NORTH CAROLINA LAW REVIEW

Volume 97 | Number 1 Article 8

12-1-2018

Remedial *Chevron*

F. Andrew Hessick
ahessick@email.unc.edu

REMEDIAL *CHEVRON*[*]

F. ANDREW HESSICK[**]

Under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, courts must defer to reasonable agency interpretations of statutes they are charged with administering. Although this deference captures the institutional advantages of agencies in interpreting statutes, critics—most notably Justices Thomas and Gorsuch—have raised serious challenges to its legality. They have argued that* Chevron *violates Article III by constraining the interpretive power of the federal courts; rests on the unjustifiable assumption that Congress has delegated primary interpretive authority to agencies; and is inconsistent with the Administrative Procedure Act, which directs federal courts to review statutes de novo. These challenges threaten to unravel* Chevron *deference, thereby losing the functional, institutional benefits of that deference and casting doubt on countless agency regulations and adjudications.*

To meet these concerns, this Article proposes restructuring Chevron *as a limitation on the remedial power of the courts instead of a doctrine of interpretation. Under this approach, courts would not defer to agency interpretations. Instead, Remedial* Chevron *would limit the circumstances under which courts could vacate agency actions as inconsistent with statutes. Courts could vacate agency actions on that ground only if the agency's interpretation was unreasonable. This approach would avoid the legal objections to* Chevron *while largely preserving the functional benefits of judicial deference to agency interpretations.*

** Professor of Law, University of North Carolina School of Law; J.D., Yale Law School; B.A., Dartmouth College. Thanks to Aditya Bamzai, Sam Bray, Emily Bremer, John Coyle, Michael Gerhardt, Carissa Hessick, Randy Kozel, Eric Muller, Aaron Nielson, Caprice Roberts, and Chris Walker for their helpful comments.

INTRODUCTION

Judicial deference to agency interpretations is a central feature of administrative law. The chief form of deference derives from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[1] in which the Supreme Court held that federal courts must defer to reasonable interpretations rendered by federal agencies of statutes that they administer.[2] The legal justification for *Chevron* deference is that, by enacting statutes for agencies to administer, Congress implicitly delegates interpretive authority to agencies. Since it was decided in 1984, *Chevron* has been invoked in thousands of judicial decisions,[3] and today it regularly underlies policy decisions made by Congress and agencies.[4]

1. 467 U.S. 837 (1984).
2. *Id.* at 845.
3. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 2 (2017) ("*Chevron* has been cited . . . in roughly 15,000 judicial decisions . . . .").
4. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 996 (2013) (concluding based on an empirical study that *Chevron* "affects the degree of specificity [drafters] use while drafting"); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1062 (2015) [hereinafter Walker, *Inside Agency Statutory Interpretation*] (concluding in an empirical study that ninety percent of agency drafters relied on *Chevron*).

Despite its ubiquity, *Chevron* rests on uneasy ground. Since its inception, critics have questioned the lawfulness of *Chevron*.[5] They have raised three major objections.[6] The first is that, as conceived at the Founding, the judicial power conferred by Article III on the federal courts includes the power to interpret statutes independently. As *Marbury v. Madison*[7] put it, "It is emphatically the province and duty of the judicial department to say what the law is."[8] Accordingly, requiring courts to defer to agency interpretations of statutes is unconstitutional.[9] The second is that the legal justification for *Chevron*—that Congress implicitly delegates interpretive authority to agencies by enacting statutes for agencies to administer—is unsound because it rests on a fiction[10] and violates the nondelegation doctrine.[11] The third is that requiring courts to defer violates the Administrative Procedure Act ("APA"), which appears to require courts to interpret statutes de novo.[12] These originalist and textualist attacks on *Chevron*'s legality have intensified as textualism and originalism have become increasingly dominant.[13]

5. *See, e.g.*, Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 466–69 (1987) [hereinafter Sunstein, *Constitutionalism After the New Deal*] (arguing that *Chevron* undermines separation of powers).

6. These legal arguments are not the only objections to *Chevron*. Others include that plenary judicial review discourages agencies from interpreting statutes to promote self-interests and prevents unconstrained agencies. Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 289, 291 (1986). This Article does not address these prudential arguments.

7. 5 U.S. (1 Cranch) 137 (1803).

8. *Id.* at 177.

9. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 922–25 (2017) (discussing constitutional challenges to judicial deference to agency interpretations of statutes).

10. Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2033 (2011) ("[The delegation theory] impairs the legitimacy of the Court's interpretive framework because it is a fiction.").

11. *See* Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1198 (2016) ("[T]o the extent executive interpretations are a form of binding lawmaking, they usurp the power of Congress . . . .").

12. *See* Patrick J. Smith, Chevron*'s Conflict with the Administrative Procedure Act*, 32 VA. TAX REV. 813, 816–18 (2013) (arguing that section 706 of the APA precludes *Chevron*).

13. Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 363–73 (1994) (noting the increase in textualist challenges to *Chevron*); Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 24–25, 42–43 (2017) (discussing recent originalist attacks on *Chevron*); *see also* John Calhoun, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484, 500 (2014) (discussing the increased "popularity of textualism and originalism"). These attacks constitute a tiny piece of the vast body of scholarship on *Chevron*. *See, e.g.*, John F. Manning, Chevron *and the Reasonable Legislator*, 128 HARV. L. REV. 457, 457–59 (2014) [hereinafter Manning,

Commentators have tended to offer three solutions to the legal objections to *Chevron*: (1) eliminate *Chevron* deference and require courts to interpret statutes de novo; (2) disregard the objections and preserve *Chevron* in its current form; or (3) take a middle path of so-called *Skidmore* deference,[14] under which courts have plenary authority to interpret statutes but must give serious consideration to agency interpretations.[15] None of these approaches is ideal. *Chevron* deference should not be maintained if it violates the law. At the same time, entirely discarding obligatory deference is unpalatable because there are good, functional reasons for courts to defer to agency interpretations.[16]

Agencies are more accountable to the public than courts, can more easily alter interpretations to respond to changes in circumstances, are more familiar with the broader regulatory scheme embodied in other statutes, can more readily establish uniform interpretations, and have greater expertise than judges on the technical and complex matters covered by regulatory statutes.[17] More

Chevron *and the Reasonable Legislator*] (discussing how the trend towards textualism and the wider gap between statutory language and legislative purpose are obstacles to *Chevron* deference); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*,*"* 112 COLUM. L. REV. 1143, 1161–65 (2012) (describing *Chevron* as a doctrine of delegation instead of deference); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 205–06 (2006) [hereinafter Sunstein, Chevron *Step Zero*] (discussing competing views of *Chevron*'s applicability to interpreting statutory ambiguities); Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1894 (2016) (considering recent cases that have accorded *Chevron* deference for procedural provisions); *see also* Peter M. Shane & Christopher J. Walker, *Foreword*, 83 FORDHAM L. REV. 475, 475 (2014) (noting that over 10,000 articles have discussed *Chevron*).

14. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that courts give weight to an agency interpretation commensurate with "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").

15. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1013–14 (1992) [hereinafter Merrill, *Judicial Deference to Executive Precedent*] (describing these "three general strategies").

16. Professors Vermeule and Gersen have proposed converting *Chevron* into a voting rule under which a multimember court will uphold an agency interpretation unless a supermajority of the judges disagree with the agency's interpretation. Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 679 (2007). Although the motivation is to combat psychological biases that can distort the application of *Chevron*, *see id.* at 679–80, their proposal also would avoid some of the Article III and APA criticisms of *Chevron*. But unlike Remedial *Chevron*, their proposal works only for multimember courts. It does not provide a protocol for *Chevron* at the trial court level.

17. Merrill, *Judicial Deference to Executive Precedent*, *supra* note 15, at 1009. Functional considerations formed the original motivation for *Chevron* deference. Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J.

generally, interpreting ambiguous statutes involves policy judgments; thus, letting courts disagree with agency interpretations threatens to undermine the agency's role of setting regulatory policy.[18]

This Article offers a fourth approach. It proposes refashioning *Chevron* deference as a limitation on the courts' remedial power. Under this approach—which this Article calls Remedial *Chevron*—courts would no longer defer to agency interpretations as they do under current doctrine; they would have the power to interpret laws de novo. Instead, courts would lack the power to vacate agency actions as contrary to law if they rest on reasonable interpretations of statutes. A court could vacate such an action only if the agency's interpretation was unreasonable. In other words, Remedial *Chevron* would restructure *Chevron* from a doctrine empowering agencies to tell the courts what the law is to a doctrine restricting what courts can do about legal errors committed by agencies.

Although it would narrow the instances in which deference applies, Remedial *Chevron* maintains much of the judicial deference to agency actions that *Chevron* currently requires. But it avoids violating Article III. Unlike interfering with a court's ability to interpret the law, restricting a court's ability to award a remedy is consistent with Article III, as damage caps and restrictions on the availability of injunctions demonstrate. Remedial *Chevron* also eliminates the need to rely on the theory that Congress implicitly delegates interpretive power to agencies through administrative statutes, because it rests on limiting the courts' remedial power instead of delegating interpretive power to agencies. It also comports better with the APA. Under a remedial conception of *Chevron*, courts would interpret the law independently, as the APA appears to require.[19] Remedial *Chevron* would simply limit the circumstances under which courts could provide relief in challenges to agency actions. That remedial limitation is easier to square with the text of the APA than the current *Chevron* doctrine.

Remedial *Chevron* would also eliminate the so-called *Chevron* step zero doctrine. That doctrine holds that not all agency

2580, 2587 (2006) [hereinafter Sunstein, *Beyond* Marbury] (discussing the pragmatic origins of *Chevron*).

18. David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 213 (noting the argument that *Chevron* "favor[s] agencies over courts in making the policy decisions inherent in the resolution of statutory ambiguity"); Sunstein, *Beyond* Marbury, *supra* note 17, at 2587 (arguing that *Chevron* is an effort to protect agency policymaking).

