

BLANK CHECKS: RESTORING THE BALANCE OF POWERS IN THE POST-CHEVRON ERA†

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INTRODUCTION

Our Constitution is a deceptively simple document. Article I grants all legislative powers to Congress,¹ article II vests executive power in the President,² and article III vests the judicial power of the United States in the Supreme Court and in inferior courts established in conformance with that article.³ Despite this scheme of government, often referred to as the separation of powers, there is considerable overlap in functions among the branches of government.⁴ These overlaps give rise to a system of checks and balances that prevents any one branch from exceeding the proper limits of its powers or from exercising its powers improperly.⁵

Overlaps in functions among the three branches of government arise frequently. For example, the judicial branch "legislates" when it engages in common-law making⁶ and in statutory interpreta-

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¹ U.S. CONST. art. I, § 1.

² *Id.* art. II, § 1, cl. 1.

³ *Id.* art. III, § 1. The main attribute of courts established pursuant to article III is that their judges enjoy lifetime tenure with non-diminishing salary. *See id.*

⁴ In his article, *Constitutionalism After the New Deal*, Sunstein states:

[T]he notion of separation of powers is in important respects a mischaracterization of the constitutional system, which should instead be understood in terms of checks and balances. The three branches of course have overlapping functions; each is involved to some degree in the activities of the other. The term "separation" tends to disguise this fact.

Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 430 (1987); *see also* Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492 (1987) (each branch serves as the ultimate authority for a particular function).

⁵ *See* *Mistretta v. United States*, 488 U.S. 361, 380–84 (1989); *Bowsher v. Synar*, 478 U.S. 714, 721–27 (1986); *INS v. Chadha*, 462 U.S. 919, 951 (1983); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

⁶ There are numerous areas of federal common law. Admiralty is perhaps the least controversial and most longstanding area. *See, e.g., Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360–61 (1959). Other areas of federal common law include controversies between states, *see, e.g., Hinderlider v. La Plata River & Cherry Creek Ditch*

tion.⁷ The judiciary necessarily executes and enforces the law when it adjudicates claims and determines remedies.⁸

The executive branch engages in legislation and adjudication through the actions of administrative agencies. Federal legislation often delegates responsibility to administrative agencies to implement statutory schemes. These statutory schemes often contain ambiguities or gaps that the implementing agency must clarify or fill. Sometimes, the statutory scheme sets forth broad policy goals to which the agency must give meaning as it implements the scheme.⁹ In all of these contexts, the agency is legislating.¹⁰ Agency duties sometimes encompass the power to adjudicate the rights and obligations of private parties under a federal statutory scheme.¹¹ In all of these situations, the executive branch exercises the kind of power ordinarily wielded by another branch of government.

Co., 304 U.S. 92, 110 (1938), and where application of federal common law is necessary to vindicate uniquely federal interests. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964) (foreign relations); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) (federally-issued securities). Sometimes, an area of federal common law is implied in order to assure the effectiveness of a federal statutory scheme. *See, e.g.*, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (federal common law deemed necessary to govern suits under section 301(a) of the Labor Management Relations Act of 1947).

⁷ Although statutory interpretation is often idealized as merely divining congressional intent, the line between law-finding and law-making is a fine one, at best. Finding the law involves an interpretive act to which a judge brings a number of interpretive tools to bear on the text, such as canons of statutory construction and legislative history. Although there is considerable debate over the proper interpretive tools to use to give meaning to legislative texts, there is little dispute that the content of a legal rule is unclear until and unless the text is subjected to interpretation. Thus, judges are an essential partner in the process of law-making. Even if it could be said that the meaning of legislative texts exist independent of their interpretation by judges, issues often arise that the text does not address. In these situations, judges are called upon to fill in "gaps" left by the text. Although this process is sometimes couched in terms of divining congressional intent, it is a hypothetically constructed intent. It is a search for what the enacting Congress would have written into the legislative text had it decided to do so. In other words, the court is fashioning a legal rule where none exists. This is law-making.

⁸ For example, the antitrust laws are enforced in three different ways: private causes of action, criminal prosecutions and FTC adjudications. In the course of adjudicating private causes of action, courts are the primary enforcers of the statute. In the other modes, the courts share enforcement with the executive branch and the FTC, respectively. *See* 15 U.S.C. §§ 4, 8, 15, 45 (1988).

⁹ *See* Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 372-85 (1989).

¹⁰ *See infra* text accompanying notes 183-99 for a discussion of the nondelegation doctrine, setting forth the limits on congressional power to delegate law-making power to administrative agencies.

¹¹ *See infra* text accompanying notes 238-83 for a discussion of the limits of Congress's ability to reassign judicial authority to administrative agencies.

The legislative branch has not succeeded in wielding executive or judicial powers directly.¹² It has succeeded, however, in vesting executive power in administrative agencies that are not directly accountable to the President.¹³ Although the constitutional authority for this "fourth branch" of government is far from clear, it is nonetheless an established feature of the modern administrative state.¹⁴

This article addresses one area of overlap in the functioning of the branches of government, namely, the power of administrative agencies to make determinations of law. It explores the extent to which the judiciary, in reviewing administrative determinations of law, should function as a check against administrative action. This article critically examines the argument, made most forcefully in *Chevron U.S.A. v. Natural Resources Defense Council*,¹⁵ that courts must defer to reasonable interpretations of law made by administrative agencies, and it rejects that argument on constitutional and non-constitutional grounds. Further, this article posits that *Chevron* represents a usurpation of judicial power and results in excessive concentration of power in administrative agencies.

Given the overlap of powers inherent in the constitutional structure, the branches of government must develop rules concerning the recognition and supremacy of the actions taken by each branch.¹⁶ Rules regarding the appropriate scope of judicial review

¹² See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 721-34 (1986) (congressionally-controlled official may not execute the law); *INS v. Chadha*, 462 U.S. 919, 944-59 (1983) (Congress may not overturn executive action without engaging in the legislative process).

¹³ I refer, of course, to so-called independent agencies such as the Securities and Exchange Commission ("SEC"), the National Labor Relations Board ("NLRB"), and the Federal Trade Commission ("FTC"), that are composed of Commissioners whom the President may not remove from office, except for cause. The validity of independent agencies was established in *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935) and recently reaffirmed in *Morrison v. Olson*, 487 U.S. 654, 685-93 (1988).

¹⁴ See generally Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (arguing that all agencies, both executive and independent, should be viewed as within a fourth branch of government). Others find a significant distinction between the two types of agencies. See, e.g., Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981) (imposing certain regulatory procedures and requirements on executive, but not independent, agencies); *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-92 (1952) (Jackson, J., dissenting) (arguing for different standards of judicial review of independent agencies than for executive agencies).

¹⁵ 467 U.S. 837 (1984).

¹⁶ See Kramer, *The Constitution as Architecture: A Charette*, 65 IND. L.J. 283, 287-88 (1990) (the overlap of power does not mean that the branches are of equal status when exercising particular functions); Strauss, *supra* note 4, at 492 (each branch serves as the ultimate authority for a particular function).

Without such rules, disagreements among the branches would spin citizens through a never-ending loop in which Congress legislates, the President (or an agency) acts in accor-

of agency action remain unresolved and controversial. Although courts often appear to defer to an agency's construction of its or-

dance with his (or its) understanding of the law, this action is challenged in court, the court acts in accordance with its understanding of the law, Congress amends the statute to restore its understanding of the act, etc. Of course, it is possible (and likely) that, in many, if not most instances, the branches will agree, thus avoiding an infinite loop. I also do not mean to suggest that the branches would not act in good faith in discharging their duties.

For example, in service of these rules, the Supreme Court has decided, apparently without much dissent from the other branches, that it is the final authority on the meaning of the Constitution. See *United States v. Nixon*, 418 U.S. 683, 703-07 (1974); *Powell v. McCormack*, 395 U.S. 486, 548-49 (1969); cf. *Baker v. Carr*, 369 U.S. 186, 211 (1962) (Court interpretation of Constitution supreme to that of state legislature); *Cooper v. Aaron*, 358 U.S. 1, 4 (1958) (Court interpretation of Constitution supreme to that of state officials). But see Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983-89 (1986) (Supreme Court decisions are not binding on future actions of other branches of government). Having set forth that axiom, the Court was then able to set forth rules on supremacy. Some of the rules the Court has developed are uncontroversial. For example, it is now clear that courts must interpret all statutes in a way that furthers clear congressional intent. There is considerable debate within the Court, as well as among the legal community generally, as to the proper methods of statutory interpretation. See generally W. ESKRIDGE & P. FRICKEY, *LEGISLATION* 569-828 (1987); Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U.L. REV. 277 (1990). Most methods of statutory interpretation, however, result in the enforcement of clear congressional directives provided that such directives are not irrational or unconstitutional.

In addition, other branches must respect congressional attempts to alter statutory interpretations if Congress modifies the statute through constitutional procedures and if the content of the new legislation is constitutional. See *INS v. Chadha*, 462 U.S. 919, 951-59 (1983). As to nonconstitutional matters, the legislative branch's pronouncements are superior to those of other branches. As Madison put it: "In republican government the legislative authority necessarily predominates." THE FEDERALIST No. 50 at 356 (J. Madison) (B. Wright ed. 1961). Other rules are less clear and more controversial. This article is concerned with what one such rule should be, namely, what posture courts should take in reviewing administrative determinations of law. This is not untread ground. More than forty years have passed since the Supreme Court's decision in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), and *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947), and the enactment of the Administrative Procedure Act (APA), Pub. L. No. 79-404, § 1-12, 60 Stat. 237-44 (1946) (current version at 5 U.S.C. §§ 551-706 (1988)). The APA judicial review provision requires the reviewing court to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.

It has been over ten years since the introduction of the Bumpers Amendment, which cleared the Senate in 1982, but was not enacted by the House of Representatives. See S. 1080, 97th Cong., 2d Sess., 128 CONG. REC. S2717 (1982). Earlier versions have existed since 1979. The thrust of the Bumpers Amendment was to make clear that courts reviewing agency actions should "independently decide all relevant questions of law." *Id.* See generally O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739 (1980).

More than five years have passed since the Supreme Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council*, 67 U.S. 837 (1984). *Chevron* is widely regarded as the most important decision in this area, and one of the most important decisions in all of administrative law. See Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512.

ganic statute, courts sometimes decide questions of law independently.¹⁷ Even when courts defer to administrative determinations, courts' descriptions of deference vary widely.¹⁸ Nonetheless, it appears that two fundamentally different concepts of deference have developed.¹⁹ One concept of deference requires courts to defer to agency interpretations only to the extent that courts find them persuasive.²⁰ The *Chevron* opinion articulates another definition of deference.

According to *Chevron*, in the absence of congressional intent to the contrary, courts should defer to reasonable agency constructions of their organic statutes, even if a court would reach a different construction if it had to address the question de novo.²¹ Adherents of this "strong reading"²² of *Chevron* view it as vindicating congressional intent to delegate policy-making to administrative agencies. They also find the strong reading to be consistent with a philosophy that policy decisions should be made by governmental actors who are politically accountable.

This article contends that the strong reading of *Chevron* should be rejected because it is unconstitutional, represents poor political theory, produces bad policy outcomes, and rests on shaky doctrinal foundations.²³ *Chevron* is based on two questionable premises: first,

¹⁷ Compare *Hearst*, 322 U.S. 111, 129 (Court defers to NLRB construction of term "employee"), with *Packard*, 330 U.S. 485, 490 (Court construes the term "employee" independently of NLRB).

¹⁸ See Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 AD. L. REV. 329, 333 (1979).

¹⁹ See Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 559-67 (1985); Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 7-14 (1983).

²⁰ See, e.g., *Chevron*, 467 U.S. at 842-45.

²¹ See, e.g., Breyer, *Judicial Review of Questions of Law and Policy*, 38 AD. L. REV. 363, 373 (1986).

²² There is more than one way to read *Chevron*. The strong reading is one that requires courts to defer to agency interpretations of law in most situations. Such a reading also interprets the term deference in its strong sense—to require courts to defer to agency interpretations they do not agree with but that are, nonetheless, reasonable. See generally *Judicial Review of Administrative Action in a Conservative Era*, 39 AD. L. REV. 353, 367-71 (1987) [hereinafter *Judicial Review*] (comment of Cass R. Sunstein).

I do not mean to imply that other readings of *Chevron* are illegitimate. I focus on the strong reading of *Chevron* because it is the most widely accepted interpretation of the case. See, e.g., Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?* 7 YALE J. REG. 1, 16-42 (1990); Breyer, *supra* note 21, at 373; Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 AD. L.J. 255, 255-86 (1988); Pierce, *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 303 (1988). It also sets forth a vision of judicial review most at odds with the one I ultimately propose.

²³ See also Breyer, *supra* note 21, at 373 ("To read *Chevron* as laying down a blanket rule

that one can distinguish between those situations in which courts are interpreting legislative texts from ones in which they are extrapolating from legislative texts;²⁴ and second, that Congress intends the agency and not the courts to extrapolate from the text.²⁵ The distinction between law interpretation and extrapolation is elusive at best, and does not form a sensible or stable line on which to demarcate judicial and agency roles. Moreover, there are few reasons to believe that Congress intends to allocate judicial and agency authority along this line.

Even if we assume that Congress intends to draw the line suggested in *Chevron*, this article contends that such an action by Congress would be unconstitutional. Interestingly, the question of the constitutionality of requiring the federal courts to defer to agency constructions of law has received scant attention in the administrative law literature.²⁶ Yet it is axiomatic that all legislative enactments are legitimate only if they are constitutional.²⁷ When one analyzes the constitutional limits on the scope of judicial review of agency action, one reaches the conclusion that Congress may not restrict the scope of review of agency action without violating principles of separation of powers.

This conclusion gives one pause—how can it be *unconstitutional* for courts to defer to agency action given the line of cases from *NLRB v. Hearst Publications* to *Chevron* that appear to require deference? The answer to this conundrum is that, although it would be unconstitutional for Congress to limit the scope of judicial review of agency action, it would not violate the Constitution for courts, as a prudential matter, to give deference to at least some agency deter-

... would be seriously overbroad, counterproductive and sometimes senseless."); *id.* at 381 ("If taken literally, the Court's language suggests a greater abdication of judicial responsibility to interpret the law than seems wise, from either a jurisprudential or an administrative perspective.").

²⁴ See, e.g., Diver, *supra* note 19, at 574-92. But see Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 22 (1985) (making such a claim). See Pierce, *supra* note 22, at 308 (distinguishing between "real" and "creative" statutory interpretation).

²⁵ See, e.g., Anthony, *supra* note 22, at 4; Levin, *supra* note 24, at 4. But, as Dean Diver has pointed out: "The trouble with this line of argument is that few statutes are addressed exclusively to an agency. Unless Congress intended to exclude judicial review, one must presume that the courts are also among its intended audience." Diver, *supra* note 19, at 576.

²⁶ The federal courts literature has given tangential treatment to the subject. See, e.g., Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 976-86 (1988); Strauss, *Article III Courts and the Constitutional Structure*, 65 IND. L.J. 307, 309 (1990).

²⁷ See Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 37 (1981).

minations.²⁸ This type of deference, radically different from the type of deference urged by adherents of the strong reading of *Chevron*, is consistent with prior case law and is preferable to the strong reading of *Chevron* as a matter of policy.²⁹

Section I of this article summarizes the major pre-*Chevron* positions towards deference to administrative determinations of law.³⁰ The section then discusses *Chevron*³¹ and the post-*Chevron* United States Supreme Court cases and examines how the Supreme Court has applied and shaped the deference doctrine since *Chevron*.³² Section II identifies and analyzes the coherence of the deference doctrine.³³ This section first explores the constitutional legitimacy of the strong reading of *Chevron* and concludes that the strong reading is unconstitutional because the deferential posture of review upsets the balance of power among the branches of government.³⁴ Section II criticizes the argument that the strong reading of *Chevron* represents an attractive theory of government.³⁵ Finally, this section unearths some cases in which courts did not follow *Chevron* and

²⁸ See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight of [an administrator's] judgment in a particular case will 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.").

²⁹ Prudential deference is different from *Chevron*'s notion of deference in two respects. First, it is not a blanket rule of deference. The trigger for prudential deference varies according to the type of decision and specific context at issue, thereby requiring a case-by-case determination. Nonetheless, one can identify general situations appropriate for deference. The flexibility inherent in a case-by-case analysis is desirable precisely because it allows the court to take into account different interests and considerations at stake in particular cases. In short, a case-by-case analysis need not be an ad hoc approach.

Second, the degree of prudential deference varies from situation to situation. The strong reading of *Chevron* generates a hard form of deference—a court must defer to a reasonable interpretation even if the court does not believe it to be the *best* interpretation. In contrast, prudential deference entails persuasive deference, that is, an agency's interpretation might influence a court's conclusion as to the best interpretation. Depending upon the issue, a court would assign the agency's interpretation greater or less weight. Prudential deference does not suffer from constitutional infirmity because the courts always retain full authority to interpret the law; they are not required to acquiesce to the administrative agency's determinations. This reservation of power serves as an effective check on administrative action even if, in practice, the court does not always exercise this power. The threat of declining to defer results in agencies acting more responsibly and, if the agency does not act responsibly, the courts retain the power to correct agency action.

³⁰ See *infra* notes 41–69 and accompanying text.

³¹ See *infra* notes 71–99 and accompanying text.

³² See *infra* notes 100–59 and accompanying text.

³³ See *infra* notes 160–73 and accompanying text.

³⁴ See *infra* notes 174–301 and accompanying text.

³⁵ See *infra* notes 302–14 and accompanying text.

suggests a more general set of concerns that ultimately undermine the rationale of *Chevron*.³⁶

Section III dismisses the strong reading of *Chevron* as an unacceptable model for judicial review and considers two alternative visions of the court/agency relationship.³⁷ This section first discusses a managerial model but concludes that it is unsatisfactory, because it creates too blunt an instrument to accommodate adequately the complex set of issues raised by the court/agency relationship.³⁸ Alternatively, the article proposes a model of interbranch cooperation.³⁹ Under this case-by-case approach, the courts choose to accord certain types of agency decisions varying amounts of persuasive deference. This section suggests some of the factors that should influence the courts' decisions to grant deference in particular cases. Finally, this section considers some likely objections to this interbranch cooperative approach, concluding that, despite objections, it is the best approach.⁴⁰

I. THE DEFERENCE DEBATE

A. *The Pre-Chevron Cases*

The pre-*Chevron* cases are notable for their apparent inconsistency regarding judicial review of agency interpretations of law.⁴¹ Two cases that review decisions of the National Labor Relations Board ("NLRB") typify two conflicting approaches to judicial deference to agency decisions.⁴² In 1944, in *NLRB v. Hearst Publications, Inc.*, the United States Supreme Court held that a court ought

³⁶ See *infra* notes 315-34 and accompanying text.

³⁷ See *infra* notes 340-95 and accompanying text.

³⁸ See *infra* notes 342-52 and accompanying text.

³⁹ See *infra* notes 353-70 and accompanying text.

⁴⁰ See *infra* notes 371-95 and accompanying text.

⁴¹ As Judge Friendly observed:

We think it is time to recognize . . . that there are two lines of Supreme Court decisions . . . which are analytically in conflict Leading cases support[] the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term.

Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976), *aff'd sub nom.* *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). The post-*Chevron* cases suffer from many of the same consistency problems. See *infra* notes 100-59 and accompanying text for a discussion of these cases.

⁴² *NLRB v. Hearst Publications*, 322 U.S. 111 (1944); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

to defer to the NLRB's interpretation of the term "employee" under the National Labor Relations Act ("NLRA").⁴³ The issue in *Hearst* was whether "newsboys" were "employees" for purposes of the NLRA. The NLRB concluded that the NLRA's definition of employee was broad enough to encompass what it described as a "hybrid" employment situation because the policies and purposes underlying the NLRA were best effectuated by interpreting the definition broadly.⁴⁴

The Court of Appeals for the Ninth Circuit rejected the NLRB's analysis,⁴⁵ deciding that the NLRA contemplated the use of common-law standards in determining the definition of employee. Because the relationship between the newsboys and newspapers best fit into an independent contractor relationship, the circuit court held that the newsboys were not employees for purposes of the NLRA.⁴⁶ The Supreme Court reversed the decision of the Ninth Circuit.⁴⁷ After noting that Congress had not defined the term "employee" explicitly, the Court concluded that the judiciary should defer to the NLRB's interpretation.⁴⁸

The *Hearst* Court did not adequately substantiate why a court should defer to an agency on an issue of law. Portions of the opinion appear to characterize the NLRB's determination as involving "ultimate conclusions," "inferences of fact" and "specific applications of a broad statutory term," rather than a legal interpretation.⁴⁹ The

⁴³ 322 U.S. at 130-31.

⁴⁴ *Id.* at 131-32. Following *Hearst*, Congress amended the NLRA definition of employee to alter the rule of law made in the *Hearst* case, making it clear that the definition of employee excluded independent contractors. See *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968); *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 75 (D.C. Cir. 1990) ("Congress, in 1947, rejected the reasoning in *Hearst Publications* and directed that 'employee' specifically exclude 'any individual having the status of an independent contractor.'").

⁴⁵ 136 F.2d 608, 614 (9th Cir. 1943).

⁴⁶ *Id.* at 614.

⁴⁷ *NLRB v. Hearst Publications*, 322 U.S. 111, 120 (1944).

⁴⁸ *Id.* at 130-31.

⁴⁹ *Id.* Regardless of semantic niceties, the NLRB decided that newsboys were employees under the NLRA. It did so, not because the relationship between the newsboys and the newspaper satisfied some agreed upon standard; to do so would be an example of the NLRB arriving at ultimate conclusions, making inferences of fact and making a specific application of a broad statutory term. Instead, the NLRB defined the statutory term "employee," albeit in the course of deciding that newsboys qualified as employees. This definition was a determination of law. See Monaghan, *supra* note 19, at 29 ("Administrative application of law is administrative formulation of law whenever it involves elaboration of the statutory norm."). It is true that the NLRB arrived at the definition implicitly, and, after *Hearst*, it remained somewhat unclear what exactly an employee was for purposes of the NLRA. That is not to say, however, that the implicit definition had no import in future situations. The process of adjudication results in a stare decisis effect which, as more cases are decided, results in a

opinion also contains some language tending to point to the NLRB's expertise in labor relations as a reason for deferring to its determinations.⁵⁰ Additional language indicates that courts should defer to the NLRB because Congress had delegated the implementation of the statutory scheme to the NLRB.⁵¹ The Court devoted most of its attention to explaining the need for a federal standard and spent little time explaining why the agency rather than the courts should set this standard.⁵²

In 1947, the United States Supreme Court appeared to reverse its course entirely in *Packard Motor Car Co. v. NLRB*.⁵³ In *Packard*, the Court held that it should not defer to the NLRB's interpretation of the term "employee" under the NLRA.⁵⁴ The issue in *Packard* was identical to the issue in *Hearst*, namely, who is an employee for purposes of the NLRA. The *Packard* Court's approach could not have been more different than it had been in *Hearst*. It distinguished "naked" questions of law, such as whether a foreman can be an employee, which are to be determined without deference to the NLRB, from other issues that might be vested in an agency's discretion.⁵⁵

more explicit crystallization of the legal rule. Although more explicit definitions, as in, for example, a rulemaking, provide more guidance as to what the legal norms are, it is generally permissible for an agency to develop legal norms using adjudication. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947). See generally Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

⁵⁰ 322 U.S. at 130-31.

