically, it would be much easier for Congress to adopt overriding legislation than to limit Supreme Court jurisdiction, which is almost certainly one reason that the few substantive limitations on the Supreme Court's jurisdiction that Congress has attempted seek to nullify judicial opinions that decide constitutional limits Congress's authority.

Similarly, Congress not infrequently oversees agency policies by calling agency officials to testify before congressional committees with jurisdiction over the agency's programs (see Asimow and Levin 2009; Wright 2015; Lazarus 1991). Ostensibly meant for committees to inform themselves of regulatory matters, the oversight process has developed into a means for the committee to communicate and develop constituent support for the legislature's view³¹ and saliently chastise agency officials for mistakes that the congressional committee claims they made.³² Generally, committee oversight implicitly threatens congressional opposition to an agency's agenda, which could result in efforts to cut the agency's statutory authority or budget (Seidenfeld 2001).³³ More directly, appear-

³⁰ See Grove (2011), who states, "Even when Congress has assembled sufficient political momentum to displace inferior federal court jurisdiction, it has consistently left the Supreme Court's appellate review power in place. . . . Congress has on only two occasions eliminated the Supreme Court's appellate jurisdiction."

³¹ See McGarity (2012b), who says, "[O]versight hearings allow influential members of Congress to convey their preferences to agencies regarding particular rulemaking initiatives." Beermann (2006) also explains that "oversight hearings 'provide an opportunity for members of Congress to express their views, often consisting of displeasure with the agency's performance, to agency personnel and the voting public.'"

³² For example, Boykin (2014) states, "For Democrats, this week's Benghazi hearings were not about the attack on the U.S. facility in Libya. Sixty four U.S. diplomatic facilities were attacked under President Bush and that prompted no similar outrage from Republicans. Instead, it was a G.O.P. ploy to score political points against President Obama and his possible Democratic successor, Hillary Clinton." See also *The Washington Post* (2015). And Horowitz and Ed O'Keefe (2012) state, "'Instead of going after guns, the Republican majority is going after the attorney general of the United States,' Rep. Carolyn B. Maloney (D N.Y.) told reporters. 'This is a political witch hunt during the witch hunt season, and the witch hunt season will probably not end until Election Day.'"

³³ Beermann (2006) states, "[O]versight and supervision often take place with a threat in the background that if an agency does not align its actions with the desires of legislators, it will find itself subject to legislation including changes to the substance of its program, changes to its structure, reductions or reallocations of its budget or targeted appropriations riders."

ing before a congressional committee can generate bad press for agency officials.³⁴ Thus, an official will work to avoid direct oversight if she is either concerned about promoting her agency's agenda, or has political aspirations for the period after she steps down from office. In either case, the threat of agency hearings can influence an agency official to minimize any conflicts with the members of the committee that oversees the agency's functions.³⁵ And as for use of appropriations bills to influence interpretation, a congressional committee would never call a sitting judge before the committee to chastise the judge for a decision he reached, except perhaps as part of an effort to impeach the judge. That would be political suicide.³⁶

3.3. An Alternative Justification for the Major-Question Exception

Overall, then, the assertion by the majority of the Supreme Court in the major-question cases—that Congress would never leave discretion to an agency to act in a manner that affects the nation's economy or ethos in a fundamental manner—would seem not to comport with Congress's relative ability to influence agency interpretations vis-à-vis those of the courts. But the alternative justification for *Chevron*, premised on relieving courts from making decisions of policy to the extent feasible under the structure of our Constitution, does no better in justifying the major-question exception. After all, if interpretation to fill statutory gaps involves questions of policy (see Seidenfeld 2011), then it hardly seems preferable to have courts become the primary interpreters of statutes when those questions of policy become more significant to the nation's interest. If there is a justification for the major-question exception, it must depend on the legislature's responsibility under Article I of the Constitution, and its implementation must somehow involve Congress in the interpretive process.

Some scholars have suggested that the major-question exception can be grounded in Article I principles similar to those that underlie the nondelegation doctrine.³⁷ That doctrine asserts that to be consis-

³⁴ Johnson (1992) explains, "Congress may conduct oversight hearings merely to gain publicity. . . . For the agency . . . bad press is generated."

³⁵ "One prominent industry lobbyist observed in 2010 that '[i]f a regulator knows they're going to get yelled at on Capitol Hill, that influences their decisions'" (McGarly 2012b [citing Schwartz 2010 (quoting an industry source)]). See also Seidenfeld (2001).

³⁶ Unless the committee members had supporters like those of President Trump, who survived criticizing a judge as biased because he was a second generation Hispanic (Steinhauer, Martin, and Herszterhorn 2016).

³⁷ Sunstein (2006) makes this point but rejects this justification because it poses similar problems to those that plague any meaningful application of the nondelegation doctrine.

tent with Article I, questions of fundamental policy must be made by the legislature. In theory, therefore, it limits the ability of Congress to delegate rulemaking authority to agencies. If a statute does so, it must provide an intelligible principle to guide agency adoption of rules (Edwards 2016). But the nondelegation doctrine has proven unworkable in practice.³⁸ There is no objective means for courts to determine how much statutory guidance is enough.³⁹ Hence, except for two cases decided in 1935, just before “the switch in time that saved nine,” the Court has never invalidated a delegation of policymaking to an agency (see *Panama Ref. Co. v. Ryan*, 293 U.S. 388 [1935]; *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 [1935]).⁴⁰

The major question suffers even more from the lack of any means to determine what constitutes an interpretive question that cannot be left to the agency (see Sunstein 2006). One cannot even formulate a theoretical standard analogous to the intelligible principle for nondelegation, by which even to focus the judicial inquiry into what is a major question. Furthermore, unlike nondelegation, once Congress enacts a statute that seems to leave a major question for the agency, the remedy for a violation of the doctrine is not invalidation of the statute, leaving how to proceed in the hands of Congress. Rather, the alternative is for the courts to decide the interpretive question. Thus the major-question exception simply replaces the delegation of policymaking from agency to court, which seems at least as problematic from Article I principles that motivate both nondelegation and major-question concerns.

One other rationale that might justify the major-question exception stems from the Supreme Court’s *Brand X* decision under the Chevron doctrine. In *Brand X*, the Supreme Court held that an agency interpretation of a statute may take precedence over a prior inconsistent interpretation by a court (*Nat’l Cable & Telecomm. Ass’n. v. Brand X Internet Servs.*, 545 U.S. 967 [2005]). *Brand X* reasoned that if a statute is silent or ambiguous with respect to a particular interpretive question, then it is the role of the agency to interpret the statute as long as

³⁸ See Bell (1999, 190–91), who concludes that the nondelegation doctrine is “ultimately unworkable.”

³⁹ In his dissent in *Mistretta v. United States* (488 U.S. 361 [1989]), Justice Scalia describes the debate over unconstitutional delegation as one of “degree” rather than “principle.” Merrill (2004) further notes that the nondelegation doctrine is unworkable because it requires courts to distinguish matters of degree.

⁴⁰ The only two cases in which the Supreme Court invalidated a congressional delegation of authority to an agency under the nondelegation doctrine are *Panama Refining* (293 U.S. 388) and *Schechter Poultry* (295 U.S. 495). The Court also invalidated a delegation under the doctrine in *Carter v. Carter Coal Co.* (298 U.S. 238 [1936]), but that involved a delegation of rulemaking authority to a private organization, which raises different issues from delegation to a federal agency.

that interpretation is reasonable under step two of *Chevron* (*Brand X*, 545 U.S. at 986).⁴¹ This means that an agency interpretation is subject to change by the agency. Given that agencies are free to be proactive with respect to statutory interpretations—that is, unlike a court, an agency does not have to wait for parties to bring a case or controversy before it and is not bound by strict principles of stare decisis⁴²—*Brand X* opens the potential for greater change in statutory interpretation than would occur if courts had ultimate interpretive authority.⁴³ For questions of major significance to the nation, the ability of the agency to vacillate on its interpretation can impose significant costs on those who have to comply with the underlying statute. The major-question doctrine mollifies the uncertainty created by ambiguous statutes by returning ultimate decision-making authority to the courts, which are guided by principles of stare decisis. But *Chevron* itself can handle this problem. A court need only read step two of *Chevron* to require that the agency justify its interpretation as a matter of policy, which would include the requirement that the agency explain how its change in interpretation affects reliance interests on the prior agency interpretation and why the change is justified despite the interference with such reliance interests.⁴⁴

There may be yet another justification for the major-question exception—one that stems from canons of interpretation that scholars have suggested, and courts have used, to bolster under-enforced constitutional norms. For example, Ernie Young (2000) has suggested that the role of states in our system of federalism is under enforced because it is not attached to many specific limitations on congressional action. Therefore, he has suggested canons of interpretation that will protect the regulatory prerogatives of state governments against federal encroachment unless Congress words a statute to clearly provide for interference with such prerogatives (Young 2000). A similar approach could be used to reinforce the understanding under Article I of the

⁴¹ “At the first step, we ask whether the statute’s plain terms ‘directly address[s] the precise question at issue.’ If the statute is ambiguous on the point, we defer at step two to the agency’s interpretation so long as the construction is ‘a reasonable policy choice for the agency to make’” (*Brand X*, 545 U.S. at 986 [citing *Chevron*, 467 U.S. at 843]).

⁴² An agency is free to change its position used to justify the outcome of a prior case so long as explains why it believes the new agency’s new position is preferable to the original one (see, e.g., *Shaw’s Supermarkets Inc., v. NLRB*, 884 F.2d 34 [1st Cir. 1989]; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 [2009]).

⁴³ “Because an agency no longer can be bound by its (or a court’s) prior pronouncements, private parties now must confront a far less predictable regulatory landscape” (Masur 2007).

⁴⁴ See Part 4 of this paper, in which I discuss the question of whether *Chevron*’s step two incorporates hard look review that would allow a court to demand consideration of such reliance interests from an agency change in interpretation.

Constitution that fundamental policy choices are usually to be made by Congress and not the executive branch.

As noted above, currently, this understanding is protected only by the nondelegation doctrine, and that doctrine may be the most under-enforced constitutional constraint.⁴⁵ A presumption against rules that implement fundamental changes in federal policy would bolster the principle that Congress must make such fundamental policy choices by forcing Congress to delegate such choices to an agency by a clear statement when it enacts legislation if it means to allow the agency to make fundamental policy.⁴⁶ This will force Congress to confront how it desires to handle such fundamental choices.