19. 5 U.S.C. § 706 (2012).

interpretations of statutes warrant *Chevron* deference; instead, *Chevron* applies only when Congress delegates the power to issue binding interpretations and the agency employs that power when rendering its interpretation.[20] Remedial *Chevron* obviates the need for courts to determine whether *Chevron* step zero is satisfied because it does not depend on a delegation of interpretive authority to the agencies but instead limits the remedial power of the courts.

The Article proceeds in three parts. Part I describes *Chevron* and the legal objections that critics have raised against it. Part II then turns to the proposal. It first describes how *Chevron* would operate as a remedy. It then explains how Remedial *Chevron* avoids violating Article III, eliminates the need to rely on fictional delegations of interpretive power, and aligns better with the APA than the current *Chevron* doctrine. Part III addresses several doctrinal consequences of reframing *Chevron* as a remedy. For example, in addition to eliminating *Chevron* step zero, Remedial *Chevron* would significantly change the effect of prior judicial interpretations of a statute. Currently, an agency may interpret an ambiguous statute differently from an interpretation of the same statute previously rendered by an appellate court. But under Remedial *Chevron*, judicial interpretations of ambiguous statutes would bind agencies.

I. THE CURRENT *CHEVRON* DOCTRINE AND ITS LEGAL SHORTCOMINGS

A. Chevron *Deference*

Chevron established a two-part test to control judicial review of an agency's interpretation of a statute that the agency administers.[21] At the first step, the court must determine whether "Congress has directly spoken to the precise question at issue."[22] If it has, the court "must give effect to the unambiguously expressed intent of Congress."[23] But if the statute is ambiguous, the court proceeds to step two. At this second step, the court must defer to the agency's interpretation of the statute if that interpretation is "a permissible construction of the statute."[24] This regime potentially permits multiple agency interpretations to which a court must defer, because

20. *See* Sunstein, Chevron *Step Zero*, *supra* note 13, at 187–90 (exploring the contours of *Chevron* step zero).

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

22. *Id.* at 842.

23. *Id.* at 843.

24. *Id.*

an ambiguous statute may support more than one reasonable interpretation.[25]

Chevron deference reflects the pragmatic conclusion that agencies are better suited than courts to resolve ambiguities in statutes that they are charged with administering.[26] When the tools of statutory interpretation run out, the resolution of ambiguity in a statute is no longer simply a legal question. Rather, interpreting the statute also calls for value-laden judgments.[27] That is especially so for statutes that describe the objects and tools of regulation because whether to regulate and how to regulate depend on broad determinations of legislative fact and policy.[28]

Agencies have various institutional advantages over courts in implementing policy through interpretation.[29] They have expertise over the areas to be regulated, are better situated to coordinate regulations across statutory schemes, are more politically accountable, may have greater initiative because they are not bound by case and controversy restrictions, can update interpretations more quickly in response to changing circumstances, and can more easily avoid inefficiencies by adopting nationwide interpretations.[30]

Although the Court invoked these institutional reasons in *Chevron* itself,[31] they do not provide the current justification for the

25. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005); *Chevron*, 467 U.S. at 843–44.

26. *See Chevron*, 467 U.S. at 865 (justifying deference on the ground that "[j]udges are not experts in the field, and are not part of either political branch of Government").

27. Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 593 (1985) ("[I]nterpretation is inherently a form of policymaking . . . .").

28. *See id.* (arguing that deference is particularly important for statutes that confer policymaking power); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 635 (1996) [hereinafter Manning, *Constitutional Structure and Judicial Deference*] (arguing that statutes that "create and regulate administrative agencies" are "habitually vague and indefinite" to afford agencies policy flexibility).

29. *See* Merrill, *Judicial Deference to Executive Precedent*, *supra* note 15, at 1009 (discussing institutional advantages of agencies).

30. Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 NOTRE DAME L. REV. 727, 749–50 (2013) (discussing these advantages). This is not to say that agencies are superior interpreters in all respects. Some have argued that because federal judges are shielded from political pressure in rendering their interpretations and often have more resources to consider statutes, they may be better at determining the "best" objective meaning of a statute. *See, e.g.*, Merrill, *Judicial Deference to Executive Precedent*, *supra* note 15, at 1009. But others have argued that agencies are actually better situated than courts to determine the intent of Congress. *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 209–10 (2006).

31. *See Chevron*, 467 U.S. at 865.

doctrine.[32] Instead, the Court's justification is that statutes require courts to defer to agency interpretations. The theory is that, by enacting the statutes that agencies administer, Congress implicitly delegates interpretive authority to the agency.[33] Under this view, a court enforces the law by deferring to agency interpretations, because the law requires the court to defer.

B. Challenges to Chevron*'s Legality*

Critics have argued *Chevron* deference is illegal in three major ways.[34] First, critics argue that requiring federal courts to defer to interpretations rendered by nonjudicial bodies violates Article III.[35] Article III vests the judicial power in the federal courts, and one aspect of the judicial power is to interpret statