CHEVRON'S FOUNDATION

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This Article addresses the question of how a court can justify deferring to an administrative agency interpretation of a statute under the Chevron *doctrine given the accepted understanding that Article III of the Constitution makes the judiciary the ultimate decider of the meaning of law in any case or controversy that is properly before a court. It further considers the ramifications of the answer to that question on the potential forms that any doctrine of interpretive deference may assume.*

This Article first rejects congressional intent to delegate interpretive primacy to agencies as the basis for Chevron*. It argues that such intent is an unsupportable fiction that distracts attention from judicial responsibility for the* Chevron *doctrine. Instead, it posits that* Chevron *is better viewed as a doctrine of judicial self-restraint under the courts' Article III responsibilities. It then analyzes how this view of* Chevron *might influence when and how the doctrine should operate.*

INTRODUCTION

How can a court justify deferring to an administrative agency interpretation of a statute under the *Chevron*[1] doctrine given the accepted understanding that Article III of the Constitution makes the judiciary the ultimate decider of the meaning of law in any case or controversy that is properly before a court? That is the question this

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1 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

Article addresses.[2] It further considers the implications of the answer on the potential forms that any doctrine of interpretive deference may assume.

Several commentators have addressed what political theory best justifies the administrative state.[3] This normative question has ramifications for the *Chevron* doctrine. In particular it provides insights about the circumstances in which it is preferable for the court to defer to an agency interpretation. It also provides guidance about how to structure any deference doctrine to maximize its benefits.[4] For example, a theory based on pluralism would justify a court demanding agency procedures to ensure that all affected groups are represented in the process, but then deferring to an agency interpretation as long as the agency remained within the bounds of its statutorily authorized power.[5] Alternatively, a theory based on deliberative democracy might justify a court deferring on a legal question when the agency has sufficiently deliberated about its reading of the law.[6]

It is imperative, however, to distinguish the normative question about what political theory best justifies the administrative state from the positive question of how, under any such theory, a court can justify "ducking" what would seem to be its responsibility to provide a definitive interpretation of a statute. The positive question, being one of how the courts can forfeit what seems to be a constitutional responsibility, is prior to the normative one. The normative question arises

2 I am not the first to inquire into the tension between *Chevron* and the statement in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803), that it is the province of the courts to say what the law is. *See, e.g.*, Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 26 (1983) (contending that delegation of lawmaking to an agency includes within it the power to interpret the statute authorizing that power); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589–98 (2006) (advocating the abandonment of judicial primacy in the interpretive process in light of the legal realist recognition that statutory interpretation involves policymaking). As will become clear, I do not find prior reconciliations of the tension persuasive.

3 *See, e.g.*, MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? 1–35 (1988); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 31–86 (1998); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1541–43 (1992); Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1805–13 (1975); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 59–64 (1985).

4 Questions relating to the optimal structure of the *Chevron* doctrine too are ones that I have previously addressed. *See, e.g.*, Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994).

5 *See* Stewart, *supra* note 3, at 1671–76. R

6 *See* Seidenfeld, *supra* note 3, at 1548–49. R

only after the positive question has been answered, and that answer will constrain the permissible responses to the normative question. Those who elide the constitutional question thus subject themselves to criticism that, whatever the attractiveness of their normative prescription for *Chevron*, their prescription may be constitutionally untenable. At least one scholar has proposed a pragmatic understanding of *Chevron* that conflates the two questions, thereby advocating that *Chevron* apply only when a hodgepodge of factors reflecting disparate theoretical levels of inquiry are satisfied.[7] By treating constitutional justifications and policy considerations on an equal footing, this understanding forfeits any potential to explain how the factors that bear on this question should fit together in resolving it.

Perhaps such confusion by scholars is excusable given that the Supreme Court's expositions on the bounds of the *Chevron* doctrine do not distinguish the positive question of the constitutional basis for *Chevron* from the normative question of what the *Chevron* doctrine should look like. I contend that the failure to maintain such a distinction has led to much of the uncertainty about the applicability of *Chevron* under Supreme Court precedent.

This Article argues that the foundation for the *Chevron* doctrine is anchored in the separation of powers as manifested by the structure of the Constitution and Article III's assignment of the judicial powers. In so anchoring *Chevron*, this Article rejects the common assumption that the foundation is in an implicit statutory prescription and the intent-based inquiry to which this assumption leads. Instead, it contends that the foundation is best viewed as a soft constitutional norm that, to the extent possible under our constitutional structure, encourages courts to refrain from dictating outcomes in policy-laden decisions. The norm is "soft" in that it does not mandate an absolute constitutional ban on courts relying on policy to resolve issues of statutory interpretation. Rather it is a self-imposed constraint meant to create barriers against a court reading a statute to effectuate what its judges believe (either explicitly or implicitly) to be the best policy available when an appropriate alternative institution also bears responsibility for interpreting the statute. Thus, this Article sees *Chevron* as a doctrine similar to the resistance norms that scholars have identified in other areas as a means of making it more difficult for Congress to act in a manner that compromises constitutional values even though the courts and these scholars all agree that Congress can

7 *See* Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1275 (2008).

compromise such values so long as it does so in clear and unmistakable language.[8]

This Article begins by addressing claims that congressional intent to have courts defer to agency interpretations of statutes is the most satisfactory constitutional mooring for the *Chevron* doctrine.[9] Concluding that the evidence of such intent is scant, the Article proposes its alternative—that the doctrine is a judicially self-imposed constraint to assuage concerns about the court's countermajoritarian role under the Constitution. Finally, the Article discusses the implications that follow from this alternative foundation.

I. CRACKS IN THE INTENT-BASED FOUNDATION OF *CHEVRON*

Assuming that Congress has the power to mandate that courts defer to agency statutory interpretation,[10] a question remains whether Congress has mandated such deference, and if so, under what circumstances.[11] Currently, the legal foundation for *Chevron*, to the extent that the Supreme Court and scholars have addressed it, rests on an

8 The best known value protected by resistance norms is federalism. *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1552 (2000) (coining the phrase "resistance norm" for a doctrine meant to discourage but not ban government action that impinges on constitutionally recognized interests); *see also* Gregory v. Ashcroft, 501 U.S. 452, 467 (1991) (interpreting the ADEA to exclude state judges from protection against mandatory retirement because state sovereignty concerns required that any interference with states' prerogatives about retention of judges must be clearly stated in the Act); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (holding that abrogation of state immunity from suit in federal court under the Fourteenth Amendment requires a clear statement by Congress).

9 There is a potential question of whether there are constitutional limits on Congress dictating to courts how to go about interpreting statutes, which could have a bearing on Congress's authority to mandate that courts defer to an agency interpretation of a statute that the agency administers. Regardless of the answer to that question, that I find little support for the proposition that *Chevron* flows from statutory prescription, *see infra* Part I, obviates my need to discuss constitutional limitations had Congress in fact attempted to mandate *Chevron* deference.

10 *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086–88 (2002) (defending the generally accepted view that Congress can tell courts how to interpret statutes); *see also infra* note 84 (discussing limits on Congress's power to dictate methods of interpretation). *But see* Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 897–98 (2009) (arguing that there are limits to Congress's power to enact "statutory directives").

11 *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1159–61 (tracing Justice Scalia's and Justice Breyer's perspectives on the mandated deference).

intentionalist theory of statutory interpretation.[12] The Court and these scholars purport to find, in the assignment of certain administrative tasks to agencies, a congressional intent that in some circumstances agencies are to exercise interpretive primacy over statutes that they administer.[13]

There are at least three variations of the intent-based justification for *Chevron*. The Supreme Court set out its current understanding most explicitly in its *United States v. Mead Corp.*[14] opinion, which relies on congressional intent to authorize an agency to act with the force of law, but sees a broad array of factors as manifesting this intent.[15] Among scholars, Tom Merrill has most directly addressed the question of *Chevron*'s foundation, and has also proposed that *Chevron* applies in reviewing agency action that Congress intended to have the

12 Not all scholars have accepted the intentionalist foundation for *Chevron*. *See, e.g.*, Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 269–70 (1988); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 623–27 (1996); Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2235–37 (1997). But, currently, the consensus of scholars seems to support the intentionalist foundation. *See* Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2642–43 (2003); *see also* Sunstein, *supra* note 2, at 2589 (noting that consensus has developed that *Chevron* "turns on congressional will"). Even most who recognize the fictitious nature of presumed congressional intent regarding *Chevron* deference nonetheless preface that deference on whether, within a particular statutory context, it is reasonable for courts to assume that Congress would have intended *Chevron* deference. *See, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (asserting that even pre-*Chevron* the fiction of legislative intent about agency authority to interpret statutes allows judges to defer to agency interpretations when they believe deference is appropriate in light of institutional competence); Manning, *supra*, at 617–18 (presuming that Congress would intend agencies rather than courts make any policy determinations necessary to interpret a statute); Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 621–22 (2008) (advocating *Chevron* deference when a decision was sufficiently major to have prompted some congressional attention to the precise interpretive issue facing the agency). R

13 By interpretive primacy, I do not mean to suggest that courts must defer to all agency interpretations, but rather only that within certain bounds courts must defer to agency interpretations of statutes. *See* Peter L. Strauss, *Overseers or "The Deciders"—The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 817 (2008) (distinguishing between the courts' role of deciding at step one of *Chevron* and overseeing agency decisions at step two of *Chevron*).

14 533 U.S. 218 (2001).

15 *Id.* at 226–31.

force of law.[16] Unlike the Supreme Court, however, he finds a narrower set of circumstances in which a statute evidences such intent. John Duffy also invokes the force of law touchstone for *Chevron*, but has proposed the narrowest intent-based foundation; he would apply *Chevron* only to interpretations included in agency legislative rulemaking.[17] All three intent-based expositions, however, suffer from a paucity of evidence of relevant congressional intent, and all three fail to shore up their proposed foundations adequately in light of the implausibility of actual congressional intent.

A. Implausibility of Congressional Intent

By most accounts, Congress does not directly address the question of which institution—agency or court—is authorized to fill gaps or resolve ambiguities in the vast majority of regulatory statutes.[18] In that sense, congressional intent about interpretive primacy is a fiction.[19] One might contend that by failing to attend to this issue Congress implicitly means to give agencies primary responsibility for clarification of statutory meaning when the statute assigns agencies the responsibility to make decisions that require resolving statutory gaps and ambiguities. But, prior to *Chevron*, Congress legislated against a background understanding that the courts have ultimate judicial responsibility to say what the law is.[20] Thus, this contention is difficult to maintain for pre-*Chevron* statutes.[21]

For post-*Chevron* statutes, the contention is still difficult to support because Congress specifically provided in the Administrative Procedure Act (APA): "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, [and] interpret . . . statutory provisions . . . ."[22] Hence, even statutes enacted post-*Chevron* would seem to be bound by Congress vest-

16 *See* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2171–75 (2004); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 837 (2001).

17 *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189–207 (1998).

18 *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212.

19 *See* Breyer, *supra* note 12, at 370; William Funk, *Faith in Texts—Justice Scalia's Interpretation of Statutes and the Constitution: Apostasy for the Rest of Us?*, 49 ADMIN. L. REV. 825, 841–48 (1997); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2379 (2001); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517. R

20 *See* Manning, *supra* note 12, at 621–25. R

21 *See id.* at 625.

22 5 U.S.C. § 706 (2006).

ing ultimate interpretive authority in the reviewing court, unless the statute explicitly specified that the agency was to have such authority. Virtually no statutes do so.

B. Inadequacy of Attempts to Shore Up Ephemeral Congressional Intent

The Supreme Court has provided the most amorphous notion of intent—a notion that would justify invoking *Chevron* in a larger class of cases than would competing conceptions. Its most explicit exposition occurs in *United States v. Mead Corp.*,[23] a confusing,[24] and I think confused, opinion. *Mead* speaks of actual congressional intent to authorize an agency to act with the force of law as a proxy for intent to designate the agency as the primary interpreter of ambiguous statutes.[25] The Court never precisely defines force of law, but implies that it involves binding those other than the parties to the particular proceeding that is being reviewed.[26] The Court does not clarify what counts as binding—in particular, whether precedential effect is sufficient. More significantly, on the question of the Court's conception of congressional intent, *Mead* indicates that a host of factors are relevant, several of which have no direct relation to intent either to imbue agency action with force of law or to specify that courts defer to reasonable agency interpretations of statutes they administer.[27]

First, the Court placed great weight on the procedures that Congress required for the agency to act.[28] The Court went so far as to suggest *Chevron* safe harbors when agencies are required by statute to engage in formal adjudication or notice-and-comment rulemaking.[29] But procedures do not affect the "force of law" of an action if that term refers in any sense to the binding effect of the action on either the agency or the public. For example, there is no difference in the legal impact of an agency order issued after formal adjudicatory procedures and an order issued after informal adjudicatory procedures.[30] Parties must comply with either order or face an enforcement action

23 533 U.S. 218 (2001).

24 *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1448 (2005); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 347–49 (2003).

25 *See Mead*, 533 U.S. at 226–27.

26 *See id.* at 229–32.

27 *See* Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 563 (2009) (illustrating how the factors on which *Mead* focuses can lead courts to defer less to agency interpretations than Congress may have actually intended).

28 *See Mead*, 533 U.S. at 230.

29 *See id.* at 230 n.12.

30 *See* Vermeule, *supra* note 24, at 349. R

in court, and both forms of adjudication can create precedent from which an agency cannot depart without explanation for why it chooses not to follow such precedent.[31] Similarly, legislative rules issued without formal or notice-and-comment procedures, such as those issued pursuant to the good cause exception in § 553 of the APA, carry no less legal weight than those adopted by more thorough or formal procedures.[32]

The *Mead* Court also concluded that Congress would not intend that multiple officials have the power to act with the force of law.[33] It is not clear, however, why this need be so. In fact there are circumstances where Congress clearly means to give many officials authority to act with the force of law. For example, agencies can have many Administrative Law Judges (ALJs), and numerous statutes authorize ALJs to make initial decisions in formal adjudications.[34] Those decisions become final and have the same legal impact as a decision of the agency head unless they are explicitly superseded by action of the agency head.[35]

If *Mead* is confused, the Supreme Court's later decision in *Barnhart v. Walton*[36] is downright perverse when viewed with a focus on congressional intent. *Barnhart* used factors that the Court had previously identified as relevant under the doctrine of *Skidmore*[37] deference

31 *See* 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 817–20 (4th ed. 2002).

32 As Justice Scalia points out in his *Mead* dissent, procedures usually are seen as a means of developing an adequate factual record to justify an action, not a factor related to questions of statutory interpretation. *See Mead*, 533 U.S. at 243 (Scalia, J., dissenting).

33 *See id.* at 233 (majority opinion).

34 *See* 29 U.S.C. § 160(c) (2006) (noting that an ALJ's recommendation may become the final order of the agency if there are no exceptions filed with the National Labor Relations Board); Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 759 (2002) ("The ALJ's ruling subsequently becomes the final decision of the FMC unless a party, by filing exceptions, appeals to the Commission or the Commission decides to review the ALJ's decision . . . ."); 20 C.F.R. § 404.929 (2010) (noting that initial determinations by an ALJ regarding Social Security may be reviewed by other ALJs).

35 *See, e.g.*, 5 U.S.C. § 557 (2006) (authorizing initial decisions of ALJs pursuant to the APA to become the final decision of the agency if the agency does not decide the case itself).

36 535 U.S. 212 (2002).

37 *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("[The Court] consider[s] that the rulings, interpretations and opinions of [an] [a]dministrator under [an] Act, while not controlling upon the courts by reason of administrator under [an] Act, while not controlling upon the courts by reason of their authority; do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will

to decide whether *Chevron* applied.[38] Those factors included the care the agency took in issuing its interpretation,[39] which cannot relate to congressional intent because Congress passed the statute before the agency acted.

The confusion in the Supreme Court opinions and the Court's reliance on factors unrelated to actual congressional intent are best explained by positing that, despite the language in *Mead* focusing on actual intent, *Mead* really depends on constructive congressional intent about whether the agency should get interpretive primacy. This is supported explicitly by several passages in *Mead*. For example, the Court discusses statutory circumstances that indicate "Congress *would* expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent as to a particular result.'"[40] The Court also alludes to *Chevron* resting on a presumption of congressional intent.[41] Thus, *Mead* and *Barnhart* are much less confusing if they are seen as relying on the court determining not what Congress intended, but rather on factors that would make it reasonable for Congress to have intended that agencies enjoy interpretive primacy.[42]

Nonetheless, the shift from actual to constructive intent in *Mead* is problematic. If *Mead* instructs judges at step zero of *Chevron* to determine whether it would be reasonable for Congress to have expected the agency to have interpretive primacy, then there is no actual assignment of that responsibility to the agency and the intent-based foundation for *Chevron* deference crumbles.

The legal foundation for *Chevron* depends on the existence of a constitutional justification for the judiciary to avoid its responsibility in any case where interpretation of the law is necessary to the out-

depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

38 *See Barnhart*, 535 U.S. at 222.

39 *See id.*

40 *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (emphasis added) (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845 (1984)).

41 *See id.* at 230 n.11.

42 That *Mead* is premised on constructive intent is further supported by the frank recognition by Justice Breyer, who joined the *Mead* majority, that congressional intent with respect to agency interpretive primacy is a fiction. *See* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 267 (2002). Justice Scalia premises much of his dissent on the fact that *Mead* deviated from *Chevron*'s presumption about agency primacy by purporting to look for actual intent. *See Mead*, 533 U.S. at 239–40 (Scalia, J., dissenting).

come. The factors that *Mead* uses in surmising whether Congress would have expected agencies to exercise interpretive primacy implicitly assumes a Congress acting to promote the public interest. But this is problematic because in reality Congress is quite different from such a hypothetical legislative body. The *Mead* and *Barnhart* Courts posit that Congress would want to grant agencies interpretive primacy when the agency uses procedures that promote deliberation and manifest care in exercising its interpretive discretion.[43] Such factors plausibly may help ensure that the agency interpretation is one likely to best serve the overall interests of the nation. But if political scientists are to be believed, Congress does not act as a unified body attempting to best serve some notion of the public interest. Instead, legislation reflects the preferences of individual members who seek to placate interest groups and organized constituents that are most likely to affect the members' reelection.[44] Thus, one would expect that Congress's preference for granting an agency interpretive primacy would depend on factors such as the pragmatic influence of the legislature over an agency both absolutely and relative to the influence of the president, the importance of the issues the agency addresses to powerful interest groups, and even the precise issue of interpretation that the agency faces.[45] Were Congress actually to focus on the choice of institution to which ultimate interpretive responsibility should be given, it is most likely that the choice would depend on political factors that the Supreme Court has not recognized in determining whether to defer to an agency interpretation of its authorizing statute. The factors are probably so complex and nuanced that the Court cannot identify what would realistically drive the congressional choice between agency and courts, and even if it could, the factors are likely to be so blatantly political, even partisan, that the Court could not legitimately rely on them for deciding whether deference was appropriate.

Hence, the Court has fallen back on a set of factors that reflect a judicial presumption about when a hypothetical nonpolitical Congress would have intended to give interpretive primacy to the agency.

43 *See Mead*, 533 U.S. at 230 (majority opinion).

44 *See, e.g.*, WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 88–93 (2d ed. 2006); MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 120 (2d ed. 1989); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 115–16 (2d ed. 2004); *cf.* R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 267–69 (1990) (explaining why legislators' interest in reelection will, in some cases, lead to enactment of legislation that serves the interest of the general public).

45 *See* Garrett, *supra* note 12, at 2648–51. R

Essentially, this "constructive intent" involves a judicial determination that it would be a good idea, in terms of the Court's conception of the public interest, for Congress to have relieved the courts of that responsibility in those circumstances identified by *Mead* as warranting *Chevron* deference. Thus, the Court's reliance on constructive intent is inconsistent with the principle underlying the intent-based justification for *Chevron* that Congress, rather than the judiciary, actually assigns interpretive primacy to the agency.

Tom Merrill and his coauthors, Kristin Hickman and Kathryn Watts, have suggested a narrower set of factors for determining congressional intent to authorize an agency to act with the force of law.[46] They would abandon inquiries about statutory required procedures, the number of officials authorized to make a decision, and *Skidmore*-type factors such as the care the agency manifested in making its interpretation when determining whether *Chevron* deference is warranted.[47] Instead, they argue that *Chevron* should apply whenever the agency acts pursuant to a statutory authorization to make decisions that bind the public to the agency interpretation of the statute.[48] For Merrill, that includes only agency actions that are independently enforceable, such as legislative rules and orders whose violation can result in fines without the agency having to go to court for an order enforcing the agency action.[49]

Merrill avoids the need to look at factors that cannot reflect congressional intent. But he does so by substituting intent to authorize the agency to act with the force of law for intent to grant the agency interpretive primacy to resolve ambiguities and gaps in the statute, and the two intents do not necessarily coincide. Merrill understands that they are not synonymous and addresses why one intent should imply the other. Many of Merrill's arguments are pragmatic—explaining that his test has sufficient definitive quality to guide courts and agencies, that it depends on Congress having given the agency authority in its authorizing statute, and that it will lead to outcomes in most cases that coincide with the outcomes the courts have reached under the *Chevron* doctrine prior to the publication of his article. Such pragmatic arguments may be well and good as a normative matter, but they are not relevant to the positive question of whether Con-

46 *See* Merrill & Hickman, *supra* note 16, at 872–82; Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 480–81 (2002). R

47 *See* Merrill & Hickman, *supra* note 16, at 854–56. R

48 *See id.* at 875–87.

49 *See id.* at 884.

gress actually provided the basis for courts deferring to agencies on questions of law.

Merrill and his coauthors do present one argument that squarely addresses the positive question. They contend that in acting with the force of law, agencies necessarily must resolve gaps and ambiguities in their authorizing statutes.[50] Furthermore, they note that Congress expects that most agency interpretations will not be reviewed, and therefore leaving gaps and ambiguities in statutes cannot have meant to provide for judicial interpretive primacy.[51] Hence, when Congress passes a statute that is silent or ambiguous on a particular question and has authorized an agency to act with the force of law to implement that statute, Congress has delegated the resolution of that question to the agency.

The problem is that Merrill's conclusion does not follow from the premises. Congress may have authorized an agency to act with the force of law under an ambiguous statute for reasons entirely unrelated to granting the agency interpretive primacy.[52] Congress may have done so because it wanted the agency to address the issue first, in the process using its potentially superior fact-finding ability and technical knowledge about the likely consequences of a particular statutory interpretation to inform the courts on the issue should the agency decision be challenged. Congress may simply have seen the agency as a pragmatic means of holding hearings to develop evidence to inform the interpretation, thereby avoiding having to increase the number of Article III trial court judges. To undermine Merrill's connection between authority to act with the force of law and interpretive primacy, one need only recognize that trial judges act with what Merrill characterizes as "force of law" when issuing their decisions, that decisions by trial courts often are not appealed, and yet when appealed lower court interpretations of law are reviewed de novo, with no deference at all.

In a similar vein to Merrill, John Duffy has proposed that *Chevron* applies only to legislative rules, which have the same legal impact on the public as statutes.[53] Duffy's formulation avoids the problematic analogy between agency interpretations and those of trial courts. In

50 Merrill and Hickman borrow this part of their argument from John Duffy, *see id.* at 877 n.232 (citing Duffy, *supra* note 17, at 199–202), whose variation on the force of law criteria I address *infra* note 53 and accompanying text. R R

51 *See* Merrill & Hickman, *supra* note 16, at 878. R

52 Merrill and Hickman essentially recognize this problem, but claim to surmount it by observing that Congress recognizes that in many cases the agency decision will not be challenged, and hence its interpretation will stand. *See id.*

53 *See* Duffy, *supra* note 17, at 199–203. R

addition, when Congress gives an agency authority to adopt a legislative rule, the agency essentially has authority to enact law. Thus, even if a statute did not clearly provide the interpretation given to it by the agency, the agency can simply adopt a rule implementing that interpretation. Such a rule has the same effect on the public as would a statutory amendment by Congress. Hence, it seems plausible to assume that by granting rulemaking power to an agency, Congress deputized that agency as a junior legislature to fill statutory gaps and resolve statutory ambiguities in the stead of Congress itself.

Duffy's formulation mirrors an argument of Henry Monaghan that because Congress can delegate to an agency the authority to adopt regulations that have the force of law, it necessarily follows that it can delegate to the agency leeway to interpret statutory language.[54] According to Monaghan, "*'interpretation' of law is simply one way of recognizing a delegation of law-making authority to an agency*."[55] Even when Congress passes a statute that delegates lawmaking authority, however, the statute simultaneously limits the agency authority, requiring that the agency stay within the bounds set out by that statute. Duffy's formulation, like the argument of Monaghan, fails to face squarely that statutes simultaneously may have been intended to authorize agencies to act and to limit the bounds of such action. Especially in a politically complex world, in which Congress may by necessity have to delegate broadly to agencies, but in which Congress is wary of accretion of power by the executive branch,[56] it is possible that Congress would intend that the independent judiciary actively determine the bounds of agency discretion even where the words of the statute are insufficient to clearly define those bounds.

The fundamental problem with both Merrill's and Duffy's inferences—that statutory ambiguity along with authorization for agencies to act with force of law evidences intent to grant agencies interpretive primacy—is that they depend on an oversimplified set of choices for legislative intent. They both posit that the legislature had intent about vesting interpretive primacy either in the agency and the court, and argue that their respective criteria make the former choice more likely. But their conclusions do not follow once one recognizes that

54 *See* Monaghan, *supra* note 2, at 26. **R**

55 *Id.*

56 *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS 156–57 (1999) (reporting a greater likelihood of delegation to federal agencies rather than other institutions when the President and Congress are controlled by the same party); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 15–19 (1994) (discussing the competition between Congress and the executive branch to control the administrative state).

the legislature has more options than simply preferring agencies or courts.

First, it is not only possible, but in most instances quite likely that Congress simply has no intent about which institution enjoys interpretive primacy over any particular issue. Because Merrill and Duffy rely on an affirmative congressional intent to override the explicit provision of the APA granting interpretive primacy to courts,[57] on judicial review, a simple lack of intent is not sufficient to support their justification for invoking *Chevron*.

Even where Congress has intent about interpretive primacy, that intent may be more complex than simply preferring one institution over another. For any statute, the interpretation of which may raise a multitude of issues, it is possible that for resolution of some issues Congress preferred agencies over courts but for other issues preferred courts over agencies.[58] It is even possible for such mixed intent to apply to two issues raised by the very same textual provision of a single statute.

This possibility is illustrated by the famous pair of pre-*Chevron* cases, construing the word "employee" in the National Labor Relations Act.[59] In the first case, *NLRB v. Hearst Publications, Inc.*,[60] the Supreme Court addressed the National Labor Relations Board's determination that "newsboys" were employees of the publishers of the newspapers they sold, rather than independent contractors, and therefore were entitled to protection under the Act.[61] The factors that distinguish employees from independent contractors are many, and these factors vary from one employer to another. For this reason the, Court characterized the issue as one of application of law to fact and reviewed the agency decision deferentially, demanding only that the agency decision have "'warrant in the record' and a reasonable basis in law."[62] In the second case, *Packard Motor Car Co. v. NLRB*,[63] the Court addressed the question of whether foremen on an automobile assembly line were employees rather than managers, and there-

57 *See* Duffy, *supra* note 17, at 158–59; Merrill & Watts, *supra* note 46, at 479–80. R

58 *See* Garrett, *supra* note 12, at 2644 (raising questions about the accuracy of any presumption about congressional intent regarding whether courts or agencies should fill particular gaps in statutes). R

59 *See* 29 U.S.C. § 152(3) (2006) (DEFINING THE TERM "EMPLOYEE" AS USED IN THE NATIONAL LABOR RELATIONS ACT).

60 322 U.S. 111 (1944).

61 *See id.* at 130–31.

62 *Id.* at 131.

63 330 U.S. 485 (1947).

fore entitled to statutory protection.[64] The Court characterized this issue as a "naked question of law" and gave no deference to the Board regarding its resolution.[65] The two cases led to two distinct lines of precedent for review of an agency action that reflected an interpretation of the exact same provision of its authorizing statute.[66]

A defense of the *Hearst-Packard* distinction hinges on the differing likelihood that Congress expected the statute to constrain the NLRB regarding the respective issues in the cases.[67] The Act's coverage of line foremen would affect virtually all major manufacturing plants and unions in the country, and given the fundamental impact of the issue, defenders of *Packard* contend that it was reasonable to presume that Congress intended the courts to check the agency discretion in determining such coverage by interpreting the statute themselves. The issue of whether a newsboy was an employee, however, was unlikely to have broad effects, and the Court was reasonable in reading the statute as not imposing significant constraints on the agency discretion to make this determination.[68] In short, *Hearst* and *Packard* as a pair can be justified only by recognizing that Congress had different intent about interpretive primacy with respect to whether the term employee under the Act included newsboys, than it did with respect to whether the term included line foremen.[69]

64 *See id.* at 486–88.

65 *Id.* at 493.

66 There are reasons to believe that the Court in *Chevron* actually thought it was following the *Hearst* line of cases and not significantly changing the doctrine by which courts review agency interpretations of their authorizing statutes. *Chevron* was unanimous and the opinion reads as if the doctrine it states was firmly established and not controversial. Moreover, Justice Stevens, who wrote the opinion in *Chevron*, later tried to interpret that opinion as applying only to agency application of law to facts, which is the realm of *Hearst*. *See* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); *see also* Bernard Schwartz, *"Shooting the Piano Player"? Justice Scalia and Administrative Law*, 47 ADMIN. L. REV. 1, 46–49 (1995) (describing Justice Scalia's vociferous objection to the narrow reading Justice Stevens gave to *Chevron* in *Cardoza-Fonseca*).

67 *See* Breyer, *supra* note 12, at 371. R

68 *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1120 (1987). The issue of whether the statute adopted the common law definition of employee was also raised in *Hearst*, and this issue would have significant impact beyond the case, essentially barring all common law independent contractors from the protections of the Act. The Court treated this issue as one of law, and while agreeing with the agency interpretation, did not rely on any deference to that interpretation in resolving the issue. *See* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 120–24 (1944).

69 Dan Gifford recently advocated that the Court return to something akin to the *Hearst-Packard* distinction to determining *Chevron*'s applicability, relying on the assumption that for issues of great importance, Congress would intend to have the

The key, therefore, to understanding the relationship between statutory-provided authority of an agency to speak with the force of law and congressional intent about the interpretive role of the agency is to recognize that Congress authorized the agency to exercise that authority only within the bounds permitted by the statute, and there is no reason to believe that Congress thereby gave authority to the agency to determine those bounds. One can read authority to act with the force of law as implying a designation of interpretive primacy only if one engages in the semantic sleight of hand of equating creating policy within the bounds of the statute with resolving gaps and ambiguities in the statute. But they are not the same. Filling in gaps and clarifying ambiguities means resolving issues about what the statute requires and prohibits, while creating policy-based rules means adding legal requirements that neither permit what the statute prohibits nor prohibit what the statute requires. In short, agency authority to act with the force of law justifies only a vacuous variation of *Chevron*—a variation that would leave the determination of all legal questions to the courts, telling a court not to strike down an action that it independently determined was consistent with the agency's authorizing statute.[70]

II. ARTICLE III AS THE FOUNDATION FOR *CHEVRON*

Given the lack of satisfactory support either for the proposition that Congress actually intended to mandate the *Chevron* doctrine, I

courts constrain agency interpretations. *See* Daniel J. Gifford, *The Emerging Outlines of a Revised* Chevron *Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 811–17 (2007). Gifford claims that Justice Breyer's opinion in *Barnhart* is best understood as a move toward that approach. *See id.* While Gifford should be lauded for recognizing the likelihood that Congress has complex intent with respect to interpretive primacy, his approach would apply *Chevron* precisely for those issues likely to fall under Congress's radar, and hence where Congress likely had no intent about such primacy. Moreover, because Congress has more influence over agencies than courts, one might surmise that it would be more apt to delegate interpretive authority to agencies for important matters. *Cf.* David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 965–66 (1999) (modeling legislative delegation based on the costs of delegating relative to the costs of determining the matter legislatively).

70 Interestingly, despite Justice Scalia noting that such a view of deference would destroy the significance of *Chevron*, *see* Scalia, *supra* note 19, at 520, his application of *Chevron* is not much more significant given that, as he phrases it, "[o]ne who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists." *Id.* at 521. R

am left to look elsewhere for a justification for the judiciary to short-change its responsibility to determine the meaning of a statute. I find authority for the judiciary to invoke *Chevron* in the structure of the Constitution, especially its separation of powers into three branches and its assignment of the judicial power to the courts.[71]

A. Article III as a Basis for Mandatory Chevron *Deference*

In addition to specifying the judicial power, Article III "define[s] the role assigned to the [federal] judiciary in a tripartite allocation of power" to ensure that "federal courts will not intrude into areas committed to the other branches of government."[72] Implicit in Article III's assignment of the judicial power is the premise that political powers, being extrajudicial, belong to the other branches of government, and that the judiciary therefore should avoid interfering with those branches' exercise of their powers where such interference would require the courts to exercise the outer bounds of judicial power.[73] This policy-interference avoidance principle translates into a court refraining from second guessing a decision by a political branch when doing so will require the court to rely heavily on policy. Such a self-limiting principle grounded in Article III is consistent with other well-established doctrines of deference. Chief Justice Marshall, in *Marbury*, recognized such a principle when he stated that when the acts of an executive branch officer reflect discretion left to the officer by the law, "there exists, and can exist, no power to control that discretion. The subjects are political . . . The acts of such an officer, as an officer, can never be examinable by the courts."[74] The Court has further developed this limitation on Article III's assignment of the judicial power under its political question doctrine, which in relevant part requires that a court refrain from deciding a case within its jurisdiction when

71 *Cf.* Manning, *supra* note 12, at 626, 633–34 (concluding that the lack of any real congressional intent regarding *Chevron* implies that the doctrine has its basis in "constitutional commitments to electoral accountability"). R

72 Franks v. Bowman Transp. Co., 424 U.S. 747, 755 (1976) (quoting Flast v. Cohen, 392 U.S. 83, 94–95 (1968)) (internal quotation marks omitted). The limiting aspects of Article III are most evident in its requirement that courts decide only cases and controversies under such doctrines as standing, ripeness, and mootness. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 883 (1983) (describing judicial concern about courts intruding into the operation of the political branches); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1474–75 (1988).

73 Article III's limit on the courts' interpretive endeavors "[p]erhaps . . . is better stated . . . as the absence of a judicial *right* to upset a political choice." Kmiec, *supra* note 12, at 277. R

74 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).

the court is faced with "a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[75]

Other scholars have justified *Chevron* based on a separation of powers rationale of having the politically accountable executive agencies rather than courts make policy decisions.[76] My Article III formulation, however, more accurately reflects the modern recognition that interpretation, in hard cases at least, cannot be reduced to a value-neutral exercise and hence neatly separated from politics. For that reason, my proposed foundation for *Chevron*, while grounded in Article III, is a resistance norm and not an outright ban on judicial policymaking in the process of statutory interpretation.

I am not the first to propose a soft constitutional norm as the foundation of *Chevron*.[77] John Manning's view of *Chevron* as a canon of interpretation meant to protect the Constitution's structural commitment to having policy decisions made by electorally accountable officials operates as such a norm.[78] At the most general level, Manning's version works similarly to my Article III foundation for *Chevron* in that it allows judges to be influenced by policy considerations for statutory interpretation generally, while demanding that courts not second guess policy determinations when reviewing agency interpretations. But Manning's version differs from my proposed foundation in several fundamental respects.

First, it grounds *Chevron* in the accountability of the executive branch, and implies that Article II validates agency authority to address issues that Congress has not resolved when the agency acts

75 Baker v. Carr, 369 U.S. 186, 217 (1962). Others have drawn the analogy between *Chevron* deference and deference to political decisions that flow from the political question doctrine. *See, e.g.*, David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 359 (2000) (distinguishing political question deference as involving matters of the propriety of any judicial determination rather than the grounds for a determination). The analogy, while helpful, is limited in value because, unlike deference under justiciability doctrines, *Chevron* retains a potentially active role for the court in overseeing the executive branch's interpretation of an ambiguous statute. *See* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 707 (2000) (noting that "*Chevron* deference is not absolute 'political question' deference").

76 *See* Kmiec, *supra* note 12, at 278; Pierce, *supra* note 12, at 2229–30, 2232–33 (1997). These scholars, however, neither tied their arguments specifically to the bounds of Article III or any particular structure of the Constitution, nor addressed the extent to which courts can make policy as part of the judicial power. R

77 *See* Manning, *supra* note 12, at 633–34. R

78 *See id.*

within its statutory authority.[79] Thus, Manning's view leaves little room for the Court to provide the parameters for when the *Chevron* doctrine should apply and when it should not. If the agency interprets a statute as part of any action within its statutorily prescribed authority to administer the law, Manning's *Chevron* applies.

Second, operationally Manning connects the Article II authority of the President to *Chevron* via a presumption that Congress intended to prefer agencies over courts for resolution of policy matters.[80] As such, it accepts that actual congressional intent, where discernible, will control the extent to which courts must defer to agency interpretation. Thus, it differs from the Article III foundation in that it recognizes unfettered legislative discretion to remove the courts entirely from the interpretive process when reviewing agency action so long as Congress does so explicitly. For example, under Manning's view of the foundation of *Chevron*, Congress could enact a statute requiring courts to accept an agency's own determination that any action the agency took was within the statutory authority granted by its enabling act. In fact, under his view of the foundation of *Chevron*, he cannot explain why the court gets to determine in the first instance whether the statute is silent or ambiguous on a particular issue, given that this determination often involves considerations of policy.[81] My formulation explicitly reserves the question of whether Congress could eliminate the judiciary totally from the interpretive process while otherwise granting the court jurisdiction to review agency action.[82]

Third, Manning unmoors *Chevron* from judicial responsibility to interpret the law. He does so by artificially distinguishing between policy and interpretation. Although Manning recognizes that interpretation often involves policy decisions, he posits that the two endeavors are separable, and assigns the former to the executive branch and the latter to the courts when Congress has not spoken on

79 *See id.* at 617.

80 *See id.* at 634. Essentially, Manning provides a constitutional justification for Scalia's view of *Chevron* as stemming from a presumed congressional intent.

81 The same criticism applies to Sunstein's view that *Chevron* reflects a principle that key policy judgments should be made by policymaking officials. *See* Sunstein, *supra* note 2, at 2598. R

82 In this Article, I refrain from addressing whether the Constitution restricts Congress's power to dictate how courts should perform their interpretive tasks, although my intuitions are that the Constitution provides some bounds on this power. *See supra* note 9. By relying on presumed congressional intent, Manning's view R accepts that Article III does not limit Congress's power to dictate interpretive methodology to the courts.

the precise issue.[83] As such, Manning's approach provides little insight into potential constitutional restrictions on how *Chevron* might work at steps one and two.

For me, although step one is a matter of interpretation and hence is left primarily to the courts, it can constrain executive policy on a basis not clearly set out in a statute. Hence, an Article III grounded noninterference doctrine would support some judicial self-limitation at step one. Analogously, although step two is a matter of policy and left primarily to agencies, I recognize that it can affect the bounds of what interpretations are reasonable. Hence, unlike Manning, my Article III foundation leaves room for the court to be involved in overseeing step two of *Chevron*.

In short, the neat distinction Manning makes precludes his theory from providing guidance about the extent and type of uncertainty courts may tolerate at step one, and the role of courts in policing agency determinations at step two. My reliance on Article III as the foundation of *Chevron* allows me to consider such guidance.

The Article III foundation still leaves room for Congress to influence *Chevron* deference. *Chevron* is a doctrine of judicial self-restraint and, being a soft norm, its assignment of interpretive primacy to agencies is not constitutionally demanded. Because the doctrine protects the political branches' prerogatives, there may be room for those branches to relieve the self-imposed restraint by statute. In particular, Article III does not affect Congress's control over agency authority.[84] Therefore, my understanding of *Chevron* does not prohibit Congress from taking interpretive primacy from agencies and giving it back to the courts.[85] Congress can do so simply by restricting the authority of

83 Manning posits a presumption that when Congress has authorized agencies to act, the Constitution presumes that policy decisions that arise in the interpretive process are to be made by agencies. *See* Manning, *supra* note 12, at 634. R

84 Congressional control over agency authority stems from its explicit Section 8 powers, including the Necessary and Proper Clause, U.S. CONST. art. I, § 8, but may be limited by the constitutional mandate that Congress not circumvent bicameralism and presentment. *See* Manning, *supra* note 12, at 652–53; *see also* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597–99 (1984) (noting that any significant constitutional power to alter the shape of the federal government falls to Congress's power under the Necessary and Proper Clause. R

85 Nonetheless, unlike others who have recently considered the question of Congress's ability to prescribe statutory interpretive directives, *see* Rosenkranz, *supra* note 10, at 2140, I entertain the possibility that statutory interpretation involves a judicial function implicit in Article III's vesting of the judicial power in the courts. *Accord* Jellum, *supra* note 10, at 867–70. Hence, I am open-minded to the possibility that there are limits on Congress's ability to prescribe how courts are to interpret statutes, R R

the agency that administers a statute from providing controlling interpretations of that statute, thereby returning all statutory responsibility to the judiciary.[86] Alternatively, Congress could take the lesser step of changing agency authority to interpret its authorizing statute by requiring the agency to acquiesce in an independent judicial interpretation of the statute.[87] In short, by exercising its statutory control over agency authority, Congress can limit the applicability or deference of the *Chevron* doctrine, but Congress cannot expand that applicability or deference.

To flesh out the influence of Article III on judicial review of an agency statutory interpretation, I begin by postulating that when legitimate factors lead to several plausible readings of the statute, the prospect is great that a reviewing judge will resort to preferences about contested policy matters.[88] Such preferences may be about the particular outcome of the precise interpretive issue, such as whether some particular conduct is subject to regulation. Alternatively, they may be about broader approaches to regulation, such as a belief that government should refrain from supplanting market mechanisms.[89] The basic insight behind my postulate is that because interpretation of an

even if such prescriptions demand less judicial deference to agency interpretations. My intuition suggests that there is such a limit. I am troubled, for example, by a statute that would preclude a court from giving even *Skidmore* deference to an agency interpretation. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Such a statute would limit the court from informing itself as it sees necessary on an interpretive issue for which the courts are responsible for issuing an interpretation with the power to control, not just persuade. *See id.* at 139–40.

86 Those who see *Chevron* as limited only by nondelegation principles run into problems explaining why a statute that gives too little guidance to allow deference to an agency to exercise interpretive primacy is not unconstitutionally vague when it grants that same deference to a court. *Cf.* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 428–29 (2008) (pointing out that vague statutes that do not call for agency interpretation essentially delegate policymaking to the courts).

87 This would essentially overrule *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 984–85 (2005), which provides that an agency may ignore prior judicial interpretation of a statute where the courts determine that the interpretation resolved a statutory ambiguity rather than reflected a determination of statutory meaning.

88 This postulate is consistent with findings that judges' decisions whether to find statutes sufficiently unclear to justify deferring to an agency interpretation correlates with the ideological preferences of the judges. *See* Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L.J. 2193, 2201–09 (2009).

89 Judges may have preferences about approaches to administrative law, such as a belief that agencies should not be afforded deference for interpretations that are in their immediate interest. *See* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 208–10 (2004).

ambiguous statute is not an objectively verifiable endeavor—because there is no demonstrably right or wrong interpretation—a judge has significant leeway to hide a policy-driven decision behind an evaluation of seemingly noncontestable factors. A judge may even fool herself into believing that her interpretation is not value laden when subconsciously she may be weighing the relevant interpretive factors to support her preferred interpretation.[90] As Justice Scalia has stated, "Where the courts, in the supposed interest of all the people, do enforce upon the executive branch adherence to legislative policies that the political process itself would not enforce, they are likely (despite the best of intentions) to be enforcing the political prejudices of their own class."[91] Thus, at its heart, my foundation for *Chevron* is a self-imposed judicial restraint to avoid taking the primary role in interpreting statutes when accepting that role creates a significant potential for a judge, either consciously or not, to impose an interpretation that furthers her policy preferences.

B. The Rationale of the Chevron *Opinion*

One possible critique of my Article III bases for the *Chevron* doctrine is that the *Chevron* Court never mentioned Article III in its opinion. Technically, this is correct. The *Chevron* Court, however, simply did not address the constitutional foundation for its holding.[92] Given that there must be such a foundation, the endeavor in discerning it should not hinge on some mystical reading of the tea leaves of the *United States Reports* to discern a hidden intent of the Justices, but rather to lay out a theory that most comfortably supports the doctrine that the Court created and the rationales that the Court gave for it.

The rationale of the *Chevron* opinion is more consistent with the separation of powers foundation than with one based on statutory pre-

90 The psychological theory of cognitive dissonance supports the likelihood that a judge will use her interpretive discretion to reduce dissonance between her values and the outcome of her interpretive decision. *See* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 18–19 (1957).

91 Scalia, *supra* note 72, at 896 (arguing that the constitutional standing requirement of Article III prevents unwarranted judicial intrusion into the execution of the law). R

92 Given the uncontroversial nature of the *Chevron* opinion, it is likely that the Supreme Court never intended *Chevron* to be a major extension of prior case law changing the relationship of reviewing courts and agencies with respect to statutory interpretation. This is also supported by Justice Stevens, the author of *Chevron*, suggesting in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–48 (1987), that *Chevron* deference is appropriate only when an agency applies law to facts and when it engages in pure statutory interpretation.

scription. The Court noted that the reason Congress left an issue unresolved by statute was not relevant to the invocation of the deference doctrine it announced.[93] Instead, the Court emphasized that once the statute was determined to be silent or ambiguous, resolution of the interpretive question depended on policy judgments, and that agencies are more qualified than courts to render such judgments on account of both superior expertise and accountability.[94] Nor can one contend that the Court's emphasis on the fact that Congress chose to leave the statute silent or ambiguous with respect to the interpretive issue at hand implies some sort of statutory assignment of interpretive primacy to the agency. As I have already made clear, inferring such an assignment conflates intent about particular meaning of the statute with intent about which institution shall resolve any uncertainty in meaning.[95]

C. Separation of Powers as a Restriction on Judicial Consideration of Policy

A second possible critique of separation of powers as the foundation for *Chevron* hinges on the fact that outside of the context of reviewing interpretations by administrative agencies, courts necessarily resolve statutory ambiguities and fill statutory gaps, and in doing so rely on policy.[96] Of course, Article III and separation of powers apply outside the administrative law context as well as within it.[97] Given that these principles do not prevent a court from engaging in such policy evaluations when they construe statutes independently, the critique proceeds, they cannot do so in the context of judicial review.[98]

This critique would have purchase were the constitutional principle that I propose a firm barrier to judicial action rather than a resistance norm.[99] As a norm, however, it only demands that a judge

93 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

94 *Id.*

95 *See supra* notes 40, 45–51 and accompanying text. R

96 *See* Lemos, *supra* note 86, at 429 (stating that "[a]lthough *Chevron* was concerned with statutory implementation by administrative agencies, there is no good reason to think that courts are not cast into the same policy-making role when Congress chooses them as its delegates"); Sunstein, *supra* note 2, at 2591–92 (noting the Legal Realist critique of judicial statutory interpretation as policy laden). R R

97 *See* U.S. CONST. art. 3, § 2, cl. 2.

98 *See* Scalia, *supra* note 19, at 515. R

99 On the use of resistance norms of interpretation generally, see Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331–32 (2000); Young, *supra* note

refrain from exercising primary responsibility for interpreting a statute when there is an alternative institution available to exercise such responsibility that is better suited to make decisions that are likely to be influenced by value judgments.

Significantly, the constitutional norm justifying *Chevron* deference does not demand that judges refrain from reliance on policy based interpretive factors and use only legal factors when reviewing agency interpretations of statutes.[100] I have already noted that in hard cases it will likely be impossible to separate legal from policy considerations. Moreover, doing so is likely to lead to bad interpretations. For example, such a demand would prevent a court from avoiding an interpretation that flows from the most direct reading of the language of a statute but which leads to a universally recognized undesirable effect.[101] Rather, the norm I have proposed allows the judge to use all the traditional tools of statutory interpretation.[102] If after doing so, however, the judge recognizes that the interpretation she reaches is not the only plausible one—that the statute is amenable to a range of reasonable interpretations—then the judge would defer to an agency interpretation made in a context that makes the agency a better institution for resolving contested policy matters.

D. Chevron *as Judicial Self-Constraint*

Chevron as a constitutional resistance norm meant to implement Article III principles is unlike other resistance norms in that it is

8, at 1552, coining the term. *See also* John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1542 n.7 (2008) (tying Young's resistance norms to Sunstein's nondelegation canons). R

100 By "legal factors" I mean those that do not explicitly rely on the desirability of the outcome of the interpretation or a preferred vision of how government should operate. They include the meaning of a particular word, the impact of statutory structure, and consistency with precedent. Policy factors are those that are outside this definition and include evaluation of the probability or desirability of impacts of the interpretation and on the nonlinguistic canons of interpretation such as the avoidance canon.

101 In such situations courts frequently reject plain meaning of statutory text in favor of a possible but less natural reading to avoid absurd results. *See* United States v. Granderson, 511 U.S. 39, 47 n.5 (1994) (rejecting the plain meaning of the statute because it would lead to an absurd result); *id.* at 70 (Rehnquist, C.J., dissenting) (agreeing that courts should reject statutory clear meaning when it leads to absurd results); *In re* Chapman, 166 U.S. 661, 667 (1897) ("[N]othing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.").

102 As such, the norm is consistent with current judicial practice at step one. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) (holding that at step one of *Chevron* courts are to employ the traditional tools of statutory interpretation).

imposed by the Court as a self-restraint on the judiciary, rather than imposed as a restraint on another branch of government. The argument that *Chevron* derives from Article III thus depends on *Chevron* actually being a limitation on courts rather than a hidden power grab by them.

The concern that *Chevron* is an assertion rather than a limitation of judicial power stems from the Court having determined which institution, court or agency, gets to exercise interpretive primacy. According to John Duffy, this is a greater and more dangerous assertion of power than had the Court merely assumed its interpretive responsibility in a particular case.[103] There is some intuitive appeal to Duffy's argument: the power to mold the institutional arrangements of government—the power to decide who decides—occurs at a metalevel and is constitutional in nature.[104] This power therefore seems more fundamental than the mere power to interpret an individual statute.

The argument, however, is flawed. Had the *Chevron* doctrine involved the courts deciding which of two nonjudicial institutions gets to interpret statutes, it would be a significant exercise of power over institutional arrangements that would dwarf the power merely to interpret a particular statute. But *Chevron* involves a choice between the courts retaining interpretive primacy or assigning that role to agencies. Thus, although the choice occurs at a metalevel, because the choice involves forfeit of a power that otherwise would reside in the judiciary, it ultimately restrains the courts from being able to exercise discretion. It is the resolution of particular statutory issues that leads to outcomes that judges may or may not prefer.[105] If the judge has discretion to choose among interpretations when faced with an ambiguous statute, she can always choose her preferred outcome. By

103 *See* Duffy, *supra* note 17, at 193–99. R

104 *See* Clinton v. New York, 524 U.S. 417, 445–46 (1998) (stating that Congress cannot assign the President the authority to repeal statutes without amending the Constitution).

105 In this discussion, I assume that judges are influenced by preferences about particular policy outcomes but can be constrained by law and institutional structures. *See* Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 503 (1996) (describing Legal Realists' position that the indeterminacy of law allows judges to pursue policy preferences). Of course, judges also react to other preferences, such as about how the legal system should operate and even whether a decision will enhance their reputation as a judge. *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 15 (1993). To the extent that judges forfeit discretion to decide some matters of statutory interpretation, *Chevron* will interfere with judges' ability to pursue such other preferences as well, unless a judge simply has a preference for allowing the executive branch to make such decisions.

demanding that judges cede some of this discretion to agencies, *Chevron* constrains the ability of the judges to choose preferred outcomes. And this remains true even if judges retain significant discretion over whether a statute is sufficiently unclear on particular issues of statutory interpretation to warrant reaching step two of *Chevron*.

This response to Duffy does not preclude *Chevron* from being an assertion of power by the Supreme Court Justices. There are hundreds of cases in which lower courts review agency statutory interpretation, and the Supreme Court could not grant certiorari on all of them to ensure that the outcome in each case was in line with the Justices' preferences.[106] Lower court judges may have different policy preferences from those that would be supported by a majority of Supreme Court Justices. Hence, *Chevron* can be seen as a power grab by the Supreme Court if the preferences of agency officials are more likely than those of lower court judges to line up with the policy preferences of the Supreme Court Justices. But, the predicates to viewing *Chevron* as an extraordinary assertion of power by the Justices are just as likely to be untrue as true, given the long-lived nature of the *Chevron* doctrine and the fact that the policy views of agencies and lower court judges will change over time in ways that are not predictable. Furthermore, at least on its face, *Chevron* constrains the Justices themselves in cases where the Court reviews agency interpretations of statutes.[107] Hence, the assertion that *Chevron* was a power grab by the Supreme Court is difficult to maintain. Moreover, even if one could maintain the assertion, it would not undermine that, as applied to the entire judicial branch, *Chevron* is a constraint.

A final possible critique of viewing *Chevron* as a self-imposed resistance norm stems from the potential for the doctrine to allow judges to avoid blame for interpreting statutes based on their personal policy preferences.[108] The critique proceeds as follows: Under *Chevron*,

106 *Chevron* enables the Supreme Court to constrain lower courts' interpretive discretion while deciding only a small number of cases a year. *See* Strauss, *supra* note 68, at 1117–19. R

107 *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005); Barnhart v. Walton, 535 U.S. 212, 221–22 (2002).

108 The potential for such a "passive aggressive" use of judicial doctrine to allow courts to implement their policy preferences by declining to decide an issue is not unique to the invocation of *Chevron*. The problem arises whenever the court has discretion under existing doctrine to determine that a petitioner fails to meet requirements allowing the court to decide a claim, which occurs frequently in claims seeking review of agency decisions under the law of standing, finality and ripeness. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–62 (1992) (suit dismissed for lack of standing); Ecology Ctr., Inc. v. U.S. Forest Serv., 192 F.3d 922, 926 (9th Cir. 1999) (suit dismissed because the agency action was not final).

courts have discretion whether to find that a statute resolved the interpretive issue. If a judge's preferences align with the agency interpretation, she can simply invoke *Chevron*, thereby hiding that she is really deciding what the statute means and escaping accountability for that decision.[109] Thus *Chevron* might encourage a judge to reach a decision consistent with her personal policy preferences in a case where she would have interpreted the statute differently to avoid blame.[110] If *Chevron* does facilitate such blame avoidance, then *Chevron* may encourage judges to decide cases based on their personal policy preferences, which would undermine my contention that it is a noninterference norm. The probability that *Chevron* provides deniability that will cause a judge to change her interpretation of a statute, however, is likely to be small because *Chevron* deference is triggered only when the court can maintain that a statute does not clearly resolve the issue facing the court.[111] In such cases, at step one of *Chevron* a judge could justify an interpretation consistent with her personal preferences using well accepted tools of statutory construction, and thereby avoid serious blame without invoking *Chevron*.[112]

III. IMPLICATIONS OF THE ARTICLE III FOUNDATION FOR *CHEVRON*

Chevron traditionally has been described as a two-step inquiry: at step one the court determines whether a statute is silent or ambiguous with respect to the particular statutory question facing an agency; at step two, if the statute is silent or ambiguous, the court asks whether the agency interpretation is reasonable.[113] But, the literature on the grounding of *Chevron* has focused on a preliminary question, now known as *Chevron* step zero, which asks whether *Chevron* should apply

109 *See* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 699–700 (2007).

110 The critique might also point out that, to the extent the judge has discretion to find clear meaning at step one of *Chevron* when an agency interpretation is discordant with her preferences, she forfeits nothing in return for *Chevron*'s enabling her to deny value-driven decisionmaking.

111 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

112 *Cf.* E. Donald Elliott, *Environmental Markets and Beyond: Three Modest Proposals for the Future of Environmental Law*, 29 CAP. U. L. REV. 245, 257 (2001) (intimating that *Chevron* is valuable for correcting abuses by courts that "imposed their own will on the law in the guise of interpreting congressional intent").

113 *See* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 611 (2009). *But cf.* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 597–98 (2009) (arguing that *Chevron*'s formulation artificially divides what is a single inquiry into two steps and advocating that courts and commentators recognize that the doctrine has only one step).

to a particular agency interpretation at all.[114] *Chevron*'s Article III foundation, consistent with the other literature on the basis for *Chevron* deference, has its most direct implication for step zero. The Article III foundation, however, may also imply constraints on how a reviewing court applies steps one and two.

A. Chevron*'s Step Zero*

The Article III foundation of *Chevron* has its most direct effect on the question of whether *Chevron* applies at all to agency statutory interpretation made within various types of agency action. This follows because, as I have noted, the grounding of *Chevron*'s step zero on legislative intent tautologically limits *Chevron*'s applicability to whatever intent about interpretive primacy one reads into statutory authorization of agency action.[115] The Article III foundation moves the inquiry away from congressional intent, focusing instead on the relative competence of courts and agencies to resolve the meaning of ambiguous statutory provisions.[116] At the same time, by avoiding grounding *Chevron* on the legislature's Article I powers, the Article III foundation provides leeway for judges to create a more nuanced doctrine of when *Chevron* applies.

Under my approach, judges should cede primary responsibilities for interpreting statutes when it is likely both that their interpretation will be influenced by policy preferences and a superior alternative interpretive mechanism—agency interpretation—is available. Whether agency interpretation is likely to be superior is the important focus for the step zero inquiry.[117] Given the lessons of public choice theory, expertise accompanied by direct political accountability can be a curse rather than a blessing by increasing the likelihood that an agency decision reflects the improper influence of focused interest groups.[118] Influence is improper when it does not reflect the accommodation of interests that the statutory scheme establishes.

The inquiry into whether the agency interpretation in any context is likely to be superior thus boils down to consideration of

114 *See* Merrill & Hickman, *supra* note 16, at 836; Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 208 (2006). R

115 *See supra* note 42 and accompanying text. R

116 *Cf.* Breyer, *supra* note 12, at 370 (discussing how pre-*Chevron*, judicial acceptance of the fiction of congressional intent, on a case-by-case basis, allowed courts to defer based on their reading of relative competence of courts and agencies to determine the meaning of a statute in a particular context). R

117 *See* United States v. Mead Corp., 533 U.S. 218, 228–30 (2001).

118 *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation*, 86 COLUM. L. REV. 223, 230–31 (1986).

whether the interpreter in the agency has incentives to deviate from the balance struck by the statute, and whether there are sufficient accountability mechanisms to prevent the interpreter from doing so. This in turn will depend on the position of the interpreter in the agency, and perhaps the procedures used to reach the decision. Thus, building on an Article III foundation for *Chevron* justifies factors akin to those used in *Mead* more than does the legislative intent foundation on which that case relied.

Consider whether numerous officials within an agency are authorized to make the decision which raised the interpretive issue. When an interpretation is made by a low-level official from a program, technical, or enforcement office within an agency as part of his day-to-day functions, the interpretation is likely to reflect the professional perspective of that official.[119] It is unlikely either to go through a serious vetting process within the agency,[120] or be the focus of congressional or White House attention.[121] Thus, such an interpretation is more likely to reflect an idiosyncratic professional perspective than is one that has been reached after consideration by agency officials with different professional backgrounds or an interpretation that is sufficiently central to the agency's mission that it will attract attention of those in the White House or on Capital Hill.

Consider as well the procedures used in making the decision. Some procedures, such as publication of proposed action in the agency annual agenda or issuing a notice of proposed rulemaking,[122] put those affected on notice that the agency might adopt an interpre-

119 *See* DOUGLAS YATES, BUREAUCRATIC DEMOCRACY 132 (1982) ("[T]he force of [guild-like] professionalism [within agency staff] is diminished by conflict among various professional groups over the shape and substance of policy.").

120 *See* Mark Seidenfeld, *Who Decides Who Decides: Federal Regulatory Preemption of State Tort Law*, 65 N.Y.U. ANN. SURV. AM. L. 611, 645 (2010) (contending that rulemaking is less susceptible to capture or idiosyncrasy of values than action of a single person or even from a single office within an agency).

121 The more significant and notorious an agency action, the more likely that some interest group is going to pull the "fire alarm" by complaining to Congress or the White House. *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166, 172–73 (1984). For the president especially, action of political appointees is more likely to coincide with the president's preferences than action by professional staff. *See* Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 28–29 (1994).

122 *See* 5 U.S.C. § 553 (2006) (requiring notice-and-comment proceedings for substantive rules); Exec. Order No. 12,866, 3 C.F.R. 638–49 (1993), *reprinted in* 5 U.S.C. § 601 app. at 745–49 (2006) (requiring an agency to include in its regulatory agenda all regulations under development and review as well as all significantly important regulatory actions the agency expects to issue).

tation, provide those affected an opportunity to register their concerns with the agency, and facilitate those affected in alerting Congress or the White House to the matter. In addition, procedures may signal self-awareness by an agency official about the significance of the decision he is making, thereby encouraging him to act less provincially and more deliberatively.[123]

Unlike the implications of viewing *Chevron* as a matter of legislative intent, the Article III foundation would free courts to consider the actual decisionmaking process used to generate an interpretation rather than the legislative mandates for that type of agency action. For example, if an agency were to use notice-and-comment rulemaking for an interpretive rule issued by the head of an agency, that would trigger *Chevron* under my approach; it would not under *Mead* because interpretive rules do not carry the force of law,[124] and virtually any agency official can issue an interpretive rule without any mandated procedures. Unlike intentionalist foundations, however, an approach founded on judicial self-restraint neither depends on the agency authority to act with the force of law, nor ignores postenactment events, such as the fact that the agency head adopted the interpretation.

One objection to the implications of the Article III foundation is that it creates uncertainty about whether *Chevron* or *Skidmore* deference applies. This criticism, which the dissent in *Mead* raised,[125] has even greater potential force with respect to my approach because the court cannot provide certainty even about which particular types of agency actions warrant *Chevron* deference. The applicability of *Chev-*

123 In a sense, the formalization of procedure acts as a reminder of the significance of the action the agency is taking. An analogy would be to doctrine of the Catholic Church under which the Pope must explicitly specify that he is speaking "ex-cathedra" (i.e. metaphorically from the Chair of Saint Peter) when he intends to invoke infallibility. *See Papal Infallibility*, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/441822/papal-infallibility (last visited Sept. 9, 2010) ("The definition of the first Vatican Council (1869–70), established amid considerable controversy, states the conditions under which a pope may be said to have spoken infallibly, or ex-cathedra ('from his chair' as supreme teacher). It is prerequisite that the pope intend to demand irrevocable assent from the entire church in some aspect of faith or morals."). I thank my good friend Walter Kamiat for bringing this point and the analogy to the ex-cathedra doctrine to my attention.

124 *Mead* was a generalization of the Court's holding in *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), denying *Chevron*'s applicability to an interpretation contained in an agency opinion letter, which under the APA is an interpretive rule. *See* 5 U.S.C. § 551(4) (2006) (defining "rule").

125 *See* United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

ron under the Article III approach would depend on the particularities of the decision making under review. From the perspective of encouraging proper agency behavior, however, the value of certainty about whether *Chevron* or *Skidmore* applies is overblown; certainty can even have perverse impacts on the agency interpretive process. *Chevron* provides a standard of review, not a standard of conduct for agencies.[126] The purpose of the *Chevron* doctrine is judicial self-limitation.[127] It is not meant to relieve the agency of its duty to carefully consider sources of law or implications of an interpretation before making it.[128] Agency knowledge that its interpretation will be reviewed under *Chevron* invites it to be lazy or strategic because it knows that the interpretation will be upheld so long as it stays within the often broad bounds allowed by statute.[129] Hence, a little uncertainty on this matter may be a good thing.

The more telling critique of this uncertainty is the leeway it leaves courts in deciding whether to invoke *Chevron*. The doctrine may create the appearance of judicial restraint while allowing courts to avoid restraint whenever they please. I am optimistic, however, that just as other judicially developed standards solidify over time to limit judicial discretion, decisions about whether *Chevron* applies will create sufficient precedent to constrain courts' discretion at step zero.

B. Chevron*'s Step One*

Step one of *Chevron* raises interesting questions about how active a judge should be in determining whether a statute has meaning with respect to the precise question before the reviewing court. The level of judicial activism inherent in step one represents a sliding scale. On one end is the position of Justice Scalia, who claims that for him *Chevron* is not as significant as for other judges because he is apt to find a

126 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

127 *See id.*

128 *See* Seidenfeld, *supra* note 4, at 133–34. R

129 For example, the Department of Health and Human Services essentially admitted that it did not try to reach the best interpretation for a statute prohibiting federal funding of abortion, which regrettably the Supreme Court not only upheld but for which the Court actually complimented the agency. *See* Rust v. Sullivan, 500 U.S. 173, 187 (1991); *see also* Yehonatan Givati, *Strategic Statutory Interpretation by Administrative Agencies*, 12 AM. L. & ECON. REV. 95, 96 (2010) (modeling agency statutory interpretation to show that the standard of review will affect the aggressiveness of the agency choice of interpretation); Seidenfeld, *supra* note 4, at 101–03 (describing this incident of admitted lack of care in interpretation). R

clear meaning.[130] Essentially, this implies that once a judge finds a convincing reading of a statute, then the judge should vote for that meaning, and therefore need never get to step two. A judge would get to step two only if she remained personally uncertain of the best meaning of a statute. On the other end of the spectrum would be a judge who reaches step two even when she is fairly certain of a best reading if she determines that other judges could reasonably reach a different meaning.[131]

Constraints on *Chevron*'s step one do not flow as directly from its constitutional foundation as do constraints at step zero. In fact, approaches that ground *Chevron* on legislative intent say nothing about how the courts should proceed at step one because they do not reflect any actual statutory prescription of the relative bounds of agency and court interpretive authority.[132] My approach, however, does inform the extent to which judges should find a statute silent or ambiguous because it calls for them to defer to the agency when their interpretations are likely to be influenced, whether consciously or not, by their policy preferences.

The set of interpretations for which judges are likely to be so influenced is substantial because judges, like everyone else, are subject to attribution errors that will hide, even from themselves, their reliance on personal preferences and perspectives on meaning that stem from their individual backgrounds and experiences.[133] The potential for such errors suggests that at step one of *Chevron* judges should liberally construe statutes as amenable to multiple interpretations. Essentially, whenever a judge finds that another reasonable jurist

130 *See* Scalia, *supra* note 19, at 521. R

131 For a statement of the spectrum of potential approaches to step one, see Gersen & Vermeule, *supra* note 109, at 688–90. R

132 *See* Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ., 550 U.S. 81, 108–22 (2007) (Scalia, J., dissenting) (criticizing use of legislative history in statutory interpretation at *Chevron* step one).

133 *See* RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE 226–27 (1980) (noting that people's causal accounts explaining their own behavior are subject to the same biases as accounts of others' behavior); LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION 79–82 (1991) (noting that when a person tries to explain his or her own reaction to a situation the mental construal process to do so can lead to bias); Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 348–49 (2008) (claiming that judges are more apt to attribute behavior to both external and internal influences, indicating not only that this influence occurs, but also that judges are aware of it); Adam Benforado & Jon Hanson, *Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights*, 57 EMORY L.J. 1087, 1127–28 (2008) (addressing claims by the fields of social psychology and social cognition that "humans often are moved by forces that exist outside of their conscious awareness").

could disagree with her about statutory meaning that derives from legitimate sources of interpretation, the opportunity for value judgments to creep into resolution of meaning is substantial. Thus, Article III's self-limiting principle counsels that a judge should find a statute silent or ambiguous whenever she determines that other jurists nonetheless might reasonably disagree about statutory meaning.

Scholars have leveled objections about the inherent tension in a standard that requires a judge who has determined that there is a best interpretation to nonetheless recognize that alternative interpretations are reasonable.[134] That said, the standard is neither incoherent nor impossible to apply. It is no different from appellate standards of factual review in both administrative and ordinary judicial cases, which require an appellate court to accept the findings of lower tribunals even when the court might have found otherwise.[135] Moreover, I believe that there are cases that the Supreme Court has decided which would have come out differently had the Court adopted this liberal approach to finding permissible meaning at step one of *Chevron*.

In *FDA v. Brown & Williamson Tobacco Corp.*,[136] the majority found that the seemingly clear words of the statute to cover cigarettes as a drug delivery device did not warrant reading the statute to give the Food and Drug Administration (FDA) authority to regulate tobacco products.[137] The majority reached that conclusion based on its consideration of several statutes Congress had passed after adopting the relevant language of the Food, Drug and Cosmetic Act (FDCA)[138], all of which seem premised on a congressional understanding that the FDA did not have regulatory authority over tobacco.[139] According to

134 *See* Gersen & Vermeule, *supra* note 109, at 690–91. R

135 In appeals from findings made by lower judges, appellate courts generally accept factual findings unless clearly erroneous. *See* Amanda Peters, *The Meaning, Measure and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 245 (2009). In appeals from jury findings of fact, and from findings after formal administrative hearings, judges are to accept the findings of the lower tribunal supported by substantial evidence in the record. *See* 5 U.S.C. § 706 (2006) (providing for substantial evidence review of facts when a determination is required by law to be made after a formal hearing); Peters, *supra*, at 245. Not only does the law require that judges accept findings that they would not have made themselves, but it also attempts to distinguish between the levels of deference given under these two standards. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 492–93 (1951) (specifying the nuances of review of fact finding under the substantial evidence standard in the APA).

136 529 U.S. 120 (2000).

137 *See id.* at 125–26.

138 Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301–399 (2006)).

139 *See Brown & Williamson*, 529 U.S. at 158.

the majority, despite the language of the Food, Drug and Cosmetic Act (FDCA) these subsequent enactments manifested a clear congressional vision that the FDA did not have the authority it exercised.[140] But, one cannot surmise that such an understanding necessarily expresses a desire to deny the FDA authority if, as the FDA ultimately proved, the tobacco companies had manipulated their products to deliver preset levels of nicotine to smokers. Dose manipulation is precisely what brought tobacco products within the textual definition of drug delivery device, and given that no one outside the industry, including Congress, was aware of this industry practice, Congress's understanding logically says nothing about its intent to deny that authority once the facts were developed.[141] In short, the majority could reject the FDA interpretation as unreasonable only if unreasonable means contrary to what the judges in the majority thought to be the best reading of the statute.

It warrants mention, that where a difference in statutory interpretation results from disagreement about the legitimacy of sources, the Article III foundation for *Chevron* does not suggest that judges must find the statute silent or ambiguous.[142] If a jurist can reach an interpretation only by use of sources of law that another judge considers illegitimate, then the second judge rightfully can conclude that the interpretation is unreasonable.[143] This seeming exception is not problematic as long as the judge acts consistently in rejecting that source. In that case, the judge is not free to pick and choose the sources of law to reach an interpretation that may reflect an extralegal preference.

140 *See id.* at 126.

141 As a matter of formal logic, this reflects that the statement *P* implies *Q* is true whenever *P* is not true. *See* PATRICK J. HURLEY, A CONCISE INTRODUCTION TO LOGIC 330 (7th ed. 2000). Essentially, by the majority's reading of the statute, Congress determined that if the tobacco industry did not manipulate the nicotine level delivered by cigarettes then the FDA does not have authority over tobacco products. The fact that the premise is false means that all bets are off about the truth of the conclusion. Coupled with statutory language under which tobacco products clearly fell within the definition of drug delivery devices, the agency's interpretation is reasonable.

142 For a description of the debate on use of one source, legislative history, in statutory interpretation, see Cheryl Boudreau et al., *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957, 981–91 (2007).

143 This follows only if the choice of sources of law at which a judge may look in interpreting statutes is a matter to be decided by judges under their Article III powers. Under a foundation built on legislative intent, presumably Congress could tell a court what sources of law are and are not appropriate for use in statutory interpretation. *See* Rosenkranz, *supra* note 10, at 2143–47. R

Zuni Public School District No. 89 v. Department of Education[144] reflects different interpretations that stem from a disagreement about what constitutes a legitimate source of statutory meaning.[145] The difference between Justice Breyer's majority, which found the statute ambiguous, and Justice Scalia's dissent, which found it clear, hinged to a large extent on the legitimacy of legislative history as evidence of statutory meaning.[146] Scalia refused to consult legislative history because he believes it is not a permissible source.[147] As such, Scalia's dissent does not likely reflect some hidden policy preference, but rather his consistent position that legislative history is irrelevant for determining statutory meaning. To phrase the relationship between the majority and dissenting opinions another way, *Zuni* is not a case in which the dissent would deem the majority to have engaged in reasonable process of interpretation, or vice-versa.

C. Chevron*'s Step Two*

Courts and commentators have entertained two disparate views of *Chevron*'s step two. Under the more traditional view, review is cursory, with the reviewing court affirming an agency interpretation as long as it falls within the bounds of the silence or ambiguity identified at step one.[148] Under the alternative view, courts apply more stringent review, requiring that the agency explain why it chose its interpretation from those allowed by the statutory silence or ambiguity.[149] This latter view recognizes the agency's policymaking function in filling statutory gaps, and imposes the same reasoned decisionmaking standard of review at step two as courts demand when reviewing agency policy choices under the arbitrary and capricious standard of review.[150]

144 550 U.S. 81 (2007).

145 *See id.* at 90–91 (finding that the Secretary of Education's interpretation of a statute was reasonable given its broad language).

146 *Compare id.* at 100, *with id.* at 108–10 (Scalia, J., dissenting) (arguing that the Secretary of Education's "implementing regulations do not look much like the statute").

147 *See id.* at 109, 121.

148 *See* Seidenfeld, *supra* note 4, at 103. R

149 *See* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1263–66 (1996) (summarizing D.C. Circuit cases in which the court treated step two of *Chevron* as a variant on hard look review); M. Elizabeth Magill, *Step Two of* Chevron v. Natural Resources Defense Council, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85, 99 (John F. Duffy & Michael Herz eds., 2005).

150 *See* Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 44–47 (1983).

In a recent colloquy, several scholars of administrative law have also debated whether *Chevron* includes a step two inquiry at all.[151] This is a separate question than the stringency of the review at step two, whether it be part of *Chevron* or something separate. But, as will become clear, this question bears on the stringency of step-two review. My grounding of *Chevron* in Article III has something to say about the answers to both of these questions.

Let me begin by considering whether *Chevron* has a step two. Matthew Stephenson and Adrian Vermeule expressed the view that there is no step two—essentially that step two either is superfluous or is better viewed as part of traditional review to ensure that agency action is not arbitrary and capricious.[152] Their view is a natural extension of an article by Gary Lawson noting that, in addition to whatever *Chevron* requires, arbitrary and capricious review under the APA also applies to statutory interpretation.[153] Stephenson and Vermeule argue that step one is about determining the bounds of allowable interpretations based on factors that courts normally consult when interpreting statutes, and that once those bounds are resolved, there is nothing left for the court to do other than compare those bounds to what the agency did.[154] They characterize what others have called step two of *Chevron* simply as an application of arbitrary and capricious review to agency statutory interpretation.[155]

Kenneth Bamberger and Peter Strauss have countered asserting that there is a step two to *Chevron*.[156] They characterize *Chevron* as dividing the statutory interpretation process into step one, for which the court is the decisionmaker, and step two, for which the court oversees the agency as the decisionmaker, or in my terms, where the agency has interpretive primacy.[157] Bamberger and Strauss see the maintenance of clear areas of responsibility as crucial to keeping courts out of the policymaking business.[158] They also note that maintaining the distinction between the inquiry for which the court is responsible and that for which the agency is responsible will help an

151 *Compare* Stephenson & Vermeule, *supra* note 113, at 597–98 (contending *Chevron* has only *one* step), *with* Bamberger & Strauss, *supra* note 112, at 611–13 (responding that *Chevron* has two steps). R

152 *See* Stephenson & Vermeule, *supra* note 113, at 599–604. R

153 *See* Gary S. Lawson, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377, 1377–78 (1997).

154 *See* Stephenson & Vermeule, *supra* note 113, at 601–02. R

155 *See id.* at 603–04.

156 *See* Bamberger & Strauss, *supra* note 113, at 611. R

157 *See id.* at 613–15.

158 *See id.* at 615–16.

agency understand what leeway it has when interpreting a statutory provision that a court has already considered outside of a *Chevron* context.[159]

My Article III foundation for *Chevron*, although premised on something other than a strict separation of interpretation and policymaking, gives theoretical support to the position of Bamberger and Strauss. To understand why, consider what step two would be under Stephenson and Vermeule's view for an issue that fell outside the dictates of the APA, or if Congress amended arbitrary and capricious review under the APA.[160] If step two merely invokes the standards of review that Congress dictates outside of the interpretive context, in these two situations, there would be no review of reasonableness of the agency's interpretation. But recall that under my approach to *Chevron*, courts voluntarily cede interpretive primacy to the agency when the agency acts in a manner that is likely to exploit its institutional competence to reach a superior interpretation.[161] Given the courts' ultimate responsibility to say what the law is, however, they remain responsible to ensure that agencies fulfill that superior institutional potential. Moreover, this responsibility justifies the unique attributes of statutory interpretation which Bamberger and Strauss argue should be encompassed by the judiciary's oversight role.[162] In short, an Article III foundation for *Chevron* will allow courts to develop a standard of oversight review for interpretation independent of the standard that governs agency policymaking discretion under arbitrary and capricious review.

Having weighed in on whether step two is part of the *Chevron* interpretive process, let me now turn to the question of the stringency of review at that step. 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.[163] A court that actively reviews agency interpretations to ensure that they are reasoned thus threatens to interfere with the policy-making prerogatives

159 *See id.* at 616–21.

160 *See* 5 U.S.C. § 706(2)(A) (2006) (requiring a court to hold unlawful and set aside agency action that is arbitrary, capricious, or an abuse of discretion).

161 *See supra* note 116 and accompanying text. **R**

162 *See* Bamberger & Strauss, *supra* note 113, at 622–23. **R**

163 *See* Levin, *supra* note 149, at 1267–68. **R**

of the agency more directly than does a court that simply defers to discretionary choices of statutory meaning.[164]

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.[165] 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.[166] 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.[167] 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

164 This is one of the critiques of the reasoned decision-making version of arbitrary and capricious review. *See* Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games and Accountability*, 57 LAW & CONTEMP. PROBS. 185, 200–04, 229–30 (1994); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1400–01 (1992); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 300–03, 308–13. Much ink has been spilled about the extent to which hard look review actually interferes with agency policymaking and whether the benefits of such review are worth the costs of potential interference. *See* Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 509–11 (2002) (arguing that judicial review provides significant benefits in the care agencies give to the rules they adopt); Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 300–02 (2009) (contending that whether judicial review inefficiently discourages agency policymaking depends on many other factors that influence agency decisions to act).

165 *See* Mark Seidenfeld, *supra* note 3, at 1549–50; Seidenfeld, *supra* note 4, at 129. R

166 *See* Bamberger & Strauss, *supra* note 113, at 622 (doubting that "hard look" review plays much of a role in review of run-of-the-mill agency adjudications). R

167 *See id.* at 622–23.

so long as that role is one of agency oversight and not substitution of judicial value judgments.

It is imperative to understand the difference between oversight and decision as that difference bears on the requirement that judges constrain their potential to impose their value judgments. Judicial oversight involves judgments about the sufficiency of agency consideration of facts and policies that are raised by issues of statutory interpretation.[168] But that is different from judgments about the outcome of the interpretive question. I do not deny that judges' values may influence the burden they place on agencies to meet the step two standards. The more a judge prefers the agency outcome, the more likely he is to find it reasonable and the less consideration he is likely to demand of the agency.[169] The key point, however, is that by being demanding at step two, the judge does not dictate interpretive outcomes.[170] This is best illustrated by the remedy were a court to find an agency interpretation insufficient at step two. The reviewing court would remand the case to the agency, which could then seek to reinstate its interpretation after bolstering its factual support and reasoning about the issue.[171]

CONCLUSION

Despite all that has been written about *Chevron*, relatively short shrift has been given to its constitutional foundation, which allows courts to cede to agencies some responsibility for determining the meaning of statutes. This is unfortunate, because a careful consideration of that foundation must inform the form that *Chevron* deference can assume.

Grounding *Chevron* in congressional intent to delegate interpretive primacy to agencies is an unsupportable fiction that distracts attention from judicial responsibility for the *Chevron* doctrine. Instead, *Chevron* is better viewed as a doctrine of judicial self-restraint under the courts' Article III responsibilities. That restraint counsels courts to avoid taking the primary role in interpreting statutes when that role creates significant potential for a judge to impose her policy preferences and a superior forum for resolving policy disputes is avail-

168 *See id.* at 623.

169 *See* Posner, *supra* note 105, at 28. R

170 *See* Seidenfeld, *supra* note 4, at 130. R

171 *Cf.* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 415–17 (2000) (concluding that hard look review does not prevent agencies from adopting fundamental regulatory policies).

able. From this principle it follows that, in deciding whether to apply the *Chevron* doctrine, courts should consider the actual decisionmaking process used to generate an agency interpretation rather than the legislative mandates about whether the agency action has the force of law. At step one of *Chevron* judges should liberally construe statutes as amenable to multiple interpretations. Finally, at step two, judicial responsibility to ensure that agencies fulfill the promise stemming from their superior expertise and accountability justifies courts taking an active oversight role over agency interpretations of statutes.