Bolstering the understanding that Congress is to make fundamental policy choices unless it explicitly delegates that role to an agency, however, is controversial. At the broadest level, there are scholars and jurists who object to presumptions and clear statement rules aimed at improving the transparency and deliberate nature of the legislative process. These opponents of the under-enforced norms approach to statutory interpretation see the courts, obligation as determining the constitutionality of a statute, and interpreting and enforcing it if it is constitutional (see, for example Manning 2010).⁴⁷ With the under-enforced norms

⁴⁵ See Sunstein (2000), who argues that the reported death of the nondelegation doctrine is exaggerated but notes, "Since 1935, the Supreme Court has not struck down an act of Congress on nondelegation grounds, notwithstanding the existence of a number of plausible occasions". See also *Dep't. of Transp. Ass'n of Am. R.R.* (135 S. Ct. 1225 [2015]), which reversed 90 the DC Circuit's use of the nondelegation doctrine, stating, "[T]he formal reason why the Court does not enforce the nondelegation doctrine with more vigilance is that the other branches of government have vested powers of their own that can be used in ways that resemble lawmaking."

⁴⁶ The Court has recognized clear statement rules and similar interpretive presumptions to protect other constitutional norms, such as federalism, state sovereign immunity, and avoidance of forcing courts to determine constitutional questions when interpreting statutes. See, for example, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building. & Construction Trade Council* (485 U.S. 568 [1988]), which stated, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." In addition, *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, (531 U.S. 159 [2001]) rejected the use of *Chevron* "[w]here an administrative interpretation of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the construction is plainly contrary to Congress' intent." *Gregory v. Ashcroft* (501 U.S. 452 [1991]) applied a plain statement rule to interpret a statute to protect against federal interference with state exercises of its sovereign powers.

⁴⁷ Posner (1985) objects to the use of clear statement rules to bend the meaning of statutes and create a "penumbra" around the Constitution. See also, for example *United States v. Monsanto* (491 U.S. 600 [1989]), which states, "such 'interpretive canon[s] are] not a license for the judiciary to rewrite language enacted by the legislature'" (quoting *United States v. Albertini* (472 U.S. 675 [1985]). Justice Kennedy wrote in his concur

approach, courts essentially reject the best reading of statutes even when that reading is constitutional, in an effort to make Congress explicitly address the underlying constitutional norm. At the more specific level of a particular doctrine to bolster Congress's policymaking primacy, the major-questions exceptions still runs into the problems that (1) there is no objective way to separate those interpretive questions that would adopt a fundamental national policy from those that would involve sufficiently mundane policy choices that would not trigger the exception, and (2) having a reviewing court resolve a major question of policy is just as much at odds with the principle under Article I that Congress should make the decision.

Moreover, recognition of a major-question canon of statutory interpretation cannot be confined to the *Chevron* context. Essentially, the under-enforced norm justification creates an independent canon that not only may trump the *Chevron* "canon," but is independent of the *Chevron* doctrine. Thus, the canon would apply in those cases in which an agency interpretation is not involved, and it is not clear how the courts should apply the canon in that context. For example, the only way to legitimately enforce the canon against judicial policymaking on major questions via interpretation of ambiguous statutory provisions would be to hold those provision unconstitutional and send the matter back to Congress. But striking down statutes for leaving fundamental questions of policy unresolved is precisely what courts are unwilling to do in the context of the nondelegation doctrine.

Nonetheless, all the Supreme Court cases supposedly announcing a major-question exception to *Chevron*, except perhaps *King v. Burwell* (135 S. Ct. 2480 [2015]), can best be read as instead announcing a new presumption or clear statement rule of interpretation against fundamental changes in the preexisting regulatory status quo. In *MCI* (512 U.S. 218), the question was whether the FCA could support a reading that would allow a common carrier, such as *MCI*, to be exempt from tariff based rate making. The Court relied on the fundamental nature of tariff-based regulation under the Act, and the ambiguity in the word "modify," to read the Act as incapable of such a reading (*MCI*, 512 U.S. 218).⁴⁸ The fact that it did so, and thereby rejected a contrary reading of the statute by the agency, is consistent with the Court, on its own,

rence in *Public Citizen v. U.S. Dep't of Justice* (491 U.S. 440, 472 [[1989]] that "the fact that a particular application of the clear terms of a statute might be unconstitutional does not provide us with a justification for ignoring the plain meaning of the statute."

⁴⁸ The Court said in *MCI* (512 U.S. at 225), "The word 'modify' like a number of other English words employing the root 'mod' (deriving from the Latin word for 'measure'), such as 'moderate,' 'modulate,' 'modest,' and 'modicum' has a connotation of increment or limitation." The Court also stated, "The tariff filing requirement is . . . the heart of the common carrier subchapter of the Communications Act" (512 U.S. at 229).

simply reading the bounds of the statute in light of a presumption that no interpreter, *court, or agency*, should use such a weak provision to allow the FCC to modify the statute and override the fundamental regulatory approach of the statute.

The *Brown v. Williamson* opinion (529 U.S. 120) even more clearly identifies the issue as whether one could read the Food Drug and Cosmetic Act to authorize regulation of tobacco products, which Congress had itself refused to authorize. Despite the seemingly clear language of the statute, the Court relied on the structural misfit between the regulation that the statute seemed to mandate for tobacco products and some post-Act statutory enactments in which Congress gave some regulatory powers over cigarette labeling to the Surgeon General, to conclude that the Act excluded tobacco products from the regulatory authority of the FDA. This decision was not about limiting the FCC because of the place of the agency within the executive branch, nor was it about an alternative reading that would somehow grant the FDA so much discretion that, in some abstract sense, the grant of discretion would violate separation of powers. It was about presuming not to change the fundamental policy that cigarette manufacturers should be free from extensive regulation such as that the FDA had adopted (529 U.S. 120). The Court did not really reject the *Chevron* doctrine; it merely found the statute clearly contrary to the agency interpretation at step one.

The same was explicitly true of the opinion in *Utility Air Regulatory Group v. EPA* (134 S. Ct. 2427 [2014]). Again, in that case, the majority rejected the agency interpretation as contrary to the “clear” meaning of the statute at step one of *Chevron* (*Util. Air Regulatory Grp.*, 134 S. Ct. 2427). The problem for the Court, as in *Brown v. Williamson*, was that the text of the Clean Air Act seems clearly to support EPA regulation of CO₂ as a criteria pollutant, especially in light of the Supreme Court’s prior determination that CO₂ was an air pollutant. As in *Brown v. Williamson*, however, the implications of reading the statute to subject greenhouse gasses to regulation as a pollutant for the provisions of the Clean Air Act addressing stationary sources, would have led to extensive regulation of sources that Congress clearly did not envision when the Act was passed. And the Court relied on this unforeseen implication, not to alter or reject the *Chevron* doctrine, but to require a clear statement by Congress before it would read the statute to increase the Clean Air Act’s permitting program by such a degree that it would fundamentally change the extent of all federal regulation of private entities in the United States.⁴⁹ In all three of these supposed major-

⁴⁹ As the Court stated in *Utility Regulatory Air Group v. EPA* (134 S. Ct. at 2444), “We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”

question-exception opinions, the Court itself relied on a presumption that Congress would have to signal clearly its intent to change fundamental regulatory requirements before the Court would read a statute to do so.

King v. Burwell is the most troublesome case for the thesis that the Court created a new substantive canon of interpretation independent of *Chevron* rather than an exception to the *Chevron* doctrine. *King* explicitly held that it would not apply *Chevron* in reviewing the Internal Revenue Service's (IRS) interpretation of ACA because the provision at issue was sufficiently significant to abandon the presumption that Congress implicitly delegated the implementing agency (the IRS) authority to fill statutory gaps by interpretation (135 S. Ct. 2480). Thus, unlike the other cases just discussed, *King* expressly created a major-question exception to *Chevron*, which I do not see any way to justify. But looking beyond *King's* determination that *Chevron* did not apply, toward how the Court itself resolved the statutory question, supports reading *King* as relying on a canon disfavoring interpretations that would cause significant dislocations of the status quo without a clear indication from Congress of intent to make that change.

The Court in *King* first analyzed the text of the statute, and found that the term "Exchange created by a State" was ambiguous regarding whether it included a federally created "State Exchange" (135 S. Ct. at 2491). The Court resolved the ambiguity by noting that, given the other provisions of the Act, interpreting the relevant text to exclude tax credits to those who purchased insurance on exchanges created by the federal government threatened to destroy health insurance markets in those states that did not establish their own exchanges. The Court thus concluded: "It is implausible that Congress meant the Act to operate in this manner" (135 S. Ct. at 2494). Essentially, the Court presumed that Congress would not have created an Act that potentially threatened the viability of any health insurance markets in many states, without making its intent to do so clear. The Court essentially relied on a status quo of workable insurance markets—whether those existing before ACA was enacted or those whose operation would depend on ACA—against which major change was to be measured. Having done so, reading the tax credit provision to preclude credits on federally created exchanges threatened that status quo. Thus, the Court, entirely independent of any considerations of the *Chevron* doctrine, relied on a presumption against Congress intending to enact statutes that would create major changes in regulatory policy or structure to interpret the troublesome language regarding availability of the tax credit. It could just as easily have relied on this presumption to find the statute unambiguous under step one of *Chevron* as to reason that *Chevron* does not apply at all.