⁵¹ See *id.* Justice Roberts, in dissent, posed the alternative position clearly and concisely: Congress did not delegate to the National Labor Relations Board the function of defining the relationship of employment so as to promote what the Board understood to be the underlying purpose of the statute. The question who is an employee, so as to make the statute applicable to him, is a question of the meaning of the Act and, therefore, is a judicial and not an administrative question.

Id. at 135-36 (Roberts, J., dissenting).

⁵² In other areas of federal law, however, federal courts have developed a federal common law based upon state law principles. See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (federal common law of labor law). Decisions arising under the federal courts' admiralty jurisdiction constitute another major example. See generally G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* (2d ed. 1975).

⁵³ 330 U.S. 485 (1947).

⁵⁴ *Id.* at 488-90.

⁵⁵ The *Packard* Court stated that:

Whatever special questions there are in determining the appropriate bargaining unit for foremen are for the Board, and the history of the issue in the Board shows the difficulty of the problem committed to its discretion. We are not at liberty to be governed by those policy considerations[, however,] in deciding the

Courts and commentators have attempted to reconcile *Hearst* and *Packard*.⁵⁶ Three approaches have emerged; none of them is entirely satisfactory. One approach, flowing almost directly out of the *Hearst* opinion, is a distinction between law declaration and law application.⁵⁷ Law declaration involves the formulation of a general interpretation of law divorced from a particular context. Law application, on the other hand, is more interstitial in character. The *Hearst* Court arguably viewed the issue at stake as one of law application, whereas *Packard* was a situation of law declaration.⁵⁸

Quite aside from the logical paradox of finding that the same legal question of defining an employee could be an example of both law declaration and law application, this distinction raises three concerns. First, it would appear to define all rulemaking as law declaration, because rulemaking is the making of general statements divorced from specific factual contexts.⁵⁹ This categorization would be anomalous because it is in precisely those situations of rulemaking that agencies are regarded as acting in a legislative capacity, and, according to many commentators, should thus be reviewed most deferentially.⁶⁰ Second, this distinction conceives of law declaration and law application as discrete categories, when, in fact, few determinations are made divorced from factual contexts, and few applications of law lack ramifications for other situations.

Lastly, and perhaps most significantly, even if one could maintain a coherent distinction between law declaration and law application, there is no jurisprudential theory that justifies courts treating law declaration differently than law application. One could advance

naked question of law whether the Board is now, in this case, acting within the terms of the statute.

Id. at 492-93. The *Packard* Court did not cite or distinguish *Hearst* in its opinion.

⁵⁶ See, e.g., L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 558-64 (1965); Byse, *supra* note 22, at 265-66; Levin, *supra* note 24, at 24.

⁵⁷ See Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235-36 (1985). Professor Byse has attempted to show that there were elements of law declaration and law application in *Hearst* itself, and that the Court employed different standards in analyzing agency action of each sort. See Byse, *supra* note 22, at 265-66.

⁵⁸ See also *Judicial Review*, *supra* note 22, at 368 (comment by Cass Sunstein distinguishing between "pure" and "mixed" questions of law).

⁵⁹ This assertion might be somewhat overbroad. Some forms of rulemaking, particularly rate setting, are specific to a situation. Perhaps it would be more accurate to restrict the observation to "informal" rulemaking conducted in accordance with 5 U.S.C. § 553.

⁶⁰ This is because agencies engaged in rulemaking are performing a legislative, rather than judicial, function. Accordingly, courts might treat such agency pronouncements as if issued from legislatures. Further, because such agency action does not represent a direct assumption of judicial power, independent review might not be required by article III. See *infra* notes 284-301 and accompanying text.

two theories to justify the distinction. First, under a comparative expertise theory, courts would have a comparative advantage in law declaration because that is, after all, their basic business. In matters of law application, however, the agency has an advantage because its experience and technical expertise in its regulatory area helps it to apply a legal rule to the facts of a particular situation. Nonetheless, one might question why, if courts are expert in law declaration because they can better identify a sound general principle or better divine congressional intent, they are not equally expert at applying specific rules. Conversely, if agency expertise is useful in specific applications of the law, why would this expertise not be equally valuable in developing general rules, where knowledge of the entire regulatory agenda and environment may be crucial to the assessment of the wisdom of pursuing various policies? The comparative expertise theory also inverts traditional conceptions of judicial expertise and power. Judicial power is typically considered to be the application of legal concepts to particular situations. As the factual context of cases become more abstract, concerns are raised as to whether the courts are overstepping their obligation to decide only cases and controversies before them.⁶¹

A second theory for reconciling *Hearst* and *Packard* focuses on the efficient utilization of court resources. In this managerial model, courts use agencies to leverage courts' capacity to decide cases. Courts defer to agencies in law application situations because relatively little is at stake—the effect of the agency action is limited to the parties involved in the specific action. In situations with broader impact, the court makes its own determination of law so as to provide accurate guidance to similarly situated potential litigants. For example, in *Hearst*, the reach of the determination was limited to newsboys.⁶² On the other hand, in *Packard*, the potential reach of the decision was larger—to all foremen in industry.

This managerial model does have some precedent in other areas of judicial review, such as appellate review of trial courts. For example, rulings of law made by trial courts are often subject to abuse of discretion review by courts of appeals.⁶³ This analogy is

⁶¹ In the extreme, the judicial attempt to set general principles might be conceived of as merely dictum. The concept of dictum transforms attempts by the courts to make declarations of law into examples of the application of principles of law to specific factual contexts.

⁶² Congress, however, which interpreted *Hearst* as setting a rule of law affecting the difference between employees and independent contractors, altered the *Hearst* result through legislation. See *supra* note 44. One should therefore be cautious about drawing lines based upon the impact of a decision.

⁶³ See, e.g., *Piper Aircraft v. Reyno*, 454 U.S. 235, 257–61 (1981) (forum non conveniens); *FED. R. Civ. P.* 11, 14, 15, 19, 37, 41, 52, 59, 60, 61.

inexact, however, and the differences between the two situations raise significant concerns. In the appellate review situation, litigants are assured that all legal determinations are made by a competent court. In contrast, deferential judicial review of agency action may deprive a litigant of having a legal issue determined by a court. This result raises constitutional concerns.⁶⁴

A third way of reconciling *Hearst* and *Packard* is to focus on congressional intent. Congress might have intended that courts defer to agency interpretations of law of some, but not all, issues. Even accepting this premise, however, judicial review provisions tend not to distinguish court posture based on the type of agency decision.⁶⁵ Any congressional intent must be inferred, and no basis seems to exist for any inference of congressional intent.⁶⁶ In addition, even if courts consider congressional intent, deference to agency declarations of law raises the issue of whether Congress can constitutionally allocate power between courts and agencies on this basis. Surprisingly, this issue has not received serious attention in the administrative law literature.⁶⁷

⁶⁴ See *infra* notes 200–37 and accompanying text for a discussion of these concerns.

⁶⁵ *Packard* and *Hearst* both involved the same provision, namely, section 2(2) of the NLRA, 29 U.S.C. § 152(2) (1988). See *NLRB v. Hearst Publications*, 322 U.S. 111, 113–20 (1944); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 486–88 (1947). The APA makes some distinctions based on the mode of agency action, but, again, this does not aid in making the kind of distinction sought to be drawn here. See 5 U.S.C. § 706 (1988).

⁶⁶ See Scalia, *supra* note 16, at 516 (arguing that there is no clear congressional intent, but that it is sensible to presume intent to defer).

⁶⁷ See *supra* note 26. See *infra* notes 174–301 and accompanying text for a discussion of the problem. Commentators have suggested that, unlike *Hearst*, *Packard* required a reconciliation between two statutory provisions, therefore justifying different treatment of the legal issue by the courts.

In particular, commentators argue that *Packard* required a reconciliation between the terms “employee” and “employer” because foremen could logically be considered either. See 29 U.S.C. § 152(2) (1988) (“The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly . . .”). This argument is weak for two reasons. First, as the *Packard* Court noted, the statutory conflict theory is a weak argument at best. See *Packard*, 330 U.S. at 488–89. Having dismissed this argument, the Court would appear to have no reason not to apply *Hearst* deference to the NLRB determination.

Second, even assuming the existence of a statutory conflict, why would such a situation not be appropriate for deference? To the extent that reconciliation of the provisions represents a balancing and prioritization of competing legislative goals, a pro-deference position should argue in favor of deference with greater force in such situations. See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 865 (1984) (“the Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference”).

Even granting this difference between *Packard* and *Hearst*, its relevance is unclear. At best, such a difference suggests that a more complicated legal problem is involved. It does not suggest, however, who should solve that problem.

In sum, after *Hearst* and *Packard*, the rules concerning judicial deference to agency determinations were uncertain. Courts had developed no clear guidelines to indicate which situations required deference. Further, when courts deferred to agencies, it was unclear whether the agency was entitled to binding, or merely persuasive, deference. *Hearst* implied that a court should defer to an agency interpretation even if it differed from the conclusion that the court might reach de novo.⁶⁸ Yet, in other cases, the Court took a much weaker deference posture.⁶⁹ Against this history of confusion, the Court set to work in *Chevron* to make a clear path for courts to follow.

B. *Chevron U.S.A. v. Natural Resources Defense Council*

In 1984, the United States Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council* held that a court should defer to an agency's reasonable construction of its organic statute, even if a court would reach a different construction if it had addressed the question de novo.⁷⁰ *Chevron* entailed a petition for review of a rule-making conducted by the Environmental Protection Agency ("EPA") pursuant to the Clean Air Act Amendments of 1977.⁷¹ These amendments imposed certain requirements on states that had not achieved specified air quality standards. Such states had to establish permit programs that imposed stringent conditions before allowing the construction of "new or modified major stationary sources" of air pollution.⁷² Under the EPA regulations, an entire

⁶⁸ "Th[e] task [of determining who is an employee] has been assigned primarily to the agency created by Congress to administer the Act Resolving that question . . . 'belongs to the usual administrative routine' of the Board." *Hearst*, 322 U.S. at 130 (quoting *Gray v. Powell*, 314 U.S. 402, 411 (1941)) (footnote omitted).

⁶⁹ See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The *Skidmore* Court took a much weaker deference position:

We consider that the rulings, interpretations and opinions of the Administrator under this 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 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.

Id. at 140.

⁷⁰ 467 U.S. 837, 842-45 (1984).

⁷¹ Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 172(b)(6), 91 Stat. 685 (1977) (current version at 42 U.S.C. § 7502(b)(6) (1988)).

⁷² 42 U.S.C. § 7502(b)(6) (1988).

"industrial grouping" could be considered to be a "stationary source."⁷³

This definition of stationary source was at issue in the petition for review. The Court of Appeals for the D.C. Circuit had set aside the regulations.⁷⁴ The court had determined that, although there were no clear indications of congressional intent with regard to the meaning of stationary source in the text or legislative history of the amended act, the EPA's definition would not further "the purposes of the nonattainment program."⁷⁵

The Supreme Court reversed. Justice Stevens, writing for a unanimous Court,⁷⁶ faulted the lower court for having made a "basic legal error"⁷⁷ by "misconceiv[ing] the nature of its role in reviewing the regulations at issue."⁷⁸ He then set forth a two-step test for judicial review of agency action on matters of law.⁷⁹ First, a court

⁷³ The regulations for the Clean Air Act state:

- (i) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.
- (ii) "Building, structure, facility, or installation" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel.

40 C.F.R. § 51.18 (j)(1)(i), (ii) (1985).

The construction of a new source of air pollution in an existing industrial grouping would not be considered to be a new stationary source under the regulatory scheme. Instead, a plant could install a new or modified source of air pollution without meeting the permit conditions if the alteration would not increase the plant's total emissions. See *Chevron*, 467 U.S. at 840. The EPA's approach thus placed a "bubble" over the entire industrial grouping and, instead of regulating with respect to each individual source of air pollution, it measured total emissions from the bubble. See *id.*

⁷⁴ *Natural Resources Defense Council v. Gorsuch*, 685 F.2d 718, 728 (D.C. Cir. 1982).

⁷⁵ *Id.* at 726 n.39.

⁷⁶ Justices Marshall, Rehnquist and O'Connor did not participate in the decision.

⁷⁷ *Chevron*, 467 U.S. at 842.

⁷⁸ *Id.* at 845.

⁷⁹ Justice Stevens described the two-step test as follows:

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

Id. at 842-43 (footnotes omitted).

must give effect to Congress's clear and unambiguous intent expressed in a statute. Second, if the statute is silent or ambiguous, a court must defer to any reasonable agency construction of the statute.⁸⁰ Thus, in applying this two-part test, the *Chevron* Court upheld the regulations because Congress had not addressed the precise issue in question, and because the Court determined that the EPA's construction of the statute was "a reasonable policy choice for the agency to make."⁸¹

The Court's justification for the test was almost as important as the test itself. Justice Stevens noted that if an agency is acting pursuant to an explicit delegation of authority by Congress, courts should give agency interpretations "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."⁸² Even when congressional delegation to the agency is implicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."⁸³

⁸⁰ *Id.*

⁸¹ *Id.* at 845.

⁸² *Id.* at 844 (footnote omitted).

⁸³ *Id.* (footnote omitted). The *Chevron* Court's reason for deference lies in comparative competence and political theory:

[T]he Administrator's interpretation represents a reasonable accommodation of manifestly competing interests Congress intended to accommodate [these] interests but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices

. . . The responsibility for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Id. at 865-66 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

Justice Stevens' opinion is striking for the breadth of its argument. First, he rejects any distinction between agency action arising from express and implied delegation.⁸⁴ Further, the Court appears not to have considered a third category of agency action, namely, action in which there is no congressional intent, express or implied, to delegate a matter to the agency to resolve. Instead, the Court indicated that courts should apply a blanket rule of deference to agency decisions.

Second, Justice Stevens offers three rationales to support this blanket rule of deference. One rationale is congressional intent—a delegation by Congress to an agency implies a reservoir of discretion granted to the agency that the courts must respect. A second rationale lies in comparative competence. Because agencies are expert in their areas of delegated power (and courts are not), courts should defer to reasonable determinations made by those agencies.

Stevens' last rationale, however, is particularly striking. He distinguishes courts, that may not make decisions on the basis of "personal policy preferences"⁸⁵ and that "have no constituency,"⁸⁶ from Congress and agencies, which may make political choices.⁸⁷ Thus, courts should uphold an agency action not only if it represents an exercise of technical expertise but, alternatively, as an exercise of political prerogatives by the Chief Executive.⁸⁸

The first two of Justice Stevens' rationales are familiar views of administrative law. With respect to congressional intent, courts have long permitted Congress to delegate certain matters to administrative agencies. Under traditional doctrine, however, agency actions must be consistent with an "intelligible principle" that is set forth in the legislation and capable of judicial review.⁸⁹ Justice Stevens

⁸⁴ *Id.* at 843-44. A close reading of Stevens' opinion indicates that there might be a difference in judicial posture depending on the source of the delegation to the agency. According to Stevens, courts should give "controlling weight" to agency action taken pursuant to an express delegation "unless [the agency action is] arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844 (footnote omitted). Courts should uphold action taken pursuant to implied delegation if "reasonable." *Id.* These two standards, whatever their differences, both appear to require a court to defer to an agency interpretation of law that the court would not adopt *de novo*.

⁸⁵ *Id.* at 865.

⁸⁶ *Id.* at 866.

⁸⁷ *Id.* at 865-66.

⁸⁸ *Id.* This dichotomy is said to be of constitutional dimension. The *Chevron* Court noted that "[o]ur Constitution vests such responsibilities in the political branches." *Id.* at 866 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

⁸⁹ *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting) (delegation must be specific enough to ensure that "fundamental policy decisions" are made by Congress

acknowledges the possibility that Congress could decide not to decide an issue and instead pass the question to the agency.⁹⁰ This abdication upsets the balance created by the Supreme Court in its nondelegation doctrine.⁹¹ It is one thing for Congress to set policy at an abstract level and delegate specific implementation to the agency. It is quite another thing for Congress to delegate policy-setting to the agency. If Justice Stevens was suggesting that Congress could give the agency a "blank check," he would be altering, if not eviscerating, the nondelegation doctrine. Congress must provide for judicial review with a meaningful standard to assess agency action for conformance with law.⁹²

Justice Stevens' second rationale for deference, agency expertise, makes some sense, given a congressional delegation accompanied by discernible standards. Indeed, on the facts of *Chevron*, the EPA appeared to utilize its admitted expertise to resolve the issue in a detailed and reasoned fashion.⁹³ But, deference based on expertise implies a different sort of deference than one based on the mere fact that an agency makes the determination. The expertise implicated involves how best to regulate in order to achieve given ends. It assumes that the ends are discernible and set by Congress and does not imply deference to set policy ends. Once the issue is shifted to one of means, expertise is reflected primarily in

and that reviewing courts have "some measure against which to judge the official action that has been challenged"). In *Yakus v. United States*, the Court noted:

[T]he only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends . . . upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.

321 U.S. 414, 425 (1944); see also *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

⁹⁰ *Chevron*, 467 U.S. at 865.

⁹¹ Although courts have questioned the continued vitality of the nondelegation doctrine, the Supreme Court, including Justice Stevens, believes that it has a continuing role in administrative law. In *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980) (the "*Benzene*" case), Justice Stevens construed a statute to impose certain restrictions on agency action in order to avoid finding it violative of the nondelegation doctrine. *American Petroleum*, 448 U.S. at 659-62. Interestingly, Stevens did not appear to accord much deference to the agency, nor did he cite the *Benzene* case in his *Chevron* opinion. Professor Pierce, who has noted the linkage between *Chevron* and the nondelegation doctrine, asserts that the *Chevron* and *Benzene* cases are inconsistent. See Pierce, *supra* note 22, at 311-12.

⁹² See *infra* notes 178-199 and accompanying text for a discussion of this standard.

⁹³ See *Chevron*, 467 U.S. at 865.

the assessment of the likely outcomes of policy alternatives. Such assessments should be entitled to deference, at least to the extent that they represent factual conclusions.⁹⁴

For example, consider two factual variations of *Chevron*. In the first variant, the EPA recognizes that its mission is to reduce air pollution while allowing reasonable economic growth to continue.⁹⁵ The EPA then concludes either that the bubble concept would maximize reductions in air pollution⁹⁶ or that the economic benefits to be obtained by employing the bubble concept would outweigh the expected societal benefits in terms of reduced air pollution to be obtained by not employing a plant-wide bubble.⁹⁷ In the second variant, the EPA indicates that it cannot serve its mission of reducing pollution and allowing economic growth at the same time. Given these two inconsistent goals, it chooses a rule that serves only one of the two goals.

In the first variant, the EPA used its expertise to arrive at its conclusion but in the second variant, it did not. To the extent that the EPA acted in accordance with the first variant, the D.C. Circuit was wrong to void the regulations, assuming that the EPA engaged in a reasoned analysis of the options and the data.⁹⁸ But, if the EPA acted in accordance with the second variant, its conclusion was not

⁹⁴ Justice Scalia, however, has argued that agency expertise provides a strong argument for persuasive deference, but not for the kind of binding deference implied in *Chevron*. See Scalia, *supra* note 16, at 514.

⁹⁵ See *Chevron*, 467 U.S. at 851 (discussing legislative history of the 1977 Amendments to the Clean Air Act).

⁹⁶ This is a plausible conclusion. The bubble concept provided incentives for plants to modernize. Without a bubble definition, it might be "simpler and cheaper to operate old, more polluting sources than to trade up . . ." *Chevron*, 467 U.S. at 863 n.36; see also *id.* at n.37.

⁹⁷ Experts often assess policy alternatives by comparing the benefits of a policy choice with its costs. See E. MISHAN, *ECONOMICS FOR SOCIAL DECISIONS* (1972). The use of benefit/cost analysis is controversial in certain contexts. In particular, to the extent that congressional policies are unambiguously phrased in a way that makes benefit/cost analysis inappropriate, it may not be used. For example, in *Independent U.S. Tanker Owners Committee v. Dole*, the court struck down a regulation permitting maritime shippers involved in international trade to enter domestic shipping, 809 F.2d 847, 852-54 (D.C. Cir.), *cert. denied*, 484 U.S. 819 (1987). The court nullified the regulation because the agency considered factors, such as economic efficiency, that were not part of the clear policies underlying the statutory scheme, while the agency gave little consideration to other policies that, though inefficient, were unambiguously expressed by Congress. *Id.* In the case of the Clean Air Act, the proposed benefit/cost analysis is more defensible because the Clean Air Act contemplates a tradeoff between pollution reduction and economic growth. See *Chevron*, 467 U.S. at 851.

⁹⁸ See *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 40-44 (1983) (courts should take a hard look to ensure that the agency has rationally considered all issues).

entitled to deference, at least if one employed the expertise rationale.

Justice Stevens' third rationale—that the Constitution requires courts to defer to the policy choices of the political branches—is the rationale that breaks new ground in administrative law. If Justice Stevens intended that, in the face of statutory ambiguity, courts ought to defer to interpretations of law made by other branches of government, he has turned the principle of judicial review inside out. Heretofore, it had been assumed that the courts were the final arbiters of statutory meaning.⁹⁹

Chevron thus redefined the terms of the judicial review debate. It appeared to resolve the inconsistency in approach suggested by *Hearst* and *Packard* with a unitary two-part test applicable to all questions involving judicial review of agency determinations of law. *Chevron* also articulated forcefully a set of rationales supporting deference to agencies.

This article now critically examines both of these aspects of *Chevron*. First, it evaluates whether *Chevron's* two-part test has proven to be a coherent, easy-to-apply test in practice. The post-*Chevron* Supreme Court cases suggest that *Chevron's* test has not been applied consistently in later cases. The article then critically examines and questions the rationales supporting *Chevron*.

C. *The Post-Chevron Debate in the United States Supreme Court*

The Supreme Court has struggled to divine the scope and meaning of *Chevron*. The very sweep of Justice Stevens's opinion has thrust it into the foreground of administrative law, and has caused litigants to raise *Chevron* arguments in a variety of contexts. The results have been surprising. The Court has retained the analytical structure of *Chevron* but, rather than serving as a unifying force, the two-step approach of *Chevron* appears to have been manipulated to achieve particular results in each case. The *Packard*/

⁹⁹ See Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 460 (1989) ("*Chevron's* language so narrowly circumscribed the judicial function in statutory interpretation that it was difficult, at first, to believe Justice Stevens' opinion could be taken literally."). Professor Monaghan, writing before the decision in *Chevron*, argues that deference in the face of statutory ambiguity only makes sense if one assumes that uncertainty creates a zone of delegated power within which the agency acts. Thus, Monaghan would require an affirmative showing of congressional intent to delegate power to the agency. See Monaghan, *supra* note 19, at 30. Monaghan does not explain, however, why congressional intent should be immune from judicial scrutiny. See *infra* notes 193–97 and accompanying text.

Hearst pre-*Chevron* debate appears to have been supplanted by a debate among the Justices as to whether a particular legal issue falls either within the first step of *Chevron*—where Congress has addressed the precise issue in question—which, like *Packard*, would not entail deference to the agency; or the second step of *Chevron*—where Congress has not addressed the precise issue in question—which, like *Hearst*, requires courts to defer to the agency.

In 1986, in *Board of Governors, Federal Reserve System v. Dimension Financial Corp.*, the United States Supreme Court held that the Federal Reserve Board ("Fed") exceeded its regulatory authority when it attempted to extend its reach over financial institutions to encompass certain "non-bank banks" that offer services similar to those of traditional commercial banks.¹⁰⁰ The Fed enacted a regulation defining a "bank" as any institution that accepts deposits that "as a matter of practice" are payable on demand.¹⁰¹ The Fed intended this regulation to reach institutions offering negotiable order of withdrawal ("NOW") accounts as alternatives to traditional checking accounts offered by commercial banks.¹⁰² The Fed argued that, although depositors in NOW accounts did not technically have a right to be paid on demand by the institution, the practice of institutions offering such accounts was to pay depositors on demand. Thus, the "legal right to withdraw on demand" language, although not literally met, was met in practice. Meanwhile, because of the overlap in function between the banks and the non-bank banks, it was important for the Fed to regulate these non-bank banks.

The Court viewed the case as a *Chevron* step-one situation: Congress expressly limited the applicable statute to regulation of institutions that accept deposits that "the depositor has a legal right to withdraw on demand."¹⁰³ The *Dimension Financial* Court did not

¹⁰⁰ 474 U.S. 361, 363 (1986).

¹⁰¹ The applicable statute defined "bank" as any institution "which . . . accepts deposits that the depositor has a legal right to withdraw on demand." 12 U.S.C. § 1841(c) (1988).

¹⁰² NOW accounts function like ordinary checking accounts, permitting depositors to write checks to third parties, but, unlike ordinary checking accounts, NOW accounts pay interest on deposits and the institution retains the right to impose a waiting period before honoring requests to withdraw funds. See *Dimension Financial*, 474 U.S. at 367.

¹⁰³ *Dimension Financial*, 474 U.S. at 368. The Court noted:

[n]o amount of agency expertise—however sound may be the result—can make the words "legal right" mean a right to do something "as a matter of practice." A legal right to withdraw on demand means just that: a right to withdraw deposits without prior notice or limitation. Institutions offering NOW accounts do not give the depositor a legal right to withdraw on demand; rather, the

consider it relevant that when Congress arrived at its definition of a bank, NOW accounts were not in widespread use. In addition, the Court did not examine Congress's purpose in arriving at its particular definition or what effects the Court's ruling might have.¹⁰⁴ Thus, even though it is doubtful that Congress intended by its language to address the precise issue in question, in adopting the plain meaning of the statute, the Court assumed that Congress had addressed that issue. The *Dimension Financial* Court declined to look beyond the plain meaning of the statute, even when confronted with plausible reasons for doing so.

In 1986, in *Japan Whaling Association v. American Cetacean Society*, however, the United States Supreme Court deferred to an agency interpretation contrary to both the plain language of the statute and legislative history.¹⁰⁵ At issue was whether the Secretary of Commerce was required to find that, when Japan refused to abide by whaling quotas set by the International Whaling Commission, it was "diminish[ing] the effectiveness of an international fishery conservation program."¹⁰⁶ The Court concluded that, despite the seemingly clear language of the statute, the statute did not preclude the Secretary from considering other factors in the course of making his certification decision.¹⁰⁷

The *Japan Whaling* Court's reasoning presents an odd application of the first step of *Chevron*. The Secretary's argument was not that Japan's actions did not "diminish the effectiveness" of the treaty,¹⁰⁸ but that the statute did not preclude the Secretary from creating exceptions to the certification requirement. In other words, the Secretary argued that discretion not to certify should be implied, absent statutory language that specifically prohibited the Secretary

institution itself retains the ultimate legal right to require advance notice of the withdrawal. The Board's definition of "demand deposit," therefore, is not an accurate or reasonable interpretation of § 2(c).

Id.

¹⁰⁴ Indeed, the Court cited *TVA v. Hill*, 437 U.S. 153 (1978), for the proposition that the Court should enforce anomalous, curious, and perhaps unwise legislation. See *Dimension Financial*, 474 U.S. at 374 n.7.

¹⁰⁵ 478 U.S. 221 (1986).

¹⁰⁶ 22 U.S.C. § 1978(a)(1) (1988). If the Secretary made such a finding certain economic sanctions against Japan would ensue. See 16 U.S.C. § 1821(e)(2) (1988).

¹⁰⁷ 478 U.S. at 232. In *Japan Whaling*, the Secretary concluded that, despite Japan's harvesting of whales in excess of quota amounts, he was entitled to conclude under the facts of the case that the conservation goals would be best served by prohibiting future whaling by the Japanese without imposing present sanctions. *Id.*

¹⁰⁸ See *id.* at 244 (Marshall, J., dissenting).

from examining surrounding factors in making a certification decision.¹⁰⁹

This presumption of discretion is not contained in the statutory language, and it runs against the grain of legislative delegation doctrine. The legislative power of the United States is vested in Congress, and any power of the executive branch to make policy choices must be delegated to it by the legislative branch. The executive branch's role in policy-making was initially limited to the ascertainment of a fact or trigger event that would dictate known consequences.¹¹⁰ Although, over time, the doctrine was expanded to permit an agency to "fill up the details"¹¹¹ of a statutory scheme or even to permit Congress to delegate broad responsibility to an agency to implement statutory objectives,¹¹² it has never been believed that Congress had to act to *eliminate* agency discretion specifically. The statute in question can only be read to direct the Secretary to engage in fact-finding that, once concluded, would trigger specific agency action.

Similarly, it is difficult to see how the statute expressly or impliedly delegates the question of whether the Secretary can consider other factors in making its certification decision to the agency. Even if the statute is so read, however, it is plain that the Secretary's conclusion that the sanction Congress would have imposed on Japan would be unwise frustrates congressional intent.¹¹³ Thus, if *Japan Whaling* is viewed as a *Chevron* step-two case, the Secretary's interpretation of the statute is not reasonable.

Japan Whaling illustrates the problems that can result when the courts do not take an active role in policing the balance of power

¹⁰⁹ *Id.* at 232.

¹¹⁰ See, e.g., *Field v. Clark*, 143 U.S. 649, 693 (1892) ("Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. . . . [The President] was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect."); *Cargo of the Brig Aurora v. U.S.*, 11 U.S. (7 Cranch) 382, 386-88 (1812) (certain provisions of an act come into effect after the President finds that certain facts exist).

¹¹¹ *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

¹¹² See, e.g., 15 U.S.C. § 45(a) (1988) (Federal Trade Commission empowered to prevent unfair methods of competition and deceptive acts or practices); *id.* § 78k (Securities and Exchange Commission empowered to promulgate rules for the protection of investors); 29 U.S.C. § 160 (1988) (NLRB empowered to prevent unfair labor practices).

¹¹³ See *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 245 (1986) (Marshall, J., dissenting) ("The Secretary's manipulation of the certification process to affect punishment is thus an attempt to evade the statutory sanctions rather than a genuine judgment that the effectiveness of the quota has not been diminished.").

between the executive and legislative branches. In *Japan Whaling*, Congress clearly had reached a policy determination that fishing treaties should be enforced.¹¹⁴ The executive branch had not been enforcing the provisions as Congress had wished.¹¹⁵ An active judiciary is needed to ensure legislative supremacy over the executive branch on matters of policy.¹¹⁶ When the judiciary blindly defers to the executive branch, the legislative branch is weakened and our constitutional structure is undermined.¹¹⁷

In 1986, in *Young v. Community Nutrition Institute*, the United States Supreme Court strained to find statutory ambiguity to enable it to reach step two of *Chevron*.¹¹⁸ In *Young*, a Food and Drug Administration ("FDA") interpretation of the Federal Food, Drug, and Cosmetic Act ("FDCA")¹¹⁹ provided that when the presence of a poisonous or deleterious substance in a food is required or cannot be avoided, the FDA "shall promulgate regulations limiting the quantity [of such poisonous or deleterious substance] to such extent as [it] finds necessary for the protection of public health."¹²⁰ When the FDA declined to promulgate a section 346 regulation covering aflatoxin,¹²¹ consumer groups brought suit to compel agency action.¹²²

The Court of Appeals for the D.C. Circuit, applying *Chevron*, concluded that Congress had addressed the precise issue in question

¹¹⁴ The International Whaling Commission had no power under the Convention to enforce the fishing quotas. *See id.* at 224. Because of this lack of power, Congress legislated the certification program. *See id.* at 225. After dissatisfaction with the original program, which vested discretion in choice of sanction in the President, Congress amended the program to impose a mandatory sanction. *See id.*

¹¹⁵ *See id.* at 225-26 ("Congress grew impatient with the Executive's delay in making certification decisions and refusal to impose sanctions.").

¹¹⁶ Interestingly, the political nature of this dispute was so pronounced that it was argued that the political question doctrine precluded judicial review. *See id.* at 229-30. The *Japan Whaling* Court rejected the argument, stating that "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.* at 230. The Court then abdicated this responsibility, finding ambiguity where none existed and rubber stamping executive action blatantly contrary to congressional intent.

¹¹⁷ *See infra* notes 174-301 and accompanying text for a discussion of the interrelationship between court deference to agency decisions and separation of powers.

¹¹⁸ 476 U.S. 974, 981 (1986).

¹¹⁹ 21 U.S.C. §§ 301-93 (1988).

¹²⁰ *Id.* § 346.

¹²¹ Aflatoxin is a carcinogen that is naturally and unavoidably present in some foods. *Young*, 476 U.S. at 977-78.

¹²² The FDA argued that section 346 only required it to promulgate regulations "to such extent as [it] finds necessary for the protection of public health" and, because it believed that regulations were not necessary, the statute did not compel issuance. *Id.* at 979.

and that section 346 required the FDA to promulgate the regulation before foods containing aflatoxin could be sold in interstate commerce.¹²³ The court interpreted the clause "to such extent as [it] finds necessary for the protection of public health" as addressing the quantity of aflatoxin to be allowed to remain in foods, not as modifying the decision whether or not to regulate aflatoxin.¹²⁴ In short, the court analyzed the case as an example of the operation of step one of *Chevron*.

The Supreme Court reversed, holding that, although Congress may have attempted to address the precise issue in question, it had not clearly done so.¹²⁵ Even if the court of appeals' reading of the statute may have been the more natural interpretation, the statute could plausibly be read such that the phrase "to such extent as [it] finds necessary for the protection of public health" modified the word "shall."¹²⁶ The meaning of section 346 was thus deemed ambiguous, and the FDA's interpretation was given deference under step two of *Chevron*.

Justice Stevens, the lone dissenter, viewed the interpretation of statutes as a distinctively judicial role, requiring the exercise of judgment.¹²⁷ Moreover, the role of a judge also entailed some autonomy, rather than blind deference to coordinate branches. Although his opinion did not generate any concurrences,¹²⁸ Justice

¹²³ 757 F.2d 354, 357 (D.C. Cir. 1985), *rev'd*, 476 U.S. 974 (1986).

¹²⁴ *Id.* at 357-58.

¹²⁵ *Young*, 476 U.S. at 980.

¹²⁶ *Id.*

¹²⁷ Justice Stevens stated that the Court was shirking its responsibility to interpret the statute:

The task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference [T]o say that the Commissioner's interpretation of the statute merits deference, as does the Court, is not to say that the singularly judicial role of marking the boundaries of agency choice is at an end. As Justice Frankfurter reminds us, "[t]he purpose of construction being the ascertainment of meaning, every consideration brought to bear for the solution of that problem must be devoted to that end alone." It is not a "ritual to be observed by unimaginative adherence to well-worn professional phrases." "Nor can canons of construction save us from the anguish of judgment." The Court, correctly self-conscious of the limits of the judicial role, employs a reasoning so formulaic that it trivializes the art of judging.

Id. at 988 (Stevens, J., dissenting) (quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529, 544 (1947)).

¹²⁸ It is not apparent to me why Justice O'Connor's crabbed opinion was joined by the other Justices, although I can understand why no other Justice joined Justice Stevens' opinion. I can well imagine the Justices concluding that the FDA's position on regulation of potentially harmful substances was reasonable. This creates a dilemma: should Congress's clear, but unwise, statute control in the face of reasonable agency action to the contrary? Doctrinally,

Stevens's approach was later supported by the Court in *INS v. Cardoza-Fonseca*.¹²⁹

In 1987, in *Cardoza-Fonseca*, the United States Supreme Court held that deference to an agency decision under section 208(a) of the Immigration and Nationality Act ("INA") was inappropriate.¹³⁰ Under section 208(a) of the INA,¹³¹ deportable aliens are eligible for asylum in the United States if they can demonstrate "a well-founded fear of persecution [in their native country] on account of race, religion, nationality, membership in a particular social group, or political opinion. . . ." ¹³² In addition, the Attorney General must withhold deportation if the alien "would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."¹³³

The Court had previously validated a "clear probability of persecution" test for the "would be threatened" provision.¹³⁴ The Immigration and Naturalization Service ("INS") argued that the section 208(a) "well-founded fear of persecution" language should be implemented using the same "clear probability of persecution" test. In support of its position, the INS argued that, in the face of a gap in the statutory scheme, *Chevron* required the courts to defer to its reasonable construction of the statutory term.¹³⁵

the Court would have to conclude that congressional intent controlled unless it was irrational or unconstitutional. See *United States v. American Trucking Ass'n*, 310 U.S. 534, 543-44 (1940). Section 346 was neither. Thus, the Court would have been forced to uphold what it considered an unwise policy unless it could find congressional intent ambiguous. Deference to the agency, in short, became a smoke screen to mask the Court's view of proper policy.

In addition, to require an agency to promulgate regulations raises separation of powers issues with which the Court does not like to deal. In general, the Court has refused to entertain suits compelling agency action. See *Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985) (decision by agency of whether or not to act is generally committed to an agency's absolute discretion). Justice Stevens' interpretation of the use of the term "shall" in section 346, however, would have removed the agency's discretion to act, rendering it reviewable. See *Dunlop v. Bachowski*, 421 U.S. 560 (1975). The Court in *Bachowski* stopped short of compelling the agency to act, deciding that the Secretary would "proceed appropriately without the coercion of a court order . . ." *Id.* at 576. Given the opening left by Congress's poor grammar, it is not surprising to find the Court willing to avoid the consequences of Justice Stevens' position.

¹²⁹ 480 U.S. 421 (1987). Professor Sunstein has called *Cardoza-Fonseca* "perhaps the most sensible treatment of [judicial review of agency action] in the last two decades." See Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 523 n.4.

¹³⁰ 480 U.S. at 445-48.

¹³¹ 8 U.S.C. §§ 1-1557 (1988).

¹³² *Id.* § 1101(a)(42), incorporated by reference into § 208(a).

¹³³ *Id.* § 1253(h)(1).

¹³⁴ See *INS v. Stevic*, 467 U.S. 407, 430 (1984).

¹³⁵ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445 & n.29 (1987).

Justice Stevens, writing for a majority of the Court, disagreed with the INS's *Chevron* argument. Because the Court was presented with "a pure question of statutory construction for the courts to decide,"¹³⁶ he held that deference to the agency would be inappropriate. "Employing traditional tools of statutory construction,"¹³⁷ the Court concluded that Congress did not intend to employ the same standard in section 208(a) asylum cases as in section 243(h) deportation withholding cases.¹³⁸

Justice Scalia viewed Stevens's opinion as an attempt to limit the more extreme reading of *Chevron* typified by cases such as *Young*. According to Scalia, Stevens's opinion made deference "a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue."¹³⁹ He termed this view "an evisceration of *Chevron*."¹⁴⁰

Interestingly, both Scalia and Stevens conceived of *Cardoza-Fonseca* as a *Chevron* step-one situation—the precise issue in question being whether the two deportation standards were identical.¹⁴¹ Having decided that Congress did not intend the two provisions to have identical standards, however, Justice Stevens did not state what the proper section 208 standard should be. He appears to have been prepared to defer to the INS's interpretation of section 208, provided that the interpretation is reasonable.¹⁴²

Under a literal interpretation of *Chevron*, however, *Cardoza-Fonseca* is a step-two case. Because Congress had not articulated what it meant by a well-founded fear of persecution, courts under *Chevron* should defer to a reasonable interpretation of the term made by the agency. The problem with the INS's interpretation was that it was not reasonable because it imported an interpretation of one statutory phrase to a different, and presumably more lenient, statutory phrase. In other words, although the INS had discretion to develop a range of different standards, the standard it chose was outside the permissible range of possible standards.¹⁴³

¹³⁶ *Id.* at 446.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 454 (Scalia, J., concurring).

¹⁴⁰ *Id.*

¹⁴¹ See *id.* at 446 (Stevens, J.); *id.* at 453 (Scalia, J., concurring).

¹⁴² *Id.* at 448.

¹⁴³ See *id.* ("We do not attempt to set forth a detailed description of how the 'well-founded fear' test should be applied. Instead, we merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical." (footnotes omitted)). Just as Justice Stevens might have caused some unintended doctrinal developments

Unlike *Cardoza-Fonseca* or *Young*, the Court's approach is more balanced in *Dole v. United Steelworkers of America*.¹⁴⁴ In *Dole*, the Court declined to use some admitted ambiguity in statutory language to invoke step two of *Chevron*.¹⁴⁵ At issue in *Dole* was an Office of Management and Budget interpretation of the Paperwork Reduction Act of 1980 ("Act").¹⁴⁶ In direct contrast to *Young*, the *Dole* Court concluded that "[w]hile the grammar of th[e] text can be faulted, its meaning is clear"¹⁴⁷ The Court's reading of the text, moreover, was bolstered by "a consideration of the object and structure of the Act as a whole."¹⁴⁸

In dissent, Justice White argued that the majority approach was contrary to *Chevron*.¹⁴⁹ He stated that, in the face of admitted statutory ambiguity, the Court's view merely represented its preference and that the Court could not rationally conclude that its interpre-

by his broad opinion in *Chevron*, he also might have gone too far in the other direction in *Cardoza-Fonseca*. Despite the language in *Cardoza-Fonseca*, Justice Stevens apparently still believes that agencies play a greater role in interpreting statutes than that of "desperation" or "tie-breaker."

Justice Scalia made this point in a concurring opinion in *NLRB v. United Food & Commercial Workers Union*, stating:

[This decision] demonstrates the continuing and unchanged vitality of the test for judicial review of agency determinations of law set forth in *Chevron* If the dicta of *Cardoza-Fonseca* . . . were to be applied here, . . . we would be deciding th[e] issue [in this case] conclusively and authoritatively, rather than merely "decid[ing] whether the agency's regulatory placement is permissible" [This case is] decided correctly only because "the statute is silent or ambiguous" with respect to an issue relevant to the agency's administration of the law committed to its charge—which is the test for deference set forth in *Chevron*.

484 U.S. 112, 133 (1987) (Scalia, J., concurring) (quoting *Cardoza-Fonseca*, 480 U.S. at 446-48).

¹⁴⁴ 110 S. Ct. 929 (1990).

¹⁴⁵ The *Dole* Court stated:

[P]etitioner's interpretation of "obtaining or soliciting facts by an agency through . . . reporting recordkeeping requirements" is not the most natural reading of this language. The common-sense view of "obtaining or soliciting facts by an agency" is that the phrase refers to an agency's efforts to gather facts for its own use and that Congress used the word "solicit" in addition to the word "obtain" in order to cover information requests that rely on the voluntary cooperation of information suppliers as well as rules which make compliance mandatory.

110 S. Ct. at 934 (construing 44 U.S.C. § 3502(4) (1988)).

¹⁴⁶ 44 U.S.C. §§ 3501-3520 (1988).

¹⁴⁷ *Id.* at 937.

¹⁴⁸ *Id.* at 935.

¹⁴⁹ Justice White stated that "by independently construing the statute rather than asking if the agency's interpretation is a permissible one and deferring to it if that is the case, the Court's approach is clearly contrary to *Chevron*." *Id.* at 940.

tation was the "only one that Congress could possibly have intended."¹⁵⁰

In the Court's most recent commentary on the applicability of *Chevron*, the Court held in 1990 in *Maislin Industries, U.S. v. Primary Steel*, that deference to an agency's statutory construction was inappropriate where congressional intent was unambiguous.¹⁵¹ *Maislin* involved the validity of an Interstate Commerce Commission ("ICC") policy allowing shippers to negotiate with certified common carrier rates that were lower than the carrier's rates filed with the ICC. Although section 10761 of the Interstate Commerce Act ("ICA") states that a "carrier may not charge or receive a different compensation . . . than the rate specified in the [filed rate],"¹⁵² the ICC argued that, under section 10701 of the ICA, "[a] rate . . . or practice related to transportation or service . . . must be reasonable."¹⁵³ The ICC's position was that, once a carrier negotiated a lower rate with a shipper, it might be an unreasonable practice to require the shipper to pay the higher filed rate. The ICC argued that it should have the power to determine on a case-by-case basis whether collection of the filed rate would be unreasonable given that a lower rate had previously been negotiated.¹⁵⁴

The Supreme Court held that, whatever deference would ordinarily be accorded the ICC's interpretation of section 10701, the ICC did not have discretion to ignore the clear requirement of section 10761.¹⁵⁵ Therefore, the *Maislin* Court rejected the ICC's interpretation either because Congress had addressed the precise issue in question in section 10701 or because the Commission's interpretation of this section was not reasonable.

In dissent, Justice Stevens attacked the decision as being unfaithful to *Chevron*.¹⁵⁶ He argued that section 10761 did not preclude the existence of exceptions to the charging of a filed rate if necessary to enforce section 10701 and that this type of determination was worthy of deference. Especially in light of amendments made to the Act in 1980, he found the ICC's interpretation to be reasonable.¹⁵⁷ Although prior cases had required carriers to charge

¹⁵⁰ *Id.* at 939 (White, J., dissenting).

¹⁵¹ 110 S. Ct. 2759, 2770 (1990).

¹⁵² 49 U.S.C. § 10761(a) (1982).

¹⁵³ *Id.* § 10701(a).

¹⁵⁴ *Maislin Indus.*, 110 S. Ct. at 2764.

¹⁵⁵ *Id.* at 2770.

¹⁵⁶ *See id.* at 2779 (Stevens, J., dissenting).

¹⁵⁷ *Id.* at 2777-78.

the filed rates, he found those cases to be of little relevance in judging the ICC's present actions, because those cases reflected deference to an agency's position that had since changed.¹⁵⁸

Thus, although the *Chevron* two-step test¹⁵⁹ has proven useful as an analytical construct in post-*Chevron* Supreme Court cases, it is unstable in practice. *Chevron* has failed to generate a consistent, easily applicable approach to the problem of judicial review of agency determinations of questions of law. Although the cases employ *Chevron*'s analytical approach, they do not reflect a consistent underlying philosophy. At times, the Court appears to allow agencies to subvert congressional intent, as it did in *Young and Japan Whaling*. Other times, the Court constricts agency discretion to make policy choices, as it did in *Dimension Financial* and *Maislin*. In light of this post-*Chevron* history, and *Chevron*'s unclear analytical underpinnings, it is time to analyze *Chevron* critically.

II. A CRITICAL ANALYSIS OF *CHEVRON*

The Supreme Court's decision in *Chevron* is problematic for several reasons. The *Chevron* two-step approach for judicial review of agency interpretations of law has not generated a coherent, easy-to-apply test in practice. The post-*Chevron* Supreme Court cases offer little guidance in identifying the dividing line between step one—when there is a finding of clear congressional intent, resulting in no deference to the agency—and step two—when a statute is ambiguous, triggering *Chevron* deference.¹⁶⁰ Even if courts interpret

¹⁵⁸ *Id.* at 2779.

¹⁵⁹ See *supra* notes 79–88 and accompanying text for a discussion of this two-part test. After this article was written, the Supreme Court decided yet another case bearing on the *Chevron* doctrine. In *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. ____ (1991), the Court deferred to the Department of Labor's conclusion that its interim regulations governing claims for black lung disease benefits were, as required by statute, "not . . . more restrictive than" similar regulations previously promulgated by the then-existent Department of Health, Education and Welfare. See 30 U.S.C. § 902(f)(2) (1988). This time, it was Justice Scalia who dissented, claiming that *Chevron* had been misapplied. See 111 S. Ct. at ____ (Scalia, J., dissenting). Justice Scalia argued that, although the regulatory scheme was intricate, it was not ambiguous and thus not a proper candidate for *Chevron* deference. *Id.* Further, he argued that "[N]othing in our *Chevron* jurisprudence requires us to defer to one agency's interpretation of another agency's ambiguous regulations." *Id.* *Pauley* thus serves as another data point confirming that *Chevron* has not produced a stable, coherent approach to judicial review of agency action.

¹⁶⁰ Professor Pierce describes the two situations as involving "real" statutory interpretation (step one of *Chevron*) and "creative" interpretation (step two of *Chevron*). Pierce, *supra* note 22, at 308. It is unclear how the use of such labels aids judges in deciding actual cases. Moreover, Pierce's labels appear to legitimate some types of interpretation, but not others,

Chevron as allowing them to employ all the familiar tools of statutory construction to identify independently a range of interpretations in keeping with congressional intent,¹⁶¹ *Chevron* requires courts to defer to agency interpretations within that range of permissible interpretations. This article critically examines this aspect of *Chevron*.

First, adherents of *Chevron* have failed to provide a constitutional justification for court deference. This failure is surprising and troubling because, at least at first blush, the *Chevron* decision cannot be easily reconciled with the constitutional role of the judiciary. *Chevron* deference indisputably entails an alteration of normal judicial functioning. In the absence of agency delegation, a court presented with an issue of law would reach an interpretation; it would not be content with the identification of a range of permissible interpretations.¹⁶² The refinement of statutory meaning in the course of adjudicating bona fide cases and controversies lies at the heart of the judiciary's function.¹⁶³ Indeed, there is nothing more fundamental to our understanding of the Constitution than Chief Justice Marshall's ringing statement in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹⁶⁴

without providing a coherent theory for so doing. Currently, a rich and active debate is taking place on and off the Court regarding how to interpret statutes. See Wald, *supra* note 16; see generally G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); R. DWORKIN, LAW'S EMPIRE (1986); R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM, 216-93 (1985); Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

How to apply *Chevron* is an interesting and important problem that raises significant questions about the art of statutory construction. It is, however, tangential to my concerns about *Chevron*.

¹⁶¹ This view of *Chevron* is most consistent with the Supreme Court's approach in *Cardoza-Fonseca*. See 480 U.S. 421, 446 (1987). See *supra* text accompanying notes 129-43 for a discussion of *Cardoza-Fonseca*. I believe the *Cardoza-Fonseca* Court's formulation of the *Chevron* approach to be the most palatable strong reading of *Chevron*. See *supra* note 129.

¹⁶² See Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 826-27 (1990) ("Of course I can—as can any judge—always determine which of the parties has the better interpretation of a statute . . .").

¹⁶³ As then Judge Starr observed:

[What the lower court did in *Chevron* was] analogous . . . to what federal courts have to do in diversity cases every day—divine what a state court might do if confronted with this particular issue. To make a reasoned judgment, with respect and restraint, about what the statute would have said if the question had been put directly to Congress. This approach, whatever its demerits, at least embodied a good faith attempt to vindicate legislative supremacy. It certainly was not, if I may use the term, an "activist" decision.

Judicial Review, *supra* note 22, at 359.

¹⁶⁴ 5 U.S. (1 Cranch) 137, 177 (1803).

Chevron is not required by the Constitution.¹⁶⁵ Indeed, the practice of delegating "legislative" power to agencies rests on shaky constitutional moorings.¹⁶⁶ The view that courts are required to defer to determinations of law made by the agency to whom power is delegated does not inevitably follow from the legitimacy of delegating legislative power; a constitutional justification for diminishing the ordinary powers of the courts is needed. Indeed, the fact that agencies exercise legislative power in conjunction with executive power argues for a strong role for the judiciary in reviewing agency action in order to curb possible agency bias.

Nor can *Chevron* be justified merely by relying on congressional intent. Even if Congress intends courts to defer to the legal determinations made by agencies,¹⁶⁷ the expression of congressional will does not relieve the courts of their obligation to assess the constitutionality of Congress's action.¹⁶⁸ If Congress may not require courts to defer to agency interpretations without running afoul of

¹⁶⁵ Even Justice Scalia, the most forceful proponent of *Chevron* on the Supreme Court, does not argue that *Chevron* is compelled by the Constitution:

The [constitutional argument] can be rejected . . . by asking one simple question: if, in the statute at issue in *Chevron*, Congress had specified that in all suits involving interpretation or application of the Clean Air Act the courts were to give no deference to the agency's views, but were to determine the issue de novo, would the Supreme Court nonetheless have acquiesced in the agency's views? I think the answer is clearly no, which means that it is not any constitutional impediment to "policy-making" that explains *Chevron*.

Scalia, *supra* note 16, at 515-16.

¹⁶⁶ The constitutionality of so-called independent agencies was a matter of great concern in recent years. See, e.g., *A Symposium on Administrative Law, "The Uneasy Constitutional Status of the Administrative Agencies,"* 36 AM. U. L. REV. 277, 277-599 (1986). Concerns have subsided since the Supreme Court's affirmation of the constitutionality of special prosecutors, see generally *Morrison v. Olson*, 487 U.S. 654 (1988), and the United States Sentencing Commission, see generally *Mistretta v. United States*, 488 U.S. 361 (1989). Although the constitutionality of executive branch agencies is unquestioned, the proposition that legislative choices may not be delegated to the executive branch retains some vitality. See, e.g., *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 645-46 (1980). See generally T. Lowi, *THE END OF LIBERALISM* 125-56, 297-99 (1969); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985).

¹⁶⁷ It is far from clear that Congress so intended. The evidence is mixed, at best. See Sunstein, *supra* note 4, at 468 (*Chevron* contrary to the judicial review provisions of the APA). Justice Scalia makes an interesting argument that, given the lack of clear indicia as to congressional intent on this matter, the *Chevron* rule amounts to a default rule on construction. See *infra* notes 335-39 and accompanying text.

¹⁶⁸ But see Monaghan, *supra* note 19, at 26 ("Judicial deference to agency interpretation of law is simply one way of recognizing a delegation of law-making authority to an agency."). See *infra* notes 193-97, 292-300 and accompanying text for a discussion of the delegation argument.

the Constitution, then it necessarily follows that courts may not enforce this prohibition.

Second, the *Chevron* decision represents unwise political theory. The modern administrative state operates in some tension with constitutional text. Generally, agencies function as a fourth branch of government that is not provided for in the constitutional scheme. Commentators sometimes support the existence of the modern administrative state because of the practical necessities of modern governance.¹⁶⁹ Similarly, commentators have defended *Chevron* as furthering a sound political theory, namely, that policy choices be made by politically accountable decision-makers.¹⁷⁰ This argument is far too simplistic. It assumes too much about both the desirability of majoritarian decision-making and the degree to which agency action reflects majoritarian concerns. Such a political theory also neglects the problem of agency bias and the role that courts should play in correcting such bias.¹⁷¹

Finally, the *Chevron* approach, if uniformly applied to the full range of agency action, could produce anomalous and unwise outcomes. As a result, courts have refused to apply *Chevron* in certain contexts.¹⁷² In particular, *Chevron* can result in a lack of uniform legal standards in situations involving parallel enforcement schemes.¹⁷³ Such exceptions to *Chevron* suggest, at the very least, that *Chevron* is not an all-encompassing command for deference. These exceptions also suggest general criteria under which *Chevron* deference is inappropriate. More broadly, these exceptions serve to underscore the flaws of the *Chevron* doctrine and suggest the desirability of rejecting the *Chevron* approach.

In sum, *Chevron* deference presents three major problems. First, *Chevron* cannot be easily reconciled with the constitutional role of the judiciary. Second, *Chevron* represents unwise political theory. Lastly, it can produce unwise and anomalous results.

¹⁶⁹ See, e.g., Rubin, *supra* note 9, at 373-85; Strauss, *supra* note 14, at 581-83.

¹⁷⁰ See *infra* notes 302-14 and accompanying text for a discussion of *Chevron* as a sound political theory.

¹⁷¹ See *infra* notes 284-301 and accompanying text for a discussion of agency bias.

¹⁷² See *infra* notes 315-34 and accompanying text.

¹⁷³ For example, the antitrust laws may be enforced through private party suits, Justice Department criminal action and FTC adjudication. See *infra* notes 302-14 and accompanying text. Applying *Chevron* literally, courts could defer to both FTC and Justice Department interpretations of the same issues of law, even if the FTC's and Justice Department's interpretations differed from each other or from the interpretation that the court could make. As a result, the same statute could be interpreted and applied in three different ways.

A. *Chevron* and Article III

Article III of the United States Constitution vests the judicial power of the United States "in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."¹⁷⁴ In addition, article III confers on the Supreme Court appellate jurisdiction of both law and fact of all cases arising under federal law, subject to exceptions and regulations by Congress.¹⁷⁵ The notion that a court should defer to an agency interpretation of law appears on its face to violate article III. Such deference can be seen either as vesting judicial power in an administrative agency that lacks the attributes of an article III tribunal or as restricting the scope of the federal courts' jurisdiction over cases arising under federal law. Nevertheless, one can read article III as permitting Congress to place certain limits on the power of the federal courts to decide questions of interpretation of federal law. Congress's constitutional power to create inferior courts could be interpreted to allow Congress to establish inferior courts with jurisdiction to decide only a portion of the available set of cases and controversies set forth in article III. Further, Congress's constitutional power to make exceptions to and regulations concerning appellate jurisdiction could be interpreted to allow Congress to restrict the appellate jurisdiction of the Supreme Court. Indeed, the Supreme Court has always found some restrictions on judicial authority to be constitutionally permissible.

In this section, the article confronts the question whether a congressional command for courts to engage in *Chevron* deference is a valid exercise of Congress's power to regulate the jurisdiction of the federal courts. This article concludes that judicial power to make independent determinations of law is necessary in order to validate constitutionally the delegated powers wielded by administrative agencies. Further, under article III, judicial power to make independent determinations of law is necessary to validate the jurisdiction conferred on the federal courts to review agency action.¹⁷⁶

1. Agency Power to Make Determinations of Law

It is long established that Congress may grant administrative agencies the power to make interpretations of law.¹⁷⁷ Typically,

¹⁷⁴ U.S. Const. art. III, § 2.

¹⁷⁵ *Id.* Article III grants the Supreme Court "appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." *Id.*

¹⁷⁶ See *infra* notes 284-301 and accompanying text.

¹⁷⁷ See *infra* notes 183-87 and accompanying text.

agencies do so in one of two modes: rulemaking or adjudication.¹⁷⁸ For reasons based primarily on procedural requirements, Congress has drawn distinctions between the two modes of action.¹⁷⁹ Moreover, Congress does not always grant an agency both powers.¹⁸⁰ Nonetheless, agencies can use either of these methods to construct a rule of law, that is, a determination of the rights and obligations of a class of actors.¹⁸¹

Despite the similarity between these two modes, two discrete doctrines have emerged delimiting agency power to engage in rulemaking and adjudication. One, the "nondelegation" doctrine, generally applies to rulemaking. The other, the "reassignment of judicial authority" doctrine, generally applies to adjudication.¹⁸² The separate development of these doctrines, however, is unfortunate and misleading because they should be seen as complementary doctrines that apply to all agency actions.

The nondelegation doctrine is triggered when Congress grants power to an agency to make rules, that is, to set, rather than merely implement, government policy. Under the present formulation of this doctrine, Congress permits an agency to "fill-up the details"¹⁸³ of general congressional policies without violating notions of separation of powers as long as these policies set forth "intelligible principles"¹⁸⁴ capable of effective judicial review.¹⁸⁵ Rulemaking is subject to the nondelegation doctrine because it entails the agency

¹⁷⁸ See 5 U.S.C. §§ 553-554 (1988).

¹⁷⁹ Under the Administrative Procedure Act, different procedures are generally required, depending upon the mode of agency action. Compare 5 U.S.C. § 553 (setting forth procedures for rulemaking) with *id.* § 554 (setting forth procedures for adjudication). In addition, the due process clause, U.S. Const. amends. V & XIV, may impose certain procedural requirements on adjudication, but not rulemaking. Compare *Londoner v. Denver*, 210 U.S. 373, 386 (1908) (imposing hearing requirements on an adjudication) with *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915) (no hearing required in rulemaking).

¹⁸⁰ See, e.g., *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 623 (1944) (agency given power to engage in rulemaking but not adjudication).

¹⁸¹ Agencies, moreover, enjoy considerable latitude in the choice between acting through rulemaking or adjudication. See generally *Heckler v. Campbell*, 461 U.S. 458 (1983); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); Shapiro, *supra* note 49.

¹⁸² See *infra* notes 238-83 and accompanying text.

¹⁸³ *United States v. Grimaud*, 220 U.S. 506, 517 (1911).

¹⁸⁴ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

¹⁸⁵ See *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir.) (en banc) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly—and the courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits." (footnote omitted)), *cert. denied*, 426 U.S. 941 (1976).

fleshing out congressional policies through official pronouncements.

Yet agency adjudications often raise the same concerns that the nondelegation doctrine addresses, namely, agency formulation of policy. The Supreme Court has long recognized that agencies can formulate policy employing either mode: rulemaking or adjudication. The choice of mode is a matter left largely to the discretion of the agency.¹⁸⁶ The same concerns animating the nondelegation doctrine apply, regardless of agency mode. For example, when Congress empowers the FTC to prohibit unfair trade practices through agency adjudications, Congress is delegating to the FTC the power to formulate policy through law-making. The nondelegation doctrine should be applicable to constrain this congressional grant of power in the same manner as in delegations exercised using rulemaking power.¹⁸⁷ In this light, all agency actions must be in conformance with an "intelligible principle" set by Congress and capable of judicial review.

Parallels to the nondelegation doctrine exist when Congress delegates its law-making power to the judiciary, rather than an agency.¹⁸⁸ The exercise of legislative power by the judiciary is legitimate but bounded. It is bounded first by the principle of legislative supremacy. That is, any common-law rule made pursuant to congressional delegation may be overturned through legislative action.¹⁸⁹

¹⁸⁶ See *supra* note 181.

¹⁸⁷ There is little doubt that the FTC Act survives the nondelegation doctrine test, and I do not wish to argue in favor of a more restrictive nondelegation doctrine. I do wish to emphasize, however, that an interrelationship exists between a lax nondelegation doctrine and the principles of judicial review over agency action. This can work in two directions. If we adopt a principle of limited judicial review of agency interpretations of law, some of the problems so created could be addressed by beefing up the nondelegation doctrine. Requiring greater congressional specificity would place more cases within the first step of *Chevron*. Some commentators have argued for this result. See, e.g., Aranson, Gellhorn & Robinson, *supra* note 166, at 63-67; T. Lowi, *supra* note 166, at 297-99; Schoenbrod, *supra* note 166, at 1249-71.

On the other hand, lax congressional delegations could be permissible if there is searching judicial review. See Farina, *supra* note 99, at 486-88. Serious problems are raised, however, when a lax nondelegation doctrine is combined with limited judicial review of agency action.

¹⁸⁸ Common-law-making by the federal courts, the judicial analog to agency rulemaking and adjudication, has not been seen as an inherent power of federal courts. See, e.g., *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law."). Instead, the federal courts have developed common law only in situations where it is necessary or desirable in achieving or vindicating federal interests in the absence of congressional action. See generally D. CURRIE, *FEDERAL COURTS* 353-70 (4th ed. 1990).

¹⁸⁹ Thus, we have the anomalous situation that, although federal courts sitting in ad-

Another doctrine, the void-for-vagueness doctrine, may also limit common-law rulemaking by the courts.¹⁹⁰ Although most often seen as a limitation on the powers of the legislature, this doctrine is also a limitation on the powers of the judiciary. It precludes the legislature from delegating certain policy choices to the courts to make in the course of deciding cases.

Much of the business of the federal courts clearly entails the type of policy-making activities performed by agencies. From "pure" common-law adjudication in admiralty cases and disputes between states, to the administration of "quasi-common-law" statutes such as the antitrust laws,¹⁹¹ to "gap-filling" such as determining the limitations period for a cause of action arising under federal law,¹⁹² to "interpretation" of ambiguous language, courts make the types of legislative choices that the Constitution vests in article I. The obvious solution is to insist upon the ability of the legislative branch to assert its supremacy when the judiciary, as an incident to the exercise of judicial power, engages in legislative power in a way that violates congressional will.

Thus, the modern process of law enunciation operates under a dual scheme of delegation. Congress retains ultimate power to set governmental policies through legislation. To the extent that a statute is unclear or leaves a gap that needs to be filled, however, either an agency or the courts might make legal determinations. Congress implicitly delegates law-making power to courts through the adjudication process. At the same time, Congress is permitted to delegate legislative power to agencies.

Chevron implies that the delegation of legislative power to an agency also represents a withdrawal of the implicit delegation to the courts.¹⁹³ This analysis is flawed, however, because a delegation to an agency is only valid if the courts are permitted to ensure that the agency acts in conformance with legislative will.¹⁹⁴ Assuming

miralty apply principles of international law to resolve disputes, federal statutes can supplant contrary international law principles. See G. GILMORE & C. BLACK, *supra* note 52, at 45-47.

¹⁹⁰ The void-for-vagueness doctrine permits certain statutes, particularly penal statutes, to be attacked facially, on grounds that they do not identify with sufficient clarity, what kinds of conduct are proscribed. Such challenges are permitted even if the pleader has committed acts that are capable of being proscribed. See generally Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

¹⁹¹ See R. Posner, *supra* note 170, at 278, 288, 301-03 (analogizing the process of construing the antitrust laws to common law adjudication).

¹⁹² See, e.g., *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 172 (1983).

¹⁹³ *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

¹⁹⁴ See, e.g., *Yakus v. United States*, 321 U.S. 414, 431-48 (1944); cf. *Schechter Poultry*

that all congressional delegations to agencies set forth guidance regarding agency action,¹⁹⁵ judicial review assesses whether Congress's will has been done. In effect, judicial review preserves the principle of legislative supremacy.

One might argue, however, that *Chevron* accommodates the concerns of the nondelegation doctrine by requiring that courts review agency action for reasonableness. That is, as long as an agency's actions are not contrary to congressional intent and are made pursuant to congressional delegation, why should a court overturn the agency's actions? Indeed, if the court overturned the agency's interpretation, would not the court be vitiating the reason for delegation to an agency?

The problem with this argument is that it confuses power to make a legal determination with the correctness of that determination. The delegation doctrine confers power to an agency to make a determination of law, provided that the agency is acting within the scope of its delegated power.¹⁹⁶ That determination must be subjected to judicial review to determine if the agency's action is in conformance with the statutory scheme.¹⁹⁷ *Chevron* review cedes the issue of correctness of an agency's interpretation to the agency.

Moreover, independent judicial review does not vitiate the reason for delegating power to an agency. Legislatures have limited ability to engage in meaningful fact-finding and analysis. Thus, Congress often delegates power to an agency to fill in statutory gaps because Congress believes that the agency will be best able to assemble and analyze the facts needed to make legal determinations. In addition, because the legislative process is not well suited to respond quickly to changed circumstances, Congress also often grants power to an agency that can adapt to changing conditions.

In contrast, courts are limited to party and case-centered fact-finding. They might not be able to assemble the records necessary

Corp. v. United States, 295 U.S. 495, 537-42 (1935) (invalidating a delegation to an agency that could not be effectively policed by judicial review); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430-33 (1935) (same).

¹⁹⁵ This process is required by the nondelegation doctrine.

¹⁹⁶ Indeed, extrapolating from *Chevron*, the clearer congressional intent is, the greater the judicial power is to invalidate agency action. Yet courts are needed most in situations in which Congress has not been as clear as it could be. In those situations, courts can play an even greater role in assuring that agency action is in conformance with congressional goals.

¹⁹⁷ Cf. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 662 (1980) (agency action within the scope of its delegated power invalidated because its action was not in accordance with statutory scheme).

to make informed factual assessments and formulate broadly applicable policies. When the agency makes its factual record and assessments available to the courts, however, the courts can determine whether the agency's determinations of law are correct. Similarly, although courts may not be able to respond to changed conditions because of the case or controversy requirement, they *can* review agency action, provided that the agency's action produces a reviewable case or controversy.¹⁹⁸ Thus, the delegation doctrine, rather than being a source of support for the strong reading of *Chevron*, supports the principle of independent judicial review of agency action in order to ensure that all determinations of law are made in accordance with legislative intent.