So where does this analysis of the major change exception leave us? Essentially, I have argued that there is no solid justification for creating a major change exception to the *Chevron* doctrine. There is, however, an argument that could support the creation of a new substantive canon of interpretation—a canon that would disfavor reading statutes to implement major policy shifts without a clear indication that Congress intended the statute to make such shifts. And the Supreme Court cases supposedly creating the major-question exception can be read to support creation of such a canon rather than creation of an exception to *Chevron*. Because this exception cannot be justified under any coherent justification for *Chevron*, if one really takes seriously the necessity of making sense of Supreme Court precedent, one could read all the major-question exceptions as creating an independent canon disfavoring major policy changes by statute. On a theoretical level, however, creating such a canon is sufficiently problematic that I would suggest seeing the major-question-exceptions cases as unprincipled and would advocate minimizing their impact to the extent possible.⁵⁰

4. THE OPERATION OF *CHEVRON'S* STEP TWO

The final matter that I would like to address, to which the foundation of *Chevron* is relevant, is the application of step two of *Chevron* review. *Chevron* stated that the first question courts are to ask in reviewing an agency interpretation of a statute it administers is whether “Congress has directly spoken to the precise question at issue” (467 U.S. at 842). If the statute is “silent or ambiguous to that specific issue,” the Court continued, then the second question is “whether the agency’s answer is based on a permissible construction of the statute” (467 U.S. at 843). A few paragraphs later, the Court stated that courts should not disturb the agency interpretation if it “represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute” (467 U.S. at 845 [quoting *United States v. Shimer*, 367 U.S. 374, 382–83 (1961)]). At step two, courts have alternatively seen their task as simply determining whether the agency interpretation is permissible in the sense of falling within the bounds set by the statute, or whether the agency adequately justified its interpretation in light of the impacts of that interpretation.

I begin this part by reviewing the history of judicial treatment of the step two inquiry. I then discuss the extent each of these approaches

⁵⁰ I put myself in the camp of scholars who disfavor presumptions and clear statement canons to protect under enforced constitutional norms. Thus, I personally would prefer that the Supreme Court never have started down the major question road, whether as an exception to *Chevron* or as an independent canon.

to step two is best explained by the congressional delegation of interpretive primacy justification for *Chevron*.

4.1. Judicial Development of *Chevron's* Step Two Inquiry

According to Ron Levin's oft-cited article in the proper operation of step two, early on in the history of the *Chevron* doctrine, the DC Circuit essentially applied the reasonable criteria by demanding the agency to justify its interpretation as a matter of policy (Levin 1996). But as Levin makes clear, the DC Circuit was hardly consistent in doing so. Some DC Circuit opinions would break the interpretive inquiry into two parts, first asking whether the statute was silent or ambiguous either by looking only at the text of the provision at issue or by considering the question in a broader sense than evaluating the precise agency interpretation, and then applying interpretive tools a second time to determine whether the agency interpretation was within the bounds of the silence or ambiguity the court identified at step one.⁵¹ And although I have not done a thorough empirical analysis, my reading of circuit court cases involving *Chevron* over the years suggests that other circuits were more likely than the DC Circuit to focus on whether the agency interpretation was permissible as an interpretive matter rather than demanding an agency policy justification for its interpretation.⁵²

⁵¹ See, e.g., *Ne. Md. Waste Disposal Auth. v. EPA* (358 F.3d 936 [D.C. Cir. 2004]), in which the court stated, "[U]nder *Chevron* 'we must decide (1) whether the statute unambiguously forbids the Agency's interpretation, and, if not, (2) whether the interpretation, for other reasons, exceeds the bounds of the permissible.'" *Arizona Public Service Co. v. EPA* (211 F.3d 1280 [D.C. Cir. 2000]) also stated, "In light of the ample precedent treating trust land as reservation land in other contexts, and the canon of statutory interpretation calling for statutes to be interpreted favorably towards Native American nations, we cannot condemn as unreasonable EPA's interpretation of 'reservations' to include Pueblos and tribal trust land." See also *Agape v. FCC* (738 F.3d 397 [D.C. Cir. 2014]) in which the court held that because the statute was ambiguous, "the FCC had latitude, within the bounds of the statute, 'to adapt [its] rules and policies to the demands of changing circumstances.' We find that, in promulgating the Sunset Order, the Commission acted reasonably within the compass of its delegated authority" (quoting *Rust v. Sullivan*, 500 U.S. 173 [1991]).

⁵² See, e.g., *Schuetz v. Banc One Mortg. Corp.* (292 F.3d 1004, 1013 [9th Cir. 2002]) in which the court said, "Whether or not HUD's interpretation is preferable, we cannot say that it is impermissible." *Sidney Coal Co., Inc. v. Social Security Administration* (427 F.3d 336, 346 [6th Cir. 2005]) also held that "to determine whether the SSA permissibly construed the statute, the rules of statutory construction tell us to determine (1) whether the statute unambiguously forbids the Agency's interpretation, and, if not, (2) whether the interpretation, for other reasons, exceeds the bounds of the permissible.'" The First Circuit in *Lovgren v. Locke* (701 F.3d 5 [1st Cir. 2012]), said at step two of *Chevron*, "[W]e evaluate the agency's interpretation under the governing standard to determine whether it 'exceeds the bounds of the permissible.'"

Furthermore, cases that demanded reasoned decision-making usually did not make as strict an inquiry as courts did under Administrative Procedure Act's arbitrary-and-capricious review (see Seidenfeld 1994).

The inconsistency in judicial treatment of step two was exacerbated somewhat by the dearth of Supreme Court step-two cases. And the few cases that the Court did decide at step two relatively soon after *Chevron* did not clearly adopt one approach or the other.⁵³ The Court did not squarely reverse an agency interpretation under step two until 1999 when it decided *AT&T Corp. v. Iowa Utilities Board* (525 U.S. 366 [1999]). That case considered whether the Telecommunications Act of 1996 authorized the FCC to require incumbent local phone companies to lease network elements to their competitors on an unbundled basis after considering whether access to proprietary elements was "necessary" and "whether lack of access to nonproprietary elements would 'impair' an entrant's ability to provide local service" (525 U.S. at 375). The FCC determined that access to all proprietary elements was necessary, and lack of access to all non-proprietary elements would impair entrant's ability to compete because inability to lease any network element would raise costs to the entrant. The Court essentially found the terms "necessary" and "impair" to be ambiguous, but it nonetheless determined that the statute did not envision the FCC requiring incumbents to lease every network element. Essentially, *Iowa Utilities Board* applied the permissible bounds approach to *Chevron*, finding, despite the ambiguity of the relevant statutory provision, the agency interpretation fell outside the bounds of that ambiguity.

Dicta in a 2011 case, *Judulang v. Holder* (565 U.S. 52 [2011]), clarified the Supreme Court's view of the proper to *Chevron* step two. The *Judulang* Court held that the Board of Immigration Appeals's

⁵³ A case that I wrote about previously, *Rust v. Sullivan* (500 U.S. 173 [1991]), had to resolve a *Chevron* step two question to reach a thorny First Amendment issue that was the true motivation for the Court granting cert in the case. With respect to the step two question, the Court first seemed to apply the permissible bounds variant of *Chevron*, stating, "Having concluded that the plain language and legislative history are ambiguous as to Congress' intent in enacting Title X, we must defer to the Secretary's permissible construction of the statute" (500 U.S. at 187). It also found "that the Secretary amply justified his change of interpretation with a 'reasoned analysis'" (500 U.S. at 187). But that reasoned analysis consisted of mere assertions that the rule better comported with congressional intent by avoiding confusion about what constituted use of federal funds "in programs where abortion is a method of family planning" (500 U.S. at 191), and the agency never analyzed the implications of the rules in terms of the effect on women choosing abortions or more importantly on the health effects on pregnant women who might be facing high risk pregnancies (see Seidenfeld 1994). It certainly did not demand the kind of reasoned decision making that it had previously held courts were to demand under arbitrary and capricious review (cf. *Motor Vehicle Mfrs.' Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 [1983]).

“comparable-grounds approach” for determining an alien’s eligibility for discretionary relief from deportation was arbitrary and capricious. In arguing the case, the government contended that the approach reflected an interpretation of the Immigration and Nationality Act and therefore should be reviewed under *Chevron* step two. In a footnote rejecting the government’s contention, the Court stated, “Were we to [apply the second step of *Chevron*], our analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is ‘arbitrary or capricious in substance’” (565 U.S. at 52 n.7).

In several subsequent cases, the Court has clearly applied something akin to the “hard look” test at step two of *Chevron*. For example, in *Michigan v. EPA* (135 S. Ct. 2699 [2015]), the Court rejected the interpretation of the provisions of the Clean Air Act governing hazardous air pollutants—the NESHAPs (National Emission Standards for Hazardous Air Pollution) program. The statute called for the EPA to regulate hazardous air pollutants from power plants if the agency, after performing a study to determine the effects of other Clean Air Act regulations on power plant emissions of hazardous pollutants, found that NESHAPs regulation was “appropriate and necessary” (42 U.S.C. § 7412(b)). While the Court recognized that the term “appropriate and necessary” does not precisely define when NESHAPs regulation is mandated, it held that the EPA’s determination that costs were not relevant in the agency’s decision whether to impose such regulation was an unreasonable reading of the statute (135 S. Ct. at 2708). The Court’s discussion focused entirely on the EPA’s policy argument that it was sufficient to consider costs when determining the categories of sources to be regulated, and the Court did not address the relationship of costs to the text or structure of the statutory provision except to note that the statute said nothing about whether they should be considered (see 135 S. Ct. 2699).

This recent Supreme Court clarification that step two of *Chevron* involves a similar inquiry to one the Court would conduct in an arbitrary-and-capricious challenge should encourage lower courts to so view *Chevron*. But, some practices die hard. In some cases, the seeming demand for reasoned decision-making at step two has led to a weird combination of this approach with the permissible bounds approach. Recently, I have seen a few cases in which a court of appeals has accepted agency reasons for its decision at step two that are purely interpretive—that is, that do not consider policy at all but parse the statute to argue why, although ambiguous, the agency’s reading better comports with the meaning that Congress intended.⁵⁴

⁵⁴ See, e.g., *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA* (846 F.3d 492 [2d Cir. 2017]), in which the court accepted an agency explanation as reasonable

4.2. Step Two and Congressional Interpretive Delegation

Congressional delegation of agency interpretive primacy, although not entirely inconsistent with a reasoned decision-making requirement at step two of *Chevron*, does not support that requirement as well as the judicial self-limitation foundation. One can certainly argue that even if Congress assigns interpretive primacy over a statute an agency administers to the agency, that does not preclude Congress from intending that the agency have to give reasons for its interpretation, and that the courts review such reasons. After all, statutes delegate policy-making authority to agencies, most commonly by authorizing agency rulemaking, and at least since 1984, the Supreme Court has found that courts are to demand reasoned decision-making—and in fact to engage in something akin to hard-look review—in evaluating whether the agency policy is arbitrary and capricious (see *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 [1983]).

But there is a difference between interpretation and policymaking, even if the former may be fraught with the latter. Interpretation involves choosing between different plausible readings of a statute. Unlike rulemaking, interpretation is something that the courts can (and, some would say, usually would be expected to) do.⁵⁵ By concluding that Congress has given interpretive primacy to the agency, proponents of the congressional delegation foundation have essentially conceded that a court is not to substitute its interpretation for that of the agency unless it finds the agency interpretation out of the bounds of meaning permitted by the statute.⁵⁶ But this is the very description of the permissible bounds approach to *Chevron* step two.

and permissible even though the explanation was largely based on the agency analysis of the statutory text and legislative history. The Ninth Circuit in *Delago v. Holder* (648 F.3d 1095 [9th Cir. 2011]) also held the Board of Immigration Appeals's interpretation permissible based on its construction of the statutory text and history. In *Village of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650 [D.C. Cir. 2011]), the court accepted the Board's justifications based on legislative history and interpretation.

⁵⁵ See, for example, Farina (1989), who states, "It is surely a far more remarkable step than *Chevron* acknowledged to number among Congress's constitutional prerogatives the power to compel courts to accept and enforce another entity's view of legal meaning whenever the law is ambiguous." Sunstein (1989) also explains that "an independent arbiter should determine the nature of [statutory] limitation [on an agency]."

⁵⁶ See, for example, Judge Gorsuch's concurrence in *Gutierrez Brizuela v. Lynch* (834 F.3d 1142 [10th Cir. 2016]), in which he explained that "[b]y *Brand X*'s own telling, . . . a judicial declaration of the law's meaning in a case or controversy before it is not 'authoritative,' . . . but is instead subject to revision by a politically accountable branch of government." Conversely, Monaghan (1983) argues that legislative delegation of interpretive primacy is consistent with the courts' role to say what the law is so long as the agency acts as Congress's lawmaking agent. See also, Strauss (2012), who proposes that *Chevron* leaves to courts the determination of the interpretive space within which the ultimate agency construction of the statute must fall.

One might similarly argue, however, that judicial review for reasoned decision-making at step two is also inconsistent with the judicial self-restraint justification for *Chevron*. In my previous article on *Chevron's* foundation, I addressed this argument and concluded otherwise (Seidenfeld 2011).

At first blush, grounding *Chevron* on the self-restraint principle of Article III would seem to preclude the court from demanding the agency to explain its interpretation. Choosing interpretations from those allowed by a statute seem more akin to policymaking than to divinations of statutory meaning. A court that actively reviews agency interpretations to ensure that they are reasoned thus threatens to interfere with the policymaking prerogatives of the agency more directly than does a court that simply defers to discretionary choices of statutory meaning.

The potential impact of my Article III grounding, however, is more nuanced than this intuition would suggest. Recall that the Article III foundation is premised on the agency having institutional potential, due to its expertise and accountability, to reach a superior interpretation. Achieving that potential depends on the agency engaging in a deliberative process that, at a minimum, considers the implications of plausible interpretations and clarifies the agency's value judgments in reaching the one it chooses. Judicial demands to ensure that the agency fulfilled this obligation will vary with the precise question addressed. Some interpretations will have sufficiently little significance that they warrant abbreviated agency consideration. Even for those that have significant implications, the facts and reasoning necessary to support the agency choice will depend on the complexity of the issue and the plausibility of the various interpretive options in light of various interpretive factors such as canons of interpretation and legislative history. Hence, some interpretations might be reasonable without the agency having considered every potential aspect of the question, while for others the inquiry required by full-blown hard look review might be necessary. Most significantly, under the Article III foundation, the court must review the agency reasoning process not to satisfy § 706 of the APA, but rather to satisfy the courts' responsibility over questions of law. That responsibility can both demand self-restraint and mandate an active role at step two so long as that role is one of agency oversight and not substitution of judicial value judgments. (Seidenfeld 2011, 310–11)

One final word regarding step two and "*Chevron's* Foundation" addresses those courts which have applied the reasoned decision-making

requirement to agency interpretive explanations.⁵⁷ This may appear to be a reasonable basis to uphold an agency interpretation on a matter that does not hold much significance. It would be perverse to require the agency to engage in the same intensity of policy-oriented explanation for a decision with little significance;⁵⁸ in fact, such a judicial expectation could prompt an agency to devote more resources to justify an interpretation than any economic effect the interpretation is likely to have. Agency explanation of its decision as a purely interpretive matter does not usually entail the devotion of significant resources. Hence, the agency will be attracted to meeting the reasoned decision-making requirement at step two by providing interpretive reasons. But, this unusual implementation of the reasoned decision-making requirement is not supported by either of *Chevron's* two competing foundations.

The congressional-delegation foundation for *Chevron* does not justify judicial review of an agency's purely statutory reasoning. Judicial determination of whether Congress delegated interpretive primacy to the implementing agency—that is, whether the statute is silent or ambiguous—inherently focuses on interpretive reasoning. But once a court has determined that the agency interpretation falls within the bounds permitted by the statute, there would be little benefit for the courts to review that interpretation. In essence, the court has already determined that the agency reading of the statute is reasonable as an interpretive matter by virtue that it falls within the ambit permitted by the statute. If the agency explanation is less convincing to the court than the court's own determination that the interpretation falls within allowable bounds, it would be perverse for the court to remand. Presumably the agency would simply repeat the reviewing court's step-one interpretive analysis, and thereby satisfy the court that the interpretive choice was reasonable.

The foundation grounded in judicial self-limitation explicitly invokes an aversion to judicial policymaking to justify reasoned decision-making at step two. By doing so, it explicitly posits that filling in statutory gaps will implicate the courts in policymaking, and hence that the role of filling such gaps properly belongs to the agency (see Seidenfeld 2011).

⁵⁷ By "interpretive explanation," I mean an explanation that relies on the process of construing the language of the statute rather than on assessing the policy implications of various alternative interpretations. Thus, such explanations will rely on canons of interpretations, dictionaries, perhaps legislative history, and generally the same tools on which a court might rely were it to interpret the statute in the first instance.

⁵⁸ Gersen and Vermeule (2016) argue that satisfaction of arbitrary and capricious review is much simpler than scholars have indicated; it simply requires an agency give a reason for an action and the depth of that explanation is based on a variety of factors including cost and size of the issue.

Judicial inquiry should review agency policy justifications for agency actions to ensure that the agency considered the implications of its interpretation carefully and deliberatively. This calls for judicial review grounded in requiring the agency to think through the policy implications of its interpretation—the outcomes that will likely follow from the interpretation and an explanation of why those outcomes justify the interpretation. The reasons for demanding such an explanation are the same as to those that justify hard-look review, which courts impose under the arbitrary-and-capricious standard of review of agency action (see Seidenfeld 2012). But reasoned decision-making akin to arbitrary-and-capricious review need not be gratuitously onerous. In fact, the level of scrutiny should reflect the cost to the agency of developing a sufficient policy analysis compared to the stakes affected by the interpretation (see Gersen and Vermeule 2016). Hence, for interpretations of small consequence under the judicial self-limitation foundation, agencies should still attempt to justify their interpretations in terms of policy implications rather than as a purely interpretive matter, understanding that the agency can reason that developing further information or analysis is not likely to be worth the cost of doing so.

One might posit a principle related to the aversion of judicial policy-making—that even with respect to interpretative explanations, agencies are superior to courts—potentially to justify why courts should credit purely interpretive arguments as constituting valid reasoned decision-making at step two of *Chevron*. Agencies may be better at the interpretive endeavor, at least for statutes of relatively recent vintage, because they are involved in the legislative drafting process and hence better understand the intent of Congress behind the statutory provisions at issue (see Vermeule 2006; Strauss 1990; Walker 2015). In addition, the agency may have its finger on the pulse of current congressional preferences, and it may even understand that interpreting a statute contrary to such preferences may sacrifice aspects of the agency program due to potential congressional reaction such as cutting agency funding or engaging in agency oversight hearings.⁵⁹ I do not doubt that those are legitimate motivations for the agency to choose one interpretation over another. But recent focus on public meaning of law suggests that such inside knowledge should not determine the meaning of otherwise ambiguous statutes (see Nelson 2007). I do not mean to imply that an agency cannot take such inside information into account when interpreting a statute it implements. Rather, I see those

⁵⁹ See Jacobs (2014), who uses arguments from Alexander Bickel's "Least Dangerous Branch" arguments to argue for allowing agencies to avoid taking action that might trigger congressional reactions adverse to the agency's overall program.

concerns as primarily political, and independent of appropriate judicial focus. Hence, as I have expressed regarding judicial review under the arbitrary-and-capricious standard, although political considerations may motivate an agency interpretation that is otherwise legitimate, they may not legitimate agency decisions that otherwise are not legitimate (see Seidenfeld 2012). And, for me, the agency must be able to justify its interpretation as a matter of policy for it to be legitimate. Hence, an agency may take into account the intent of the enacting Congress or the preferences of the current Congress, which it discerns based on its special involvement in the legislative process, but that intent should not be the foundation of the agency's justification for its interpretive choice. Rather, the agency should see its primary interpretive task as choosing an interpretation that best implements the policy underlying the overall statutory scheme the agency administers.⁶⁰

5. CONCLUSION

This article has provided an opportunity for me to update my evaluation of congressional delegation of interpretive primacy as the most persuasive rationale for the *Chevron* doctrine. Despite several significant articles that suggest that this rationale for the doctrine is better supported than it appeared when I last addressed this matter, I have concluded that the delegation rationale is still problematic as a justification for the *Chevron* doctrine. In addition, I considered how well that rationale might justify recent developments in the *Chevron* doctrine—in particular the development of a major-question exception to *Chevron* and the developing consensus that step two of *Chevron* incorporates something akin to hard-look review of agency statutory interpretation. Whether one thinks those developments are good, the delegation rationale for *Chevron* is hard pressed to justify them. Thus, I end up close to where I started before writing this paper: I am skeptical that the congressional delegation justification for *Chevron* reflects actual congressional intent, and I find that it fails to explain recent developments in the doctrine.

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⁶⁰ See Stack (2015), who asserts, "agencies' institutional capacities make them particularly well positioned to exercise the functions that a purposive approach requires."

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