Chevron can also be seen as reassigning a judicial function to an agency. Namely, if *Chevron* is read as requiring a court to defer to an agency interpretation of a statute, one can regard Congress as withholding the traditional judicial function of law declaration from the courts and conferring that function on an agency. This article argues that Congress may not constitutionally assign this judicial power to an agency without upsetting the principle of article III supremacy over judicial matters. This argument proceeds from an assumption that is similar to the nondelegation doctrine, namely, that agencies may perform judicial functions incidental to their constitutional function of implementing legislative schemes. Just as article I bodies must ultimately exercise legislative power, however, article III courts must also ultimately exercise judicial power. Thus, administrative agencies can and do render interpretations of law. If they do so while exercising judicial power, however, the courts must be able to exercise their constitutional role by independently deciding these questions of law.¹⁹⁹

¹⁹⁸ See 5 U.S.C. § 702 (1988) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

¹⁹⁹ Professor Rubin has argued that the very existence of broad delegations dictates that courts take a deferential posture. Rubin, *supra* note 9, at 387-97; see also Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 441-45 (1989). Rubin describes the trend of Congress to pass "intransitive" legislation that does not set forth specific rules of law but creates an agency mechanism for developing these rules. Although he recognizes that intransitive legislation is in some tension with the nondelegation doctrine, he finds that practical necessities argue in favor of such broad delegations. Rubin then attacks the concern that intransitive legislation impermissibly constrains the courts:

The second source of concern about standardless delegation is the desire to give courts a job to do in the modern legislative process If one begins

2. The Ability of Congress to Withhold Judicial Review of Agency Action

Chevron, by requiring courts to defer to an agency's determination on questions of law, places a limit on the power of the courts to set aside agency actions. It does not withhold judicial review over agency action per se, but it does limit the scope of judicial review over agency action. Nonetheless, the debate over Congress's power to withhold judicial review of agency action is logically related to the problem of limitation on scope of review and provides an analytic approach to the scope of review problem. This article, therefore, addresses both issues. It concludes that Congress may not empower an agency to act without providing for judicial review of the agency's action and that congressional power to prescribe the scope of judicial review is also limited by the Constitution.²⁰⁰

If Congress were to withhold judicial review over agency action, it would be restricting the judicial power of the United States, which extends to all cases arising under the laws of the United States.²⁰¹ One could raise three arguments to support such a restriction of judicial power. First, article III does not create any lower federal courts, but merely empowers Congress to do so.²⁰² Could not Congress decide to create lower federal courts with jurisdiction over only a subset of the full judicial power of article III? Second, although the Constitution does establish a Supreme Court, Congress is also given the power to regulate and make exceptions to the Court's appellate jurisdiction.²⁰³ Could not Congress make judicial review of agency action an exception to the Supreme Court's appellate jurisdiction? Lastly, suits challenging agency action represent suits against the government. Could not sovereign immunity preclude judicial review in these cases?

from the a priori position that the judicial role must be restored, the delegation doctrine is well suited to that purpose.

Rubin, *supra* note 9, at 396-97. To Rubin, however, judicial involvement is merely a question of "implementation strategy, not of legislative theory." *Id.* at 415.

Rubin overstates the case. He focuses exclusively on the public-law nature of administrative action, ignoring the fact that only cases or controversies involving injured parties reach the courts. When confronted with a bona fide case involving agency action, it is far from obvious why courts should defer to agencies in service of implementation strategies. Moreover, as Professor Strauss has observed, even if one accepts the legitimacy of intransitive legislation, such legislation still sets boundaries on administrative action that courts can play a useful role in policing. Strauss, *supra*, at 443 & n.51.

²⁰⁰ See U.S. Const., art. III, § 2.

²⁰¹ *Id.*

²⁰² *Id.* § 1.

²⁰³ *Id.* § 2.

These arguments fail for three reasons. First, due process requires that agency action affecting liberty or property interests be subject to judicial review. Second, the principle of separation of powers argues for judicial review of agency action in order to protect against biases in agency actions. Lastly, as to agency action that is judicial in nature, article III's requirement that the judicial power of the United States be exercised by courts with judges enjoying lifetime tenure with non-diminishing salary requires that an article III court exercise independent review over agency actions.²⁰⁴

With regard to the first argument for restriction of judicial review—that Congress has the power to set the jurisdiction of the lower federal courts as it chooses—Congress apparently *does* enjoy considerable leeway.²⁰⁵ Exercise of this power, however, still leaves the state courts free to review agency action.²⁰⁶ Congress's ability to restrict the jurisdiction of all lower courts, state and federal, requires additional constitutional justification.²⁰⁷ It is axiomatic that courts have the power to review their own jurisdictional grants for constitutional infirmity.²⁰⁸ A court could thus consider whether congressional action withholding subject matter jurisdiction to review

²⁰⁴ *Id.* § 1.

²⁰⁵ See generally *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). The classic treatment of this general topic is Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953), reprinted in P. BATOR, D. MELTZER, P. MISHKIN, D. SHAPIRO, HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 393 (3d ed. 1988) [hereinafter HART & WECHSLER]. Other notable commentaries on the issue include Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985); Bator, *The Constitution as Architecture: Legislative and Administrative Courts under Article III*, 65 IND. L.J. 233, 263–70 (1990); Fallon, *supra* note 26; Sager, *supra* note 27.

²⁰⁶ See HART & WECHSLER, *supra* note 205, at 423.

²⁰⁷ See *id.* at 423 (In the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones). Many commentators have argued that state judges, who are often not selected on a merit basis and who often do not enjoy the guarantees of life tenure with nondiminishing salary, are imperfect substitutes for the article III judiciary. See, e.g., Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121–24 (1977). Of course, Hart relies on the existence of state courts with appellate review by the United States Supreme Court. Thus, even if state court judges displayed bias or incompetence, the real value of state courts is to provide a pathway to the Supreme Court whose Justices enjoy the guarantees of article III. See HART & WECHSLER, *supra* note 205, at 423.

The state court/federal court debate has little relevance to the question of whether a federal body lacking the attributes of article III may displace an article III court. The former question deals with state/federal issues, whereas the latter question deals with separation of powers issues. See Kramer, *supra* note 16, at 286; Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 301–04 (1990).

²⁰⁸ See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

agency action is constitutional in the face of a charge that such a restriction violates the due process rights of persons injured as a result of agency action.

Commentators have long noted that many types of agency actions involve the deprivation of a liberty or property interest, thus triggering due process concerns.²⁰⁹ They have sometimes seen other types of agency action, often called "public rights" cases,²¹⁰ however, as not involving a protectable right because they entail the conferral or denial of a congressionally created benefit.²¹¹ Beginning with *Goldberg v. Kelly*,²¹² the Supreme Court recognized that benefits created by statute could create entitlements that could not be withheld without affording the party due process of law. Thus, Congress may not develop a statutory scheme that confers benefits without providing a constitutionally adequate remedy for those unlawfully denied that benefit. With respect to agency action, the question is whether such action without any judicial review is a constitutionally adequate remedy for this type of property deprivation.

Little authority exists on this precise point.²¹³ This lack of authority may be the best indicator of how the Court would decide the question. In past cases, when Congress appeared to provide only an administrative remedy for deprivations of liberty or property, courts have construed the statutes to find that Congress had *not* precluded judicial review.²¹⁴

²⁰⁹ See HART & WECHSLER, *supra* note 205, at 399-403.

²¹⁰ See *id.* at 411 & 396 n.6 (discussing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)).

²¹¹ See *id.* at 410-11.

²¹² 397 U.S. 254 (1970). *Goldberg* and the emergence of the role of due process has severely undercut the soundness of Hart's distinctions in the dialogue. See HART & WECHSLER, *supra* note 205, at 410 n.27.

²¹³ For examples of statutes appearing to preclude judicial review, see Note, *Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers*, 97 HARV. L. REV. 778, 778 n.4 (1984).

²¹⁴ For example, in *Johnson v. Robison*, the Court construed a judicial review provision to allow judicial review of a denial of a claim in the face of a constitutional objection. 415 U.S. 361, 366-74 (1974). Although *Johnson* was arguably limited to constitutional challenges, most lower courts found it dispositive of nonconstitutional challenges as well. See, e.g., *AFGE v. Nimmo*, 711 F.2d 28, 31 (4th Cir. 1980); *University of Maryland v. Cleland*, 621 F.2d 98, 99-101 (4th Cir. 1980); *Wayne State Univ. v. Cleland*, 590 F.2d 627, 631-32 (6th Cir. 1978). But see *Gott v. Walters*, 756 F.2d 902, 905-06 (D.C. Cir.), *vacated*, 791 F.2d 172 (D.C. Cir. 1985).

The judicial provision at issue in *Johnson* read as follows: "The decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no . . . court

If a court had to grapple with unmistakable language, however, an application of the test enunciated in the due process cases would argue decisively in favor of requiring judicial review. Suppose, for example, that a dispute involving a question of "merely" statutory import, such as a question of eligibility under an entitlement program, was precluded from judicial review. Under the test announced in *Mathews v. Eldridge*,²¹⁵ the court would consider three factors: (1) the private interests affected by the governmental action; (2) the risk of an erroneous deprivation caused by the procedures being employed and the probable value of adding judicial review; and (3) the burden that the additional procedures would place on the government.²¹⁶

It is difficult to see how the *Mathews v. Eldridge* factors could fail to point unequivocally towards judicial review. Unlike the prototypical administrative due process situation in which the issue is the procedures to be employed *before* an agency could act, the issue posed in this situation is the process to be employed *after* the agency has acted. The only burden placed on the agency is the cost of litigation.²¹⁷ Even if we are prepared as a nation to allocate access

of the United States shall have power or jurisdiction to review any such decision." 38 U.S.C. § 211(a) (1982).

The *Johnson* approach was later described in a D.C. Circuit opinion:

[I]t has become something of a time-honored tradition for the Supreme Court and lower federal courts to find that Congress did not intend to preclude altogether judicial review of constitutional claims in light of the serious due process concerns that such preclusion would raise. These cases recognize and seek to accommodate the venerable line of Supreme Court cases that casts doubt on the constitutionality of congressional preclusion of judicial review of constitutional claims. This foreboding line of Supreme Court cases and the ominous warnings of scholarly commentators have moved courts to apply the "clear and convincing" standard to congressional enactments in part to avoid the constitutional morass, as we do here.

Bartlett v. Bowen, 816 F.2d 695, 699-700 (D.C. Cir. 1987) (footnotes omitted). Indeed, the court in *Bartlett* engaged in "creative," if not disingenuous, statutory construction to conclude that a judicial review provision that precludes judicial review if the amount in controversy is less than \$1000 did not preclude constitutional challenges to a determination where the amount in controversy was less than \$1000. *Id.* at 700 (construing 42 U.S.C. § 1395ff(b)(1)(C) (1982)).

²¹⁵ 424 U.S. 319 (1976).

²¹⁶ *Id.* at 332-35. For another example of the use of *Mathews v. Eldridge* in this context, see Note, *supra* note 213, at 780, 791-96.

²¹⁷ An additional monetary and time burden, of course, is placed on the court system. To consider these types of costs, the problem of access to the courts must be substantially reexamined. In any event, a blanket prohibition in judicial review would not be required to satisfy this type of judicial burdens argument because a jurisdictional amount requirement

to the courts on this basis,²¹⁸ the judicial system would be largely self-regulating as to matters of cost efficiency. A private party would only seek judicial review of agency action when the expected benefits of review²¹⁹ exceed the cost of litigation. Thus, even if judicial review is permitted, such review would tend to be sought only when the first factor—the private interest at stake—is at least as weighty as the third factor—the burden on the government.

The second factor—the benefits of judicial review—is thus likely to be the decisive factor in the *Mathews v. Eldridge* analysis. The benefits of such review are two-fold. First, and perhaps most importantly, an agency's knowledge that its decision might ultimately be subject to judicial review provides incentives for the agency to act properly.²²⁰ Second, if the agency fails to act properly, the court would be available for corrective action. The only arguments against judicial review, therefore, are that either the courts have no effect on agency behavior, and thus produce no beneficial effects, or the courts reach the wrong answers. The former argument is belied by the facts—courts often reverse agency action.²²¹

The latter argument is more problematic. How do we know if a court decision is right or wrong? As Justice Jackson pointed out about the decisions of the Supreme Court: "We are not final because we are infallible, but are infallible only because we are final."²²² As Justice Jackson's aphorism illustrates, one cannot conclude with any degree of certainty that court or agency determinations are correct. The presence of judicial review, however, increases the likelihood that the ultimate determination will be correct. When both an agency and a court agree on the correctness of a determination of law, we have greater confidence in its correctness. When the court and agency disagree, we might conclude that the judicial determi-

could alleviate such burdens. See, e.g., *Bartlett v. Bowen*, 816 F.2d 695, 710–11 (D.C. Cir. 1987).

²¹⁸ I, for one, am not. It may make sense to develop alternative dispute mechanisms that have a lower cost than traditional court proceedings. The purpose of doing so, however, should be to reduce costs to litigants, not to reduce costs to the government at the expense of litigants.

²¹⁹ By expected benefits, I mean the value of the relief sought multiplied by the probability that the claim will succeed.

²²⁰ This is one of the premises of the "hard look" doctrine. See generally *Motor Vehicle Mfr. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983).

²²¹ See Schuck & Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1031 (court reversals or remands of agency action at 28%, the year before *Chevron* was decided, and 17%, the year after *Chevron* was decided).

²²² *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

nation is correct because it is made by a neutral observer. The agency's interpretation might suffer from some problems of bias.²²³

Other commentators have attempted to demarcate cases in which the courts' or the agency's interpretations should prevail. Hart, for example, distinguishes between matters involving rights from those involving privileges.²²⁴ There is something quite odd about an argument, however, that would permit the agency the final word only in situations involving the conferral of a statutory benefit.²²⁵ If we are to grant the agency the last word, on at least some issues of law, it must be based on criteria that would point to situations where we have some reason to believe that the agency is more likely to reach the correct result than the courts.²²⁶ In sum, notions of separation of powers and due process reveal that Congress may not preclude all judicial review of agency action.

The second argument for restriction of judicial review—congressional power to preclude the Supreme Court's appellate review—presents a weaker case. First, due process concerns would not argue forcefully for mandating the possibility of Supreme Court review. Second, article III and separation of powers concerns would

²²³ See *infra* notes 284–91 for a discussion of the problem of agency bias. To the extent that an agency's view is informed by special expertise, courts should accord some persuasive deference to the agency. See *infra* notes 362–63 and accompanying text for a discussion of special expertise.

²²⁴ See HART & WECHSLER, *supra* note 205, at 410–11.

²²⁵ See Monaghan, *supra* note 19, at 24 (“the exercises of ‘the judicial power of the United States’ cannot vary with whether a private litigant is a plaintiff or a defendant, so long as the court is expected to enter a final judgment on the merits of the claim”).

²²⁶ Similarly, a distinction between constitutional and nonconstitutional issues is unsatisfying. See Monaghan, *supra* note 19, at 2 (“Marshall's grand conception of judicial autonomy in law declaration was not in terms or in logic limited to constitutional interpretation”). This “essential function” argument, which places constitutional issues on a different plane than other issues, has considerable support. See Amar, *supra* note 205, at 220–22 (discussing the essential function theory); Monaghan, *supra* note 19, at 32–34; Sager, *supra* note 27, at 56–57. Recent scholarship, however, has offered a more unified theory of article III. See Amar, *supra* note 205, at 235–39 (arguing that certain categories of article III cases must be capable of being heard by an article III court at the trial or appellate level); Fallon, *supra* note 26, at 976–77 (suggesting that all categories of article III cases must be capable of at least appellate review by an article III court). The essential function theory may now be explained, in part, as an application of the principles enshrined in footnote four to the *Carolene Products* case. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Footnote four identifies an active judicial role in the vindication of certain constitutional rights and a lesser judicial role in the review of other claims. *Id.* See *infra* notes 375–391 and accompanying text for a discussion of *Carolene Products* and its relevance to administrative law. Whatever the validity of the *Carolene Products* principle in the general context of preclusion of judicial review, it would appear to be limited to review of congressional, not agency, acts. See *infra* notes 378–79 and accompanying text.

appear to be satisfied as long as there is *some* article III participation.²²⁷ The only difficult question is whether principles of separation of powers and article III are satisfied if only state courts are involved.²²⁸ As a practical matter, however, it is unlikely that Congress would ever opt to provide for only state court review of federal agency action without also providing for appellate review in the Supreme Court.

Finally, the third argument for restriction of judicial review—that sovereign immunity is a valid bar to judicial review—is flawed.²²⁹ First, sovereign immunity would be applicable, if at all, only if the agency is a defendant.²³⁰ That is, an agency seeking to compel a private party to act would not raise sovereign immunity concerns.²³¹ Further, sovereign immunity only extends to claims against the government. If a claim is raised against an official, such as an agency head, immunity would not apply.²³² Thus, sovereign immunity would only apply in claims for money damages against the government. Yet, the due process revolution has altered conceptions of constitutionally protected interests in precisely this area.²³³ These recent constitutional understandings may vitiate the rationale for the availability of sovereign immunity.²³⁴

The due process revolution led then-Judge Bork to attempt to reconceptualize the rationale for preclusion of judicial review. He argues that even if sovereign immunity cannot be defended against a due process challenge on the basis of historical precedent, it might be justified in light of "the practical necessities of the administrative welfare state."²³⁵ This argument for administrative necessity sweeps too broadly. Although good arguments exist for reassigning many

²²⁷ See *infra* note 237.

²²⁸ *Id.*

²²⁹ See HART & WECHSLER, *supra* note 205, at 398–99.

²³⁰ *Id.*

²³¹ Many administrative schemes are not self-enforcing. The agency must seek enforcement through an action in the courts. See, e.g., 15 U.S.C. § 45(c) (1988) (enforcement of FTC order); 29 U.S.C. § 160(e) (1988) (enforcement of NLRB order). In these situations, a sovereign immunity defense would be unavailing because the agency would be the plaintiff in federal court.

²³² Officials might enjoy some immunity from suit for money damages. See *Butz v. Economou*, 438 U.S. 478, 508–17 (1978). Prospective relief may be awarded, however. See *Pulliam v. Allen*, 466 U.S. 522, 528–43 (1984). The availability of relief against officials might cause the government to waive sovereign immunity. See HART & WECHSLER, *supra* note 205, at 398.

²³³ See *supra* notes 212–14 and accompanying text for a discussion of these interests.

²³⁴ See Fallon, *supra* note 26, at 952–53.

²³⁵ *Bartlett v. Bowen*, 816 F.2d 695, 722–23 (D.C. Cir. 1987) (Bork, J., dissenting).

judicial-like functions to agencies, these arguments do not carry over to necessitating preclusion of judicial review.²³⁶ Most commentators have reached this conclusion,²³⁷ which is supported by the case law. This case law uniformly holds that, although Congress enjoys considerable latitude to reassign matters to non-article III bodies, it must provide for probing judicial review of the decisions of these bodies.

3. The Ability of Congress to Assign Judicial Matters to Agencies

The foregoing analysis has focused generally on the ability of Congress to preclude judicial review of agency determinations of law. When an agency makes such determinations in the context of delineating the rights and obligations of specified parties in agency adjudications, an additional constitutional issue is raised: namely, does it violate article III when an agency, rather than a federal court, exercises judicial power? A series of recent Supreme Court cases involving reassignment of judicial authority to article I bodies has addressed this question.²³⁸ Although these cases have produced some fractured courts and much confusion,²³⁹ they all implicitly support a crucial dichotomy: although fact-finding may sometimes be reassigned to article I bodies, law declaration may not be assigned to such bodies. In order to maintain the checks and balances inherent in our constitutional framework, judicial review of article I adjudications must exist and independent review of questions of law must be permitted.²⁴⁰

²³⁶ Administrative necessities may well implicate the timing of judicial review. *See, e.g.*, *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 243 (1980) (finality doctrine); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139–41 (1967) (ripeness); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938) (exhaustion of administrative remedies). Once the agency has finished acting, however, the only burden on administrative functioning caused by judicial review is cost, which is largely self-regulating. *See supra* notes 217–19 and accompanying text.

²³⁷ *See, e.g.*, Amar, *supra* note 205, at 229–30 (arguing that an article III court must have the power to participate in the adjudication of federal question cases); Bator, *supra* note 205, at 268 (suggesting that initial assignment to agency is permissible if, among other things, there is article III review); Fallon, *supra* note 26, at 933 (arguing that matters may be assigned to non-article III entities provided there is article III review).

²³⁸ Article I bodies include entities such as agencies and certain courts, such as the Tax Court, courts of the District of Columbia, and territorial courts, that are composed of persons who are not judges enjoying the protections of article III. It is somewhat of a misnomer when referring to an administrative agency, which is most often identified as being in the executive branch.

²³⁹ *See Redish, Legislative Courts, Administrative Agencies and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 202–04.

²⁴⁰ *See also* Fallon, *supra* note 26, at 983 (arriving at similar conclusion).

The "reassignment of judicial authority" doctrine might appear to have relevance only to agency adjudications. The scope of judicial review of agency rulemaking,²⁴¹ however, necessarily affects parties' ability to challenge the content of the rule in the context of a subsequent agency adjudication or in a lawsuit brought initially in a federal court. In either situation, the determinations of law made initially in the rulemaking would be subject to independent judicial review.²⁴² Because applications of a rule would entail independent judicial review, it follows that, if the court reviews the rulemaking directly, it needs to engage in independent review at that time as well. Otherwise, the court would be faced with the prospect of either overruling its determinations when the same issue is presented as an application of the rule, or it would be bound by its earlier determination, despite the fact that the prior determination entailed deference to the agency.

Several recent cases address the ability of Congress to reassign judicial business to article I bodies.²⁴³ In 1982, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the United States Supreme Court declared that a grant of jurisdiction to bankruptcy court judges to hear all civil proceedings arising in or related to a bankruptcy claim unconstitutionally granted article III judicial power to a non-article III body.²⁴⁴ Although the case produced no majority opinion, the various opinions confirm that, whatever the congressional power to assign adjudicatory matters to non-article III bodies, an article III court must conduct an independent review of issues of law and some review of questions of fact.²⁴⁵

Justice Brennan's plurality opinion stressed that article I bodies are competent to adjudicate in three distinct areas.²⁴⁶ The one area

²⁴¹ At present, judicial review generally is available under 5 U.S.C. § 702. The availability of review, however, is sometimes tempered by the ripeness doctrine. See generally *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

²⁴² If the application of the rule takes place initially in a court, *Chevron* apparently does not apply. See *infra* notes 315-34 and accompanying text. If the application of the rule takes place in the context of agency adjudication, the reassignment of judicial authority doctrine requires independent judicial review of questions of law.

²⁴³ The important modern cases are *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), and *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

²⁴⁴ *Northern Pipeline*, 458 U.S. at 87.

²⁴⁵ See *id.* at 73-76, 89, 92, 95.

²⁴⁶ The first two areas, courts martial and federal territories and districts, including the District of Columbia, are not relevant to this article.

relevant to this article involves "the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving 'public rights.'"²⁴⁷ Justice Brennan observed that the claim in the bankruptcy proceeding did not involve a public right, which he defined as requiring "at a minimum [a dispute] 'between the government and others.'"²⁴⁸ Thus, the state-based claim involved in *Northern Pipeline* could only be adjudicated by an article III court within the federal system.²⁴⁹

Justice Brennan's thoughts concerning the role of administrative agencies, however, are highly relevant to the problem at hand. Brennan first underscored the system of checks and balances provided by the Constitution and noted the fundamental importance of an independent judiciary in that system of checks and balances.²⁵⁰ Brennan appeared to concede, however, that article I bodies may adjudicate cases involving public rights²⁵¹ because such cases are covered by principles of sovereign immunity, "which recognizes that the Government may attach conditions to its consent to be sued."²⁵² Brennan did not argue that the Government may provide *no* avenue for redress of public rights, only that it need not provide an article III procedure. Further, Brennan suggested that article III review of article I adjudication may be required.²⁵³

²⁴⁷ *Northern Pipeline*, 458 U.S. at 67 (footnote omitted). In the omitted footnote, Justice Brennan noted that "Congress's power to create legislative courts to adjudicate public rights carries with it the lesser power to create administrative agencies for the same purpose, and to provide for review of those agency decisions in article III courts." *Id.* at n.18.

²⁴⁸ *Id.* at 69 (quoting *Ex Parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)).

²⁴⁹ Many commentators have criticized Brennan's categorical approach as lacking a coherent rationale. See, e.g., Bator, *supra* note 205, at 243-53.

²⁵⁰ *Northern Pipeline*, 458 U.S. at 58. Justice Brennan stated, "[a]n inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Article III both defines the power and protects the independence of the Judicial Branch." Justice Brennan summarized by stating that "our Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary." *Id.* at 60.

²⁵¹ *Id.* at 67.

²⁵² *Id.* at 67-68 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)). Sovereign immunity "recognizes that the Government may attach conditions to its consent to be sued." *Id.* at 67.

²⁵³ *Id.* at 69 n.23. Justice Brennan may have invoked notions of sovereign immunity and separation of powers in discussing the public rights doctrine because of this suggested review. *Id.* at 67. Sovereign immunity does not shield the government's actions from judicial scrutiny, although it might preclude the judiciary from making initial determinations.

This limitation on judicial fact-finding is what was at issue in the cases that Brennan cites in support of his public rights' doctrine: *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856), *Ex Parte Bakelite Corp.*, 279 U.S. 438 (1929), and *Crowell*

In dissent, Justice White directly supported the proposition that article III review of article I adjudications is essential under the Constitution.²⁵⁴ Justice White noted that "[t]here is no difference in principle between the work that Congress may assign to an Art. I court and that which the Constitution assigns to Art. III courts."²⁵⁵ The validity of an assignment to an article I court depends on the extent to which the congressional scheme accommodates article III values.²⁵⁶ To Justice White, judicial review of agency action played a critical role in achieving a proper allocation of power between the article I and article III bodies.²⁵⁷

In 1985, the Supreme Court in *Thomas v. Union Carbide Agricultural Products Co.* clarified these positions regarding article III review of article I decisions.²⁵⁸ This time, the Court was faced with an adjudicatory scheme in which claims were submitted to arbitration subject to article III review only for "fraud, misrepresentation, or other misconduct."²⁵⁹ The Court was unanimous in result, but not in rationale.²⁶⁰ Justice O'Connor appeared to adopt Justice White's approach in *Northern Pipeline*, terming the arbitration procedure "a pragmatic solution to [a] difficult problem."²⁶¹ Turning to the question of whether "the review afforded preserves the 'appropriate exercise of the judicial function,'"²⁶² Justice O'Connor

v. Benson, 285 U.S. 22 (1932). The Court did not attempt to preclude judicial review of questions of law in any of these cases.

²⁵⁴ Justice Rehnquist's concurrence and Chief Justice Burger's dissent do not stake out positions relevant to my discussion.

²⁵⁵ *Northern Pipeline*, 458 U.S. at 113.

²⁵⁶ *Id.* at 115.

²⁵⁷ Justice White stated:

[T]he presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers. Appellate review of the decisions of legislative courts, like appellate review of state court decisions, provides a firm check on the ability of the political institutions of government to ignore or transgress constitutional limits on their own authority. Obviously, therefore, a scheme of Art. I courts that provides for appellate review by Art. III courts should be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court.

Id. In a similar vein, Justice White quoted *Crowell*: "[T]he reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function" *Id.* at 110 (quoting *Crowell v. Benson*, 285 U.S. 22, 54 (1932)).

²⁵⁸ 473 U.S. 568, 593 (1985).

²⁵⁹ See 7 U.S.C. § 136a(c)(1)(D)(ii) (1988).

²⁶⁰ Justice O'Connor wrote for five Justices (joined by Chief Justice Burger and Justices White, Powell and Rehnquist). Justice Brennan wrote for three Justices (joined by Justices Marshall and Blackmun). Justice Stevens wrote a concurring opinion.

²⁶¹ *Thomas*, 473 U.S. at 590.

²⁶² *Id.* at 592 (quoting *Crowell*, 285 U.S. at 54).

concluded that judicial review was adequate.²⁶³ In doing so, however, she took an expansive reading of "fraud, misrepresentation, or other misconduct" to permit reversal in situations in which arbitrators "abuse or exceed their powers or willfully misconstrue their mandate under the governing law,"²⁶⁴ commit "constitutional error" and allow "whatever judicial review might be required by due process."²⁶⁵ Thus, although courts are surely constrained in their review of arbitral awards, they appear constrained in much the same way that courts are constrained with regard to jury awards. Courts could review errors of law, although most applications of law to fact, like jury damage awards, may not be altered.²⁶⁶ Through somewhat strained statutory interpretation, the *Thomas* Court retained a vital role for the article III courts for questions of law.

Justice Brennan concurred in the result.²⁶⁷ In so doing, he clarified his position regarding the public rights doctrine. He reinforced the point that, even if a matter can be adjudicated in an article I court, there must be article III review of that adjudication.²⁶⁸ He concurred in the result because he understood the judicial review provision in *Thomas* to "preserve[] the judicial authority over questions of law."²⁶⁹

Justice Brennan also expanded his view of how article III review of article I adjudication implicates the separation of powers. He noted that judicial review of constitutional questions is necessary to constrain the actions of the legislative branch and, moreover, judicial review of all questions of law is necessary to check executive action.²⁷⁰ This review not only ensured an appropriate balance between the judicial and executive branches, but also the proper balance between the legislative and executive branches.²⁷¹

²⁶³ *Id.* at 592-93.

²⁶⁴ *Id.* at 592.

²⁶⁵ *Id.*

²⁶⁶ This is in stark contrast to typical court review of arbitral awards where reversal is not proper for mere errors of law. *See, e.g.,* *Northwest Airlines v. Air Line Pilots Ass'n*, 808 F.2d 76, 78 (D.C. Cir. 1987).

²⁶⁷ Justice Brennan apparently concurred rather than joining the majority opinion because he desired to retain his categorization of permissible areas of article I adjudicatory powers from the *Northern Pipeline* case. Justice Brennan then had to fit *Thomas* into the public rights category. This is no mean feat considering that it involved a dispute between two private parties.

²⁶⁸ *Thomas*, 473 U.S. at 596 n.1.

²⁶⁹ *Id.* at 601.

²⁷⁰ *Thomas*, 473 U.S. at 601 n.4.

²⁷¹ *Id.*

The third installment in the Court's article I court analysis was *CFTC v. Schor*.²⁷² In *Schor*, the Commodity Futures Trading Commission adjudicated claims pendent and ancillary to a claim under its organic statute. This time, Justice O'Connor garnered a solid majority of the court for the White/O'Connor view.²⁷³ Once again, this opinion, as well as Justice Brennan's dissent, confirms that the Constitution requires article III review of questions of law.

Justice O'Connor observed that article III "serves both to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government,' and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'"²⁷⁴ To ensure these roles, article III courts must exercise the "essential attributes of judicial power."²⁷⁵ This condition was met in *Schor* because article III courts had "weight of the evidence" review over facts and "*de novo* review" over questions of law.²⁷⁶

The Court wrote the latest chapter in *Granfinanciera, S.A. v. Nordberg*.²⁷⁷ Although not squarely on point, the opinions are instructive in clarifying *why* the public right/private right distinction in the cases is important. *Granfinanciera* is *Northern Pipeline* revisited; it concerns the powers of the bankruptcy court to adjudicate a claim. The precise issue, however, was whether the parties had been denied their seventh amendment right to a jury.²⁷⁸ This time, Justice Brennan carried a majority of the Court, with Justice White in dissent. Brennan, again relying on the public right/private right distinction, held that the seventh amendment does not apply to public rights.²⁷⁹ This decision is important because it usefully distinguishes between reassignment of the judicial fact-finding function, which is sometimes susceptible to separation of powers and seventh amendment challenges, and reassignment of judicial law declaration function, which is susceptible to only separation of pow-

²⁷² 478 U.S. 833 (1986).

²⁷³ Justice Brennan dissented because he could not fit the claim adjudicated into the public rights category. See *id.* at 865-66 (Brennan, J., dissenting).

²⁷⁴ *Schor*, 478 U.S. at 848 (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985) and *United States v. Will*, 449 U.S. 200, 218 (1980)).

²⁷⁵ *Id.* at 852.

²⁷⁶ *Id.* at 853.

²⁷⁷ 492 U.S. 33 (1989).

²⁷⁸ *Id.* at 35. The seventh amendment issue was not a problem in *Marathon Pipeline* because bankruptcy judges had been permitted to empanel a jury. This power was removed post-*Marathon Pipeline*.

²⁷⁹ *Granfinanciera*, 492 U.S. at 41 n.4.

ers challenges. It suggests that the public/private rights distinction is relevant to the problem of reassignment of factfinding but not to reassignment of the law declaration function.²⁸⁰

In the wake of *Northern Pipeline*, a groundswell in the legal literature has arisen against the continued use of the public/private rights distinction. Some commentators have argued that courts have not consistently drawn this distinction over the years, and therefore, it is suspect on that basis.²⁸¹ Others have argued that subsequent legal events have undermined this distinction, most notably the recognition of government entitlements as creating property interests subject to due process protections.²⁸²

These cases thus point to a unitary conclusion: the article III command that the judicial power of the United States be exercised by article III courts is satisfied even when an article I body adjudicates, so long as an article III court is available to engage in some review over factual conclusions and de novo review over legal determinations.²⁸³ One may best regard the public rights cases as situations where article I bodies may conduct *fact-finding* without

²⁸⁰ Those who might have believed that public rights need not have article III determination of legal issues thus might be reading too much into the public rights cases. The fact-finding limitation is consistent with the result and rhetoric in the cases; the limitations on judicial review of legal issues are not.

²⁸¹ See Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFFALO L. REV. 765, 840-56 (1986).

²⁸² See, e.g., Fallon, *supra* note 26, at 952-53; Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 593 (1985); Redish, *supra* note 239, at 204-14; Saphire & Solimine, *Shoring up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U.L. REV. 85, 120 (1988).

Professor Bator's dismissal of the concept succinctly makes the point:

In the modern administrative state, suffused by statutory and administrative schemes that characteristically create complex interdependencies between public and private enforcement, it is unintelligible and futile to try to maintain rigid distinctions between questions of private and public rights And, in any event, the answer really has no bearing at all on the question whether it is or is not appropriate to dispense with the trappings of Article III adjudication. For even if the "public rights" category were an intelligible and manageable category (which it is plainly not), we still have not been told why the category is congruent with cases where the use of an article I court or administrative agency is valid.

Bator, *supra* note 205, at 250. Professor Bator, of course, was not oblivious to the arguments made by Hart in the Dialogue. Bator was, after all, an editor of the HART & WECHSLER casebook. He was simply not persuaded, nor am I, by the distinctions made by Hart. This can be seen as well in the additions to the footnotes from the Dialogue made by the editors in HART & WECHSLER. See HART & WECHSLER, *supra* note 205, at 410 n.27.

²⁸³ See *supra* note 226; see also Saphire & Solimine, *supra* note 282, at 139 ("Thus, we conclude that the mandate of article III is only satisfied when Congress, in creating a non-article III tribunal, makes available article III review of that tribunal's factual and legal determinations. Most authorities have reached the same conclusion.").

offending article III or the seventh amendment. Although sovereign immunity is implicated in these cases, the Constitution does not allow the government to ignore harms inflicted on private parties or to treat private parties illegally, even in entitlement cases. The bearing of sovereign immunity is that the government has some leeway to devise appropriate procedures for adjudicating claims against the government. Such leeway, however, does not include the leeway to preclude article III scrutiny of governmental action.

4. The Ability of Congress to Limit the Courts' Scope of Review

Although Congress has not attempted to preclude judicial review of agency action,²⁸⁴ one can construe the strong reading of *Chevron* as sanctioning congressional attempts to restrict the scope of such review. Such restrictions violate the principles of separation of powers because they place the power to set policy in the same branch of government that implements policy.²⁸⁵ This result interjects the possibility of biases in the administrative process.²⁸⁶ As Professor Sunstein has aptly put it, "[t]he case for judicial review depends in part on the proposition that foxes should not guard henhouses—an injunction to which *Chevron* appears deaf."²⁸⁷ Agencies are not neutral bystanders in the setting of government policy; rather, they are self-interested players. The checks and balances in our Constitution are designed to protect parties against such self-interested action.²⁸⁸ The constitutional scheme of government places article III courts in a vital role of protecting parties from attempts by the other branches to overreach their powers.²⁸⁹

Private parties also need an active judiciary to protect them against the excesses of the modern administrative state. The *Chevron* decision does not merely affect the integrity of the judicial branch.

²⁸⁴ See Farina, *supra* note 99, at 472 n.81.

²⁸⁵ A more general limitation on the power of courts, such as the relief that courts may award, is not as troubling from a separation of powers perspective as a limitation in scope of review of an action taken by another branch of government.

²⁸⁶ See Strauss, *supra* note 26, at 308 ("Assigning prosecutorial responsibilities to an adjudicator is an excellent way to covertly affect the adjudication."); see also *Judicial Review*, *supra* note 22, at 375 (comments of Alan Morrison); Farina, *supra* note 99, at 476 n.98.

²⁸⁷ Sunstein, *supra* note 4, at 467.

²⁸⁸ See generally Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

²⁸⁹ The special attributes of the article III judge, lifetime tenure with nondiminishing salary, protect the courts and enable their judges to act freely and independently. The role of the courts follow from the mythic image of the principles, objective and detached judge standing up to the king. See Resnik, *supra* note 282, at 611-17.

Although commentators sometimes speak in terms of grandiose public law principles, it would be a mistake to see judicial review of agency actions solely as a matter of public law.²⁹⁰ Although the general problem of who ought to decide legal issues is an important, if somewhat abstract, concern, litigants do not seek review of agency action merely to facilitate the advancement of the law; they sue because they have suffered injury. The *Chevron* Court's refusal to use its judicial power to vindicate the rights of litigants in the face of potential agency bias is a decidedly unattractive model for a court to follow.²⁹¹

Commentators have attempted to defend *Chevron*-like limitations on the scope of judicial review in a number of ways. For example, Professor Hart focused on two arguments: the type of proceeding and whether the question was one of "law" or "discretion."²⁹² Hart found the type of proceeding important because he believed that certain types of government action could be shielded from judicial review altogether.²⁹³ Thus, according to this argument, Congress presumably could limit the scope of review of these types of cases.

Hart's first argument depends, in part, on the ability of Congress to shield the courts from reviewing the particular class of case, altogether. As discussed earlier, this argument is a dubious proposition.²⁹⁴ Even if that condition is satisfied, however, it does not follow that Congress is free to place whatever restrictions it wishes on courts once it chooses to make the case reviewable. Indeed, Hart acknowledges congressional limitations when he notes that article III would not permit Congress to instruct courts on how to decide cases.²⁹⁵ If Congress empowers an article III court to exercise judicial power, that court must be free to do so. Requiring courts to give binding force to agency interpretations strips the courts of judicial power and confers such power on the agency.²⁹⁶

²⁹⁰ See Strauss, *Considering Political Alternatives to "Hard Look" Review*, 1989 DUKE L.J. 538, 541.

²⁹¹ It also represents a curious inversion of *Marbury v. Madison*. *Marbury* is premised on the idea that a court must determine the law as an incident to its duty to decide cases. See Sager, *supra* note 27, at 76-77. In *Marbury*, the Supreme Court discovered in its attempt to vindicate Marbury's claim that it lacked the power to do so. In *Chevron*, the Court had that power to vindicate the petitioner's claims, but decided that it was not a court's role to do so.

²⁹² HART & WECHSLER, *supra* note 205, at 403-04.

²⁹³ *Id.* at 410-11 (cases involving plaintiffs complaining about decisions in connection with non-coercive government programs).

²⁹⁴ See *supra* notes 178-283 and accompanying text.

²⁹⁵ *Id.* at 400 (emphasis in original).

²⁹⁶ See Bator, *supra* note 205, at 250-51; Meltzer, *supra* note 207, at 305-06 & n.68.

Hart's second argument is that a difference of constitutional dimension exists between law and discretion. This argument is common in administrative law²⁹⁷ and is one of dubious validity.²⁹⁸ When a question of law suddenly becomes a question of discretion is not apparent. Although Congress may grant an agency some discretionary power in how it will implement a statutory scheme, that discretion would appear to end once the agency has exercised its discretion by making a determination of law. The agency must then be subjected to judicial review.²⁹⁹

Some commentators have maintained that courts must defer to administrative acts of discretion because the courts have no basis on which to reverse the agency.³⁰⁰ If Congress delegates a matter to the agency, they argue, a court has no basis to overturn the agency's action as long as the agency has acted within the limits of the delegated power. The court can review agency action, however, based on how well it meshes with the scheme created by Congress. Even in situations in which some ambiguity exists as to what Congress might have preferred, one could make an inquiry whether the option selected is the best option, given evidence of congressional intent. It is one thing to leave a question to an agency to decide; it is another thing entirely to say that whatever the agency decides is permissible. Courts can meaningfully review agency action, even in the absence of specific standards to guide review.³⁰¹

Thus, the problem of congressional restrictions on the scope of judicial review of agency action reduces, in form, to the problems of withholding of judicial review and reassignment of judicial authority. Courts must enjoy unrestricted power to review agency determinations of law because, otherwise, agencies would be able to deprive persons of liberty or property without due process of law, the courts would be left without the ability to exercise an essential judicial function, and too much power would be concen-

²⁹⁷ See, e.g., *Scope-of-Review Doctrine: Restatement and Commentary*, 38 AD. L. REV. 233, 235-36 (1986) (proposing strict judicial review of questions of law and arbitrariness review of questions of policy); Levin, *supra* note 24, at 25.

²⁹⁸ See Monaghan, *supra* note 19, at 29.

²⁹⁹ Thus, the failure of an agency to take action might not be subject to judicial review. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 838 (1985). If such action is reviewable, it is a deferential form of review. See, e.g., *Dunlop v. Bachowski*, 421 U.S. 560, 568 (1975). When an agency in its discretion chooses to act, however, its actions are not shielded from review because they were discretionary.

³⁰⁰ See, e.g., Rubin, *supra* note 9, at 396-97.

³⁰¹ To the extent that a delegation is broad, it will be more difficult to conclude that one alternative is the best alternative. Thus, in those situations, a court is more likely to uphold an agency's actions.

trated in the executive branch. Any other result would be inconsistent with the due process revolution and the resultant demise of the public/private rights distinction; the nondelegation doctrine and the principle of legislative supremacy; and the constitutional role of article III courts as the ultimate bodies capable of wielding judicial power. *Chevron* does not fit in the context of a web of the interrelated separation of powers doctrines that serve structural values, as well as individual liberties.

B. *The Strong Reading of Chevron as Political Theory*

Some adherents of the strong reading of *Chevron* find it attractive as a matter of political theory.³⁰² Simply put, these adherents posit that law ought to be generated by politically accountable actors. They argue that Congress meets this requirement and therefore, its policies should be enforced, at least when no counter-majoritarian concern is implicated.³⁰³ In the absence of congressional action, we must choose between judicial and administrative policy-making. These adherents conclude that because agencies are more accountable to the public, they should make policy in the absence of congressional action.

This argument assumes that agencies are politically accountable because their decisions are made by people selected and removable by the President.³⁰⁴ The President enjoys some supervisory power over agencies but, once again, this power is largely limited to executive departmental agencies. Although some commentators have suggested that the President could exercise supervisory oversight of independent agencies,³⁰⁵ no President has chosen to do so.³⁰⁶ Even as to executive branch agencies, presidential control is indirect

³⁰² See, e.g., Pierce, *supra* note 22, at 304; Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEXAS L. REV. 469, 520-23 (1985); Pierce, *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1251-56 (1989).

³⁰³ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting vigorous judicial review of governmental actions when counter-majoritarian concerns are raised); J. ELY, *DEMOCRACY AND DISTRUST* (1981).

³⁰⁴ This assumption may be true with respect to executive departmental agencies, but the argument is less persuasive when applied to independent agencies. Commissioners of independent agencies appear to be on a footing similar to judges in that they are selected by the President with the advice and consent of the Senate. To be sure, these commissioners do not enjoy life tenure and may be removable for cause, but, in practice, given the high turnover in the judiciary, it is unclear whether the President enjoys more control in the composition of the independent agencies than he does in the composition of the judiciary.

³⁰⁵ See, e.g., Strauss, *supra* note 4, at 590, 662-67.

³⁰⁶ See, e.g., Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981) (imposing certain regulatory procedures and requirements on executive, but not independent, agencies).

through the Office of Management and Budget, and is nonbinding.³⁰⁷ Indeed, some commentators have suggested that *all* agencies operate outside of the direct control of any of the other branches of government.³⁰⁸

The very idea that an administrative agency reflects majoritarian values is at odds with prevalent conceptions of agency action. Our modern conception of agencies suggests that agencies act out of the exercise of expertise³⁰⁹ or as a result of "capture" by the target of regulation.³¹⁰ Neither of these exercises of power is consonant with majoritarianism. In the former conception, agencies are elite organizations, immune from politics. In the latter conception, agencies act at the behest of the group that they are regulating, not at the behest of the public.

As a theoretical matter, the argument proceeds with a majoritarian assumption that is "neither established by nor easily reconciled with the Constitution."³¹¹ It is peculiar to use majoritarian concerns to defeat judicial review. If we accept this argument's premise, then judicial review, which is necessarily non-majoritarian, will always be defeated. At some point, however, one must confront the fact that, although majoritarian concerns influenced the Constitution, the structure of government involves a balance of majoritarian and non-majoritarian practices and institutions, including the establishment of an independent judiciary.³¹²

If we accept the premise that the power to create law is vested by the Constitution in the legislative branch, and that Congress may, by leaving gaps in the statutory scheme, delegate some law-making powers to either an agency or a court, it does not follow that courts or agencies should fill those gaps however they see fit. Regardless of who fills the gaps, the only way to ensure legislative supremacy is to have the gaps filled in conformance with the legislative scheme. A court should not fill in gaps in a statutory scheme based on its political convictions, not because the court is not politically accountable, but because the court would be usurping legislative power. Indeed, in the state courts where judges are elected, and hence politically accountable, judges decide cases employing the standard

³⁰⁷ See Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U.L. REV. 646, 665 (1988).

³⁰⁸ See Strauss, *supra* note 4, at 492-96.

³⁰⁹ See, e.g., J. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

³¹⁰ See, e.g., T. Lowi, *supra* note 166, at 125-56, 297-99.

³¹¹ Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 488 (1982).

³¹² See *id.*

tools of decision: stare decisis, legislative intent and judicial restraint.

Similarly, one cannot assume that, because Congress has delegated a matter to an agency rather than a court, Congress intended a political solution to the problem. It is one thing to realize, as Justice Stevens does in *Chevron*, that Congress sometimes defers to an agency to make policy choices. It is quite another thing to conclude that, because of this deference, a political decision is acceptable or desirable.³¹³

In short, the strong reading of *Chevron* as political theory, marked by reliance on majoritarian concepts, goes too far. Although the Constitution might favor legislative action because of majoritarian concerns, there is no support for the extension of majoritarian concerns to render administrative determinations superior to those of courts.³¹⁴

C. Exceptions to the Strong Reading of *Chevron*

Despite the broad pronouncements of *Chevron*, courts have refused to apply the strong reading of *Chevron* in certain situations. Courts developed these exceptions based largely on concerns over agency bias. The existence of exceptions to a general rule inevitably raises concerns over the proper scope of the rule and the exceptions to that rule. After identifying the exceptions and their rationales,

³¹³ This point was made graphically in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). In that case, the Secretary of Transportation was empowered to make decisions with regard to passive restraints on passenger cars—a politically charged issue with which Congress probably did not wish to deal. *Id.* at 36–38. President Reagan had made a campaign issue over such regulations and their effects on the automotive industry. *Id.* at 59 (Rehnquist, J., dissenting). The Secretary's decision to abandon passive restraint requirements was a perfect example of politics in action. *Id.* To a majority of the Supreme Court, however, the Secretary was not to decide on the basis of politics but on the basis of fact and expertise. *Id.* at 46–57. A decision, no matter how much in keeping with political will, had to be justified with respect to congressional goals and supported in those terms. When a decision is not supported with respect to congressionally-authorized goals, it will not be upheld on judicial review, even if it *could* be supported based upon such goals. See, e.g., *Independent U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854–55 (D.C. Cir.), *cert. denied*, 484 U.S. 819 (1987).

³¹⁴ Professor Mashaw has advanced a variant on the majoritarian theory. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985). He argues that the executive is the *most* accountable branch, and that agencies are the entities most likely to produce coherent policies. Accordingly, broad delegations to agencies are desirable and, presumably, courts should be ready to defer to administrative choices. *Id.* at 91. Mashaw's theory, however, appears to ignore a vital concern about the workings of administrative agencies: the question of bias. See *supra* notes 284–291 and accompanying text.

this article concludes that the same concerns that justify the exceptions to *Chevron* cast doubt on the propriety of *Chevron* in general.

One exception to *Chevron* applies to the enforcement of criminal laws. Although the Justice Department is an administrative agency exercising delegated power to enforce the penal statutes, courts have not accorded its interpretation of the criminal law any deference.³¹⁵ This exception to *Chevron* appears to be premised on two assumptions. First, a concern over agency bias arises because the agency that enforces a statute may do so overzealously.³¹⁶ Second, the fact that enforcement must take place in the courts might negate any inference of congressional intent to require courts to defer to agency interpretations. Both of these assumptions seem warranted.³¹⁷

It is not clear, however, why this exception should be limited to criminal law situations. Whenever a court accords deference to an agency position, the spectre of agency bias is raised.³¹⁸ Because virtually all agency actions are reviewable in federal court, and many administrative schemes may only be enforced through court order,³¹⁹ why would one assume that Congress would want deferential review over agency action as a general proposition? The logic of the criminal law exception casts doubt on the soundness of *Chevron* itself.³²⁰

³¹⁵ As Justice Scalia has explained:

[T]he vast body of *administrative* interpretation that exists . . . is not an administrative interpretation that is entitled to deference under [*Chevron*]. The law in question, a criminal statute, is not administered by any agency but by the courts The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.

Crandon v. United States, 110 S. Ct. 997, 1011 (1990) (Scalia, J., concurring) (emphasis in original).

³¹⁶ See *id.* at 1011–12 (reasoning that the Justice Department would tend to interpret statutes expansively, so as to make more conduct illegal).

³¹⁷ Of course, this article maintains that congressional intent is ultimately irrelevant because Congress lacks the power to restrict judicial review to that extent. See *supra* notes 284–301 and accompanying text. Even if one accepted the validity of the concept that congressional intent can influence the courts' posture to administrative action, however, there are good reasons to suspect that congressional intent to have courts defer to agency action is lacking in this context.

³¹⁸ See *supra* notes 284–91 and accompanying text for a discussion of agency bias.

³¹⁹ See, e.g., *supra* note 231.

³²⁰ Judge Starr addressed the problem as follows:

[W]hile courts recognize the inevitability and, in certain contexts, the desirability of legislation that leaves some details to be resolved as the statute is applied, there are limits

Chevron is also inapplicable in situations involving parallel enforcement modes, such as the antitrust laws. Under the Sherman and Clayton Acts, antitrust policy is enforced in three ways: private party suits, criminal actions brought by the Justice Department, and FTC adjudications.³²¹ First, *Chevron* is clearly inapplicable in private party suits because there is no agency to which to defer. Second, courts do not defer to Justice Department determinations, presumably because of the aforementioned criminal law exception to *Chevron*. Lastly, with respect to FTC adjudications, courts have decided legal questions independently of the FTC, according persuasive deference to the agency's position at best.³²²

One cannot explain judicial posture in the antitrust arena in *Chevron* terms. Under *Chevron*, only three factors remove the reviewing court's obligation to give deference to the FTC. Two of these factors, that Congress has addressed the precise issue in question and that the agency's interpretation is not reasonable, are unlikely to occur given the loosely textured, common-law-like nature of the antitrust laws. Under *Chevron*, the less specific a statutory mandate, the more likely a court would have to defer to the agency interpretation. In addition, the courts generally adopt the agency's position, meaning that the position was, in fact, reasonable. The

That is to say, the law of crimes must be clear. There is less room in a statute's regime for flexibility, a characteristic so familiar to us on this court in the interpretation of statutes entrusted to agencies for administration. We are, in short, far outside *Chevron* territory here.

United States v. McGoff, 831 F.2d 1071, 1077 (D.C. Cir. 1987).

The criminal law exception, however, cannot be explained in terms of statutory clarity. To the extent that a criminal statute is unclear, we might expect a court to refuse to enforce it. See *supra* note 190. The criminal law exception to *Chevron*, however, admits that statutes may contain some interpretative gaps, but finds that such gaps are to be filled by courts and not agencies.

³²¹ Moreover, the antitrust laws are the type of loosely structured laws that give rise to many "gaps" that must be judicially filled. See *Pierce, supra* note 22, at 304; R. POSNER, *supra* note 170, at 300-02.

³²² Courts often defer to the FTC when it is the only enforcer of a provision. Thus, for example, courts frequently defer to FTC positions construing section 5 of the Clayton Act when the FTC attempts to identify unfair trade practices that would not constitute violations of the specific provisions of the antitrust laws. Even in section 5 cases, however, the Supreme Court asserts its role as ultimate authority on what constitutes a section 5 violation. See, e.g., *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986) ("The legal issues presented . . . are . . . for the courts to resolve, although . . . the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair.'").

courts arrive at their conclusion independently of the agency, however, and not as the result of deferential review.³²³

The third factor is congressional intent. To argue that congressional intent precludes deference suggests that Congress did not implicitly or explicitly delegate law-making power to the agency. Yet congressional delegation to the FTC is explicit and parallel in language to other congressional grants of power to agencies that confer *Chevron* deference to the agency.³²⁴ Further, courts apparently grant varying amounts of deference to the FTC, depending on the nature of the FTC's activity. For example, if the FTC is engaged in determining which practices constitute unfair trade practices that fall short of antitrust law violations, courts will often defer to the FTC.³²⁵ If, on the other hand, a specific antitrust violation is at issue, the court gives no deference to the FTC.³²⁶

Thus, none of the recognized exceptions to *Chevron* appears to apply in parallel enforcement schemes, such as antitrust law. Nonetheless, it is easy to understand why courts are reluctant to defer to the FTC. Such deference could result in either inconsistent legal standards or FTC dominance. Suppose, for example, that Congress has not specifically addressed a particular issue of law under the antitrust law. A court faced with this particular issue in the context of a private antitrust action, employing traditional tools of statutory construction, would arrive at a conclusion of law. Assume that sometime thereafter, the FTC confronts the same issue of law, decides that the court's interpretation was wrong, and adopts a contrary position.³²⁷

What is a court to do upon judicial review? Under *Chevron*, it should recognize that, because Congress has not addressed the

³²³ See, e.g., *Indiana Fed'n of Dentists*, 476 U.S. at 456-59 (independent conclusion that, under section 1 of the Sherman Act, the legality of industry practice should be analyzed using a rule of reason test).

³²⁴ For example, the delegation to the NLRB is almost identical in language and purpose to the delegation to the FTC. Compare 15 U.S.C. § 45(a) (1988) (FTC empowered to prevent persons "from using unfair methods of competition") with 29 U.S.C. § 160(a) (1988) (NLRB empowered to "prevent any person from engaging in any unfair labor practice").

³²⁵ See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385-86 (1965).

³²⁶ See, e.g., *Indiana Fed'n of Dentists*, 476 U.S. at 456-59.

³²⁷ The FTC, not a party to the earlier suit, is not bound by the legal determination in that suit. See Greenbaum, *Government Participation in Private Litigation*, 21 ARIZ. ST. L.J. 853, 950-64 (1989). Even if the FTC had been a party to the earlier suit, agencies of the federal government are generally not bound by prior determinations absent mutuality of the parties. See *United States v. Mendoza*, 464 U.S. 154, 158-59 (1984). In fact, agencies often refuse to alter their practices in the face of adverse rulings by lower courts—a practice termed agency nonacquiescence. See generally Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989).

precise issue, it ought to defer to the agency's interpretation, if reasonable. Because the court had previously arrived at a contrary interpretation, it does not follow that the agency's interpretation is necessarily unreasonable. This difference simply means that, in the face of statutory ambiguity, the court decided that the best interpretation of a statutory provision is X. Yet, the agency's decision that the best interpretation is Y may also be a reasonable position.³²⁸

If the court defers to the agency's interpretation per *Chevron*, the question of the validity of its earlier holding remains. The rationale of *Chevron* implies that, outside the scope of delegation to the agency, no deference to the agency is warranted. Thus, the court would adhere to its earlier holding in all cases not involving the agency. This result would lead to the same statutory language carrying different meanings, depending on the enforcement mechanism.³²⁹ Such a result places intolerable demands on legal actors attempting to conform their conduct to these differing legal norms.³³⁰

The alternative, however, acceptance of the agency view for all contexts, is also unacceptable. Not only would it extend agency power beyond *Chevron* limits, it would also upset the balance of powers, thereby making the agency superior to the courts. Moreover, in statutory schemes employing Justice Department actions as well as agency adjudications, agency determinations result in the agency binding the Justice Department as well as the courts. It is not surprising, therefore, that courts seek to avoid the entire problem by not deferring to the agency.³³¹

³²⁸ A similar situation is presented when circuit courts differ on the meaning of a statutory term. Although only one interpretation is "correct," we do not consider it illegitimate for the courts to disagree. Indeed, the existence of intercourt conflicts is an expected incident of the federal court system and furnishes a justification for Supreme Court review of a lower court decision. See Sup. Ct. R. 10.

³²⁹ See Report of the Attorney General's National Committee to Study the Antitrust Laws 148 & n.77 (1955).

³³⁰ This problem exists in the context of intercourt conflicts as well. See generally Note, *Using Choice of Law Rules to Make Intercourt Conflicts Tolerable*, 59 N.Y.U. L. REV. 1078, 1082-85 (1984). Courts can address the intercourt conflict problem, however, through the use of venue or choice of law rules. See *id.* at 1088-97.

³³¹ Similar problems develop if the agency construes a statutory provision before the courts. If the reviewing court applies *Chevron*, it must accept a reasonable agency interpretation even if it is not the interpretation the court would have reached independently. In a later private action, however, no basis exists for a court to adopt the agency's position. Courts should ignore *Chevron* in this context in order to have a unitary judicially-made rule of law apply in all enforcement contexts. For examples of courts not deferring to agency interpretations in enforcing the antitrust laws, see *Hospital Corp. of America v. FTC*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987); *Lieberman v. FTC*, 771 F.2d 32 (2d Cir.

Parallel enforcement schemes exist in many other contexts.³³² Indeed, by logical extension, whenever a statutory scheme provides for private remedies in addition to agency enforcement, *Chevron* should be inapplicable.³³³ If nothing else, these exceptions prove that the Constitution does not require *Chevron*, which must be thought of either as a court-created doctrine or one resulting from legislation. If *Chevron* is the latter, it is an incoherent and unpredictable doctrine because one is left uncertain as to when Congress intends for courts to defer. If, instead, *Chevron* is a court-created doctrine, its exceptions raise a concern that might call for the abolition of the doctrine; that is, active judicial review might be needed to curb the zealous interpretations made by agencies empowered to enforce statutory schemes.³³⁴

D. Deference as a Canon of Interpretation

Recently, Justice Scalia elaborated on his interpretation of *Chevron*.³³⁵ He views *Chevron* as creating a rule of statutory interpretation that requires a court to presume that a question is left to the discretion of the agency, whenever congressional intent regarding scope of review is unclear.³³⁶ Justice Scalia notes that this presumption is not based on any notion of constitutional or political theory, but is merely a convenient and easily understood baseline assumption that Congress could alter on a case-by-case basis.³³⁷

Justice Scalia arrives at this theory, in part, because he rejects the idea that *Chevron* is compelled by the Constitution. He observes that if Congress wished to have the courts independently review agency interpretations of law, Congress could do so and courts would find Congress's action constitutional.³³⁸ Scalia never ad-

1985); *Russell Stover Candies v. FTC*, 718 F.2d 256 (8th Cir. 1983); *TRW, Inc. v. FTC*, 647 F.2d 942 (9th Cir. 1981); *RSR Corp. v. FTC*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *Fred Meyer, Inc. v. FTC*, 359 F.2d 351 (9th Cir. 1966), *rev'd* 390 U.S. 341 (1968); *Ekco Prods. Co. v. FTC*, 347 F.2d 745 (7th Cir. 1965); *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962).

³³² See, e.g., 15 U.S.C. §§ 78k, 78u, 78u-1, 78ff (1988) (creating parallel enforcement scheme under the Securities Exchange Act of 1934).

³³³ See, e.g., *Aluminum Co. of America v. United States*, 867 F.2d 1448, 1451-52 (D.C. Cir. 1989).

³³⁴ See *supra* notes 284-291 and accompanying text for a discussion of this concern over agency bias.

³³⁵ See generally Scalia, *supra* note 16, at 511-21.

³³⁶ *Id.* at 516.

³³⁷ *Id.* at 517.

³³⁸ *Id.* at 515-16.

dresses the obverse proposition, however, that Congress cannot restrict judicial review of agency action.³³⁹ If such restrictions are impermissible, as this article suggests, it is improper to assume, even as a baseline assumption, that Congress wishes the court to defer to agency interpretations of law.

III. WHAT IS LEFT?: PRUDENTIAL DEFERENCE

Chevron deference is contrary to the framework of checks and balances created by the Constitution.³⁴⁰ Should courts therefore never accord deference to the legal interpretations made by agencies? Such an argument would be inefficient, counter-productive and violative of long-standing Supreme Court precedent.³⁴¹ Courts should give deference to administrative determinations of law, but not the kind of deference urged by adherents of the strong reading of *Chevron*. Judicial deference to agency determinations should be a prudential device employed to serve a number of goals, including facilitating the separation of powers and ensuring the proper role of the courts.

This article now considers two alternative models of prudential deference: a managerial model suggested by Professor Strauss, and an interbranch cooperative model.

A. Deference as a Managerial Tool

Peter Strauss has argued that *Chevron* is best seen as an attempt to ensure uniformity in federal administrative law.³⁴² The sheer size and complexity of the modern administrative state produces many administrative actions that are subject to judicial review. Because of the limited adjudicatory capacity of the Supreme Court, it can only review a small percentage of these cases.³⁴³

This limitation generates certain problems for the enforcing agency. First, the agency must decide how to respond to an unfavorable ruling by a lower court. The agency would find adherence to the lower court ruling unacceptable in many situations.³⁴⁴ Assum-

³³⁹ See Sager, *supra* note 27, at 37 ("When Congress undertakes to limit jurisdiction, it is fully bound by the constitutional limitations that ordinarily constrain its behavior.").

³⁴⁰ See *supra* notes 177-301 and accompanying text.

³⁴¹ See *supra* notes 41-69 and accompanying text.

³⁴² 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, 1118-26 (1987).

³⁴³ *Id.* at 1096-1100.

³⁴⁴ See generally Estreicher & Revesz, *supra* note 327.

ing that the Supreme Court declines to review the case, the agency must either adhere to a ruling it believes to be wrong or follow a policy of nonacquiescence by choosing to comply with the ruling only with respect to the affected party or within the geographic reach of the court.³⁴⁵ Nonacquiescence results, however, in a lack of uniformity in the law. This lack of uniformity creates administrative burdens as well as concerns about unequal treatment among regulated parties. Even if the agency's decision is upheld by a lower court, because that decision is not binding on nonparties or on courts outside a lower court's geographic reach, the agency's policy remains vulnerable to later attack. Indeed, the primary basis upon which administrative action merits Supreme Court review is the presence of an intercourt conflict.³⁴⁶

In light of this limitation, Strauss contends that *Chevron* makes sense when one conceives of it as a managerial tool. Strauss argues that agency concerns about uncertainty are diminished when agency decisions are subject to the deferential form of review *Chevron* imposes. In addition, Strauss contends that *Chevron* deference reduces to a more manageable number the number of cases in which courts strike down agency action. He further argues that such deference might even limit the number of administrative law cases that the Supreme Court must accept for review, thereby freeing the Court for other matters.³⁴⁷

Strauss's interpretation of *Chevron* is novel and provocative. Although it acknowledges that *Chevron* deference is a prudential doctrine and is required neither by the Constitution nor by legislative intent, Strauss's interpretation is not an attractive prudential doctrine. First, it overstates the problems of uncertainty that agencies face. Agencies can often eliminate uncertainty by using rule-making to formulate policy. Once the agency seeks review of the final rule, the rule, if upheld by the courts, will be binding.³⁴⁸ Second, if an agency rule is struck down by the courts, a separation of powers, not a mere managerial, problem is presented. Because *Chevron* appears to apply to the Supreme Court as well as the lower courts, it places agencies on a superior plane to courts. This deference might be defended on constitutional, political or functional

³⁴⁵ *Id.*

³⁴⁶ See Sup. Ct. R. 10.

³⁴⁷ See Strauss, *supra* note 342, at 1121-22.

³⁴⁸ A failure to seek review could preclude later consideration of the claim. See *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 909-12 (D.C. Cir. 1985). Even if not precluded, a later action would be decided with the persuasive, if not binding, effect of the earlier judgment.

grounds, but it takes the managerial argument too far to make it carry this much weight.

Third, even if one views *Chevron* as a managerial device, it is not the best managerial device. Several other possible devices could address the problem of lack of uniformity in federal law more efficiently. For example, a national appeals court³⁴⁹ or more limited venue over agency action³⁵⁰ could handle uniformity problems while doing less harm to the balance of powers between the legislative and judicial branches.³⁵¹

Lastly, the managerial approach effectively removes the judiciary's role in administrative law. As a managerial device, it is analogous to a supervisor "eliminating" his problems of supervision by allowing his employees to supervise themselves. In effect, it pays short shrift to the bias objection to *Chevron*—that "foxes should not guard henhouses."³⁵²

B. Interbranch Cooperation

The Supreme Court has consistently indicated, both before and after *Chevron*, that courts should often defer to the legal interpretations of agencies. The problem with *Chevron* is not that it places courts in a deferential posture; the problem is the kind of deference *Chevron* appears to require. This article, however, proposes a different model of deference with a different rationale. For a number of principled reasons, courts should often give persuasive deference to agency interpretations of law.³⁵³

First, the existence of statutory ambiguity could give rise to some deference to agency interpretations. Part of the difficulty with

³⁴⁹ See Baker & McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1410-14 (1987). See generally S. ESTREICHER & J. SEXTON, *REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* (1986).

³⁵⁰ See McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. PA. L. REV. 302, 356-75 (1980); Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 990-1000 (1982).

³⁵¹ There are serious drawbacks to a national appeals court as a solution. Venue choice, on the other hand, appears to be a sensible approach in the agency context. For an assessment of these and other alternatives, as well as an argument that courts make too much of the problems of uniformity, see generally Note, *supra* note 330.

³⁵² Sunstein, *supra* note 4, at 467.

³⁵³ See Breyer, *supra* note 21, at 370 (congressional intent is really a legal fiction for "practical features of the particular circumstance to decide whether it 'makes sense,' in terms of the need for fair and efficient administration of that statute in light of its substantive purpose, to imply a congressional intent that courts defer to the agency's interpretation."); Sunstein, *supra* note 4, at 466.

the two step approach in *Chevron* is that it views statutory interpretation as a binary choice: either Congress has addressed the precise issue in question—resulting in no deference to the agency's interpretation, or Congress did not—triggering *Chevron* deference. This view is an oversimplification of statutory interpretation.³⁵⁴ Most text is capable of more than one plausible interpretation. Unless one adopts canons of statutory construction that limit the range of plausible interpretations, virtually all questions of interpretation logically fall into the second of *Chevron*'s two-step approach.³⁵⁵

If a court does not construe statutes literally,³⁵⁶ the rigidity of *Chevron* becomes either a straitjacket or an obstacle to be circumvented. It is a straitjacket to those who candidly discuss the ambiguity in a statute,³⁵⁷ but it is an obstacle for courts that, given the ramification of *Chevron*'s approach, attempt to find a statute to be "clear" despite other plausible interpretations.³⁵⁸ Thus, *Chevron* may have merely shifted the deference/no-deference debate into a debate over statutory interpretation.³⁵⁹

³⁵⁴ See Sunstein, *supra* note 4, at 467 ("ambiguities are not always delegations").

³⁵⁵ Justice Scalia, an adherent of restrictive canons of interpretation, has observed: In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a "strict constructionist" of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One 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. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt. Contrariwise, one who abhors a "plain meaning" rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of "reasonable" interpretation that the agency may adopt and to which the courts must pay deference. The frequency with which *Chevron* will require *that* judge to accept an interpretation he thinks wrong is infinitely greater.

Scalia, *supra* note 16, at 521 (emphasis in original).

³⁵⁶ Most Justices, judges and lawyers view the interpretation of statutes as a search for meaning guided, but not solely determined by, the plain meaning of the text. See generally W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 569-828.

³⁵⁷ One wonders whether *Chevron* itself would have been deemed worthy of Supreme Court review if Judge Ginsburg had been less forthright about the ambiguity of the statutory scheme in the opinion for the D.C. Circuit.

³⁵⁸ See *Continental Air Lines v. Department of Transp.*, 843 F.2d 1444, 1447-48 (D.C. Cir. 1988) ("The parties have jostled skillfully (and at length) over the meaning of the key provision . . . [W]e cannot but observe . . . the irony of diametrically opposed positions . . . that the statute is clear.").

³⁵⁹ See *supra* note 160 and accompanying text.

Instead, courts should candidly acknowledge that statutory meaning is often ambiguous, but not indeterminate. If forced to do so, courts could arrive at a "best" interpretation. The best interpretation, however, is not necessarily the "correct" interpretation. In such situations, a persuasive argument by the agency charged with enforcement of the statutory scheme should be entitled to some weight.³⁶⁰

Second, agency expertise can and should influence deference. Agency expertise often shapes the records produced to support agency action.³⁶¹ The facts and the implications of particular policy choices can and do influence a court's legal conclusion. To the extent that an agency can conclude that a particular determination of law is more likely to lead to a specific policy consequence, courts should defer to that conclusion, assuming that the court agreed with the agency as to the relevance of the specific policy consequence at issue.³⁶² Although no blanket rules suggest themselves, courts should often defer to agencies, particularly when the issue is one of some technical complexity.³⁶³

Third, commentators have often observed that certain types of legal determinations have little impact on other cases.³⁶⁴ Often, this distinction is phrased as the difference between law declaration and law application.³⁶⁵ They view deference as appropriate in the latter situation but not in the former. Despite problems of definition, there

³⁶⁰ This approach raises the question of what is persuasive. In particular, should courts endeavor to establish a spectrum of permissible conduct based on the presence (or absence) of clear congressional intent and permit any agency action within the spectrum of permissible conduct so created? If courts adopted a delegation theory, it should not matter *how* an agency supported its action as long as the action is supportable. When reviewing legislation, for example, courts do not attempt to ascertain the motive behind legislative action, but only whether the action taken is within an enumerated power and whether a rational basis for the legislation could be ascribed to the legislature. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 & n.4 (1938). Courts have long held, however, that an agency decision must find adequate support in the record, even if a question of law is at stake. In some cases, for example, the Supreme Court has upheld an agency action earlier held by the Court to be unsupportable. *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947); *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). The difference was not the action taken or the legislative scheme under which the action was taken, but the rationale for the agency's action. In short, the agency must explain itself, and the Court must be persuaded by the agency's explanation.

³⁶¹ See Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 51-59 (1975).

³⁶² Following *Chevron*, at least one court has concluded, however, that *Chevron* deference is applicable even if the agency's decisions are not based on its expertise. See *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1570 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987).

³⁶³ See Diver, *supra* note 19, at 592-93.

³⁶⁴ See, e.g., Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 723-24 (1984).

³⁶⁵ See *supra* notes 57-61 and accompanying text.

is some appeal in a distinction along these lines. Functionally, courts should view deference differently, depending on whether the legal determination would have an impact on many or a few regulated actors.

For example, courts sometimes reconcile the *Hearst* and *Packard* cases on this basis.³⁶⁶ In both cases, the issue was essentially the same, namely, what is an "employee" for purposes of the NLRA. The key difference between the cases is that the answer in *Hearst* would only affect the status of newsboys whereas the answer in *Packard* would affect all supervisory personnel.

Similarly, courts would defer to an agency determination involving the specific application of an already articulated standard, much the same way that certain issues involving application of a legal standard are given to a jury, rather than a judge, to decide.³⁶⁷ Courts may defer to such determinations because they do not have ramifications for regulated parties other than those specifically acted upon. The legal standard for the regulated group, as a whole, is the standard already articulated, and, presumably, would be subject to independent judicial review.

Lastly, the manner in which Congress grants power to an agency should affect the amount of deference a court gives to that agency's actions. The amount of judicial deference, however, should not be based on the notion that the delegation reflects congressional intent to permit the agency to determine policy.³⁶⁸ The congressional intent argument fails because Congress may not restrict the courts' power to interpret law.³⁶⁹ Further, no basis usually exists to conclude that Congress had this intent when it delegated a matter to the agency. The fact that an explicit delegation has occurred does mean, however, that congressional intent is probably ambiguous with respect to the matter delegated. An agency's action pursuant to an express delegation of authority, utilizing its expertise reasonably, is entitled to persuasive deference, and, given the probable lack of a definitive expression of congressional intent, is more likely to be found persuasive. On the other hand, when the agency acts

³⁶⁶ See *supra* notes 57-58 and accompanying text.

³⁶⁷ For example, a jury ordinarily determines whether the elements of a cause of action are satisfied. This determination might entail the application of legal concepts, such as proximate cause in negligence law, to a specific factual situation. It is a mixture of factual and legal determinations. See Byse, *supra* note 22, at 335-36; *Judicial Review*, *supra* note 22, at 368 (comment by Cass Sunstein).

³⁶⁸ See, e.g., Anthony, *supra* note 22, at 31-35.

³⁶⁹ See *supra* notes 177-301 and accompanying text.

pursuant to general authority, as, for example, with interpretative regulations, courts would generally accord less persuasive weight to the agency's interpretation. Nonetheless, courts should not ignore a reasoned interpretation, based upon agency expertise, merely because the agency's action was not pursuant to an express delegation.³⁷⁰

C. *Objections to the Interbranch Cooperation Model*

At this point, I anticipate some objections to my views. On the one hand, commentators might be concerned that I have adopted a judicial supremacy model. That is, although I give lip service to deference, my deference has no teeth; courts only defer to agency interpretations with which they agree. Moreover, other commentators might claim that I have committed the cardinal sin of modern jurisprudence: I have resurrected *Lochner*³⁷¹ with respect to judicial review of agency action. On the other hand, others might think that I have merely regarbed *Chevron* deference in clothes more to my liking. Under my view, courts would continue to defer to agency action. Would this deference not run contrary to the command of *Marbury*? I turn now to these objections.

³⁷⁰ Similarly, agency interpretations made less formally—litigation positions, for example—should be examined by courts, but only for their persuasive weight. Such agency positions are not appropriate candidates for *Chevron* deference, however. See Anthony, *supra* note 22, at 55–63. *But see* Church of Scientology v. IRS, 792 F.2d 153, 165 (D.C. Cir. 1986) (en banc) ("To suggest . . . that the . . . [counsels' position] is not an 'agency position' is to imply that IRS counsel are mavericks, disembodied from the agency that they represent.") (Silberman, J., concurring) (emphasis in original), *aff'd*, 484 U.S. 9 (1987). Although such agency interpretations did not have to withstand the rigor of notice and comment procedures or even the scrutiny of internal agency procedures before being announced, there is no reason for a court not to consider them. It does make sense, however, to give less deference to a position that has not withstood the scrutiny of public notice and comment or even the full range of internal agency policy-making procedures.

Courts and commentators are currently divided post-*Chevron* as to how much deference interpretive regulations are owed. See, e.g., Doe v. Reivitz, 830 F.2d 1441, 1446 (7th Cir. 1987) (interpretive regulations accorded less deference), *amended*, 842 F.2d 194 (7th Cir. 1988); Anthony, *supra* note 22, at 42–43, 55–63 (interpretive rules and less formal agency action do not bind the courts); Knight & Knight, *A New Approach to Judicial Review of Interpretive Regs.*, J. TAX'N 326, 326–31 (Nov. 1986) (courts do give deference to IRS interpretive regulations); Saunders, *Interpretive Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 357 (*Chevron* eliminates the distinction between legislative and interpretive rules).

³⁷¹ *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* stands for, among other things, the Court impermissibly interjecting its view of sound policy to invalidate the legislative acts of majoritarian bodies. See generally Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

1. Does Prudential Deference Have any Teeth?

One objection to the prudential deference model that this article suggests is that it lacks teeth; that is, courts "defer" only to agency interpretations with which they agree. This objection merely restates the fallacy implicit in *Chevron*—that statutes are clear or they are not. Once we accept that statutes are ambiguous, but that some plausible interpretations are "better" than others, prudential deference can have the effect of favoring an agency's plausible interpretation of the statute. Thus, the agency's view is likely to be decisive in many cases.

In addition, this objection loses sight of the fact that, despite the court's active role in reviewing questions of law, the agency still exercises considerable control over regulatory policy by setting its regulatory agenda and by controlling the record employed in reviewing agency action. True enforcement policy—deciding what aspects of a regulatory scheme to emphasize and when—remains largely immune to judicial review.³⁷² Even when agency action is reviewable, the scope of remedy is restricted. The agency controls what gets done; the court's role is only to assure that what is done comports with congressional intent.

Even if the court plays the predominant role in making legal determinations, because of the deferential role played in reviewing the agency's factual determinations³⁷³ and because of the limited ability of courts to influence the record produced by the agency,³⁷⁴ the agency is in a position to control the outcome of many decisions. This article does not suggest that agencies may alter the record; such transgressions would justify enhanced judicial scrutiny. This article suggests, however, that agencies take many, if not most, of their actions on the basis of an assessment of facts, and that, in the factual sphere, the court's role is limited.

2. Is Independent Review a Return to *Lochner*?

Another objection to the prudential deference model is that by having courts determine legal questions, rather than deferring to reasonable agency interpretations, independent review replicates

³⁷² See *Heckler v. Chaney*, 470 U.S. 821, 838 (1985).

³⁷³ See 5 U.S.C. § 706(2)(A), (E) (1988).

³⁷⁴ See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 523-25 (1978) (courts may not impose procedural requirements not required by congressional act or the Constitution).

the same evil committed by the *Lochner* Court. In 1905, in *Lochner v. New York*, the Supreme Court struck down a statute regulating the hours of bakery workers as a violation of the due process and contract clauses.³⁷⁵ Today, *Lochner* is a symbol of the idea that courts ought not second-guess the wisdom of policy decisions made by legislative bodies.³⁷⁶

To some extent, the validity of the objection depends on whether a significant difference exists between actions by legislative and administrative bodies. If there is no significant difference, the *Lochner* objection is compelling. As discussed earlier, however, the argument that decisions made by administrative parties are on par with those made by legislative bodies is weak.³⁷⁷ At best, those who argue this position mean that agencies are more like legislatures than courts are. They do not seriously argue for agency parity with legislatures.³⁷⁸ Even the claim for agency superiority to judicial bodies is premised on the assumption that agencies are more responsive to majoritarian concerns than courts and that majoritarianism is a value implicated in the court/agency context. Each of these assumptions is open to serious question.

To the extent that the judicial review issue revolves around congressional intent, invalidating administrative action that does not comport with the best understanding of congressional intent represents *legislative*, not *judicial*, superiority. Courts are imposing Congress's policy views on agencies, not their own policy views. Such imposition does not run afoul of *Lochner*. Indeed, independent review can be seen as consistent with majoritarianism, as it seeks to preserve legislative superiority over the executive branch on matters of policy.

Moreover, to the extent that the problem with *Lochner* dealt with deference to fact-finding by majoritarian bodies,³⁷⁹ independent review of agency interpretations of law does not replicate the evils of *Lochner*. Under my approach, courts accept administrative facts if they are not arbitrary or are supported by substantial evidence.³⁸⁰

³⁷⁵ 198 U.S. 45, 64 (1905).

³⁷⁶ See Sunstein, *supra* note 371, at 882-83.

³⁷⁷ See *supra* notes 284-91, 302-14 and accompanying text.

³⁷⁸ But see Mashaw, *supra* note 314, at 91.

³⁷⁹ The *Lochner* Court, for example, appeared to be sympathetic to the idea that the legislation was needed to produce wholesome bread, but found that the facts did not support the rationale. See *Lochner*, 198 U.S. at 62.

³⁸⁰ Some courts might argue, however, that the hard-look doctrine, see *Motor Vehicle*

To the extent that the evil of *Lochner* was a disagreement as to the permissible exercises of governmental power, however, some parallel exists between *Lochner* and independent review. In both situations, the courts are telling another branch of government that its actions cannot be permitted. This aspect of *Lochner* retains vitality today,³⁸¹ however, and, even if this aspect of *Lochner* were also discredited, there are crucial distinctions between the two situations. Surely, we do not wish to abandon the idea that, at least as to matters involving constitutionality, it is the duty of the Court to say what the law is. The problem with *Lochner* was not its posture of review, but the content of its constitutional theory.³⁸²

In the administrative review situation, moreover, the consequences of erroneous court decisions are far less severe. After *Lochner*, all New York could do was attempt to amend the Constitution or to wait for the Court's composition to change.³⁸³ Because independent review of questions of law retains the principle of legislative supremacy, Congress can correct erroneous interpretations of law.

One further difference remains between administrative and legislative action that bears on *Lochner*. Since the renunciation of *Lochner*, commentators have wrestled with an apparent inconsistency in the law. Although modern courts do not subject many legislative actions to *Lochner*-like scrutiny, in some situations the courts do engage in heightened scrutiny of legislative action.³⁸⁴

Mfg. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 41-44 (1983), does result in a *Lochner*-like effect in that the court must be satisfied with the thoroughness of the agency's analysis. This doctrine is a type of scrutiny that admittedly, goes beyond what we now require of legislative bodies. This scrutiny seems appropriate, however, given the agency's inferior status to legislatures, so long as the court only ensures that the agency rationally considers all issues and that the remedy for inadequately considered decisions is a remand to the agency. If this is done, the courts do not substitute their judgments for those of the agency, but they do ensure that agency action is rational.

³⁸¹ See Sunstein, *supra* note 371, at 882.

³⁸² See *id.*

³⁸³ See *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). In *West Coast Hotel*, Justice Roberts, in siding with the majority, has been credited with a "switch in time" that saved the Supreme Court from being expanded in size under President Roosevelt's "Court Packing Plan." See generally G. GUNTHER, CONSTITUTIONAL LAW 130 n.2 (11th ed. 1985). Whether this result is true, between 1937 and 1941, President Roosevelt was able to make seven Court appointments, producing a Court more receptive to Roosevelt's theory of government. Cf. *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.").

³⁸⁴ Justice Stone's opinion in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 & n.4 (1938), contains the classic declaration of this dichotomy.

Some courts have explained this dichotomy in terms of majoritarianism.³⁸⁵ Under this view, courts should not overturn the determinations made by majoritarian bodies unless the legislation affects values that are anti-majoritarian in nature,³⁸⁶ reduces the effectiveness of the legislative process³⁸⁷ or disparately affects the interests of discrete and insular minorities.³⁸⁸ Others have explained the dichotomy as a result of comparative competence.³⁸⁹ Under that view, the courts have decided that it would be an improper intrusion on legislative prerogatives to second-guess legislation, unless there is an affirmative mandate to review the legislation. Such affirmative mandates are provided by specific constitutional provisions.³⁹⁰ General scrutiny of legislation under due process or equal protection grounds, however, would not be allowed.

Under either of these rationales, the evils of *Lochner* are not implicated when a court reviews an agency determination. Unless one views agencies as majoritarian bodies,³⁹¹ one non-majoritarian body—a court—is reviewing the determination of another non-majoritarian body—the agency. Even if one assumes that agencies are majoritarian bodies, however, courts are reviewing agency action not to vindicate their own view of wise government policy, but to vindicate congressional policy. To seek to vindicate congressional supremacy in matters of governmental policy is not to commit the sins of *Lochner*, but to learn the lessons gained from the rejection of *Lochnerian* jurisprudence.

3. Is Prudential Deference Different from *Chevron* Deference?

Some commentators might argue that, after showing that courts must independently review administrative interpretations of law, this article retreats and, following *Chevron*, allows courts to defer to agency action. Two differences in approach make the prudential deference model defensible in a way that *Chevron* is not. First,

³⁸⁵ See, e.g., J. Ely, *supra* note 303.

³⁸⁶ E.g., the religion clauses of the first amendment.

³⁸⁷ E.g., the free speech and association clauses of the first amendment.

³⁸⁸ E.g., the equal protection clause of the fourteenth amendment as applied to racial and ethnic minorities.

³⁸⁹ See Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417, 424–26 (1981); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–20 (1978).

³⁹⁰ Thus, courts can review legislative enactments to determine if they violate specific prohibitions in the Constitution, such as the first and fourth amendments.

³⁹¹ See *supra* notes 302–14 and accompanying text for a discussion of this argument.

prudential deference is triggered by a variety of factors and does not represent a blanket rule. Further, it involves persuasive, not binding, deference. Thus, courts are ultimately available to provide independent review and, in fact, would often engage in independent review. In the interests of accuracy, efficiency and interbranch cooperation, however, they share this power with the agency when it is appropriate to do so.

Second, this model is a *court-made* restriction on judicial review. It is one thing for the legislative branch to place restrictions on the judicial branch. Such restrictions raise questions of separation of powers. It is another thing for the judicial branch to engage in judicial restraint.³⁹² When the courts selectively choose to defer, they retain the *power* to engage in independent review, maintaining the requisite control over all agency determinations of law.

4. Is the Approach Manageable?

Given the multi-factored approach suggested, one might raise a concern about manageability—is the approach clear enough so that courts can apply it without error? If not, the Supreme Court must either review the lower court decisions to correct them or allow erroneous lower court decisions to stand. Neither situation is attractive.

The suggested approach would not be entirely error-free. Indeed, the case-by-case nature of the approach invites inconsistency. The *Chevron* approach, however, has not proven to be a clear test.³⁹³ Although *Chevron* presents a simple-to-describe test, it has not been easy to apply, and, although *Chevron* presents a uniform test, it has not produced uniform results. Thus, a better question might be which approach would be more manageable. Although the answer to this question is not obvious, it should not be decisive in selecting among theories of judicial review.

A related concern involves the agency, Congress and regulated actors. As Justice Scalia suggests, *Chevron* could be seen as a default rule that Congress could change.³⁹⁴ This alternative approach, depending as it does on specific factors in each case, is harder to predict. Whatever functional merit *Chevron* might have as a rule of

³⁹² See Amar, *supra* note 205, at 267 (decision by court not to exercise power to review a case is different than the court being precluded from reviewing the case); Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 458 (1983) (same).

³⁹³ See *supra* notes 100–49 and accompanying text.

³⁹⁴ See *supra* notes 335–39 and accompanying text.

statutory interpretation, it is still subject to constitutional scrutiny; and if the default rule is an impermissible one, it matters little whether it is easy to identify. Prudential deference is the only type of deferential method of review that is also constitutional. Any manageability problems inherent in the prudential approach are present because they directly or indirectly serve constitutional ends.

The interbranch cooperation model is, like all models of judicial review of agency action, subject to criticism on a number of levels. Because the problem cuts to the heart of separation of powers, the solution proposed in this article represents an attempt to balance competing concerns that urge in favor of different branches of the federal government. The article has tried to justify its model in separation of powers terms and to argue that it strikes the proper balance. Although the model does not have the ease of administration of a blanket rule, *Chevron* has not produced an easily administered rule either. In light of the alternatives, the article has argued that the interbranch cooperation model represents the best model for judicial review of agency action.

IV. CONCLUSION

In some ways, one can easily understand why some judges and commentators have embraced *Chevron*. *Chevron* appeared to replace an admittedly messy area of the law with a unitary test. Its rationale also appealed to those who take the view that courts should restrict their role to "applying" rather than "making" the law. It is equally clear why *Chevron* was decried by other judges and commentators. *Chevron* restricts the ability of the judiciary to interpret the law. Opponents of *Chevron* viewed it as usurping the traditional role of the judicial branch.

This article has critically examined these claims and concluded that, by restricting judicial review over agency action, *Chevron* unconstitutionally shifts the balance of powers among the branches of government. Administrative agencies exist in the context of a number of checks on their power. The legitimacy of their wielding of legislative and judicial power depends upon an active judicial role in checking their power. As for the exercise of "pure" executive power, judicial review is needed as well in order to ensure the due process rights of affected parties.

Even if restricting judicial review per *Chevron* were constitutional, it would not represent an attractive political theory. The claim that *Chevron* serves to ensure that politically accountable

branches make legal determinations fails on factual and theoretical bases. Moreover, a competing concern, that of agency bias, affirmatively argues for active judicial review.

As the post-*Chevron* experience shows, the ease of application promised by *Chevron* has proven elusive. The *Chevron* approach has raised as many issues as it has clarified, and has merely reshifted the existing battle to a different battlefield. It is time to reject the strong reading of *Chevron*.

Although this article squarely rejects *Chevron*, it does not advocate that courts always engage in an independent review of the legal determinations made by agencies. It advocates a return to the pre-*Chevron* tradition of courts deciding, as a prudential matter, to defer to agency determinations on a case-by-case basis. This type of deference need be neither arbitrary nor toothless. Although such deference generates some uncertainty as to when courts will defer to an agency's interpretation, this uncertainty is, in fact, a positive feature of the approach because it provides incentives for agencies to act reasonably.³⁹⁵ It also gives courts needed flexibility to allow agencies to adapt to change and to curb agency excesses. Unlike *Chevron*, prudential deference accommodates the realities of the modern administrative state without eviscerating the notions of separation of powers and checks and balances on which our government is based.

³⁹⁵ See Byse, *supra* note 22, at 266-67; Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U.L. REV. 1, 8-9 (1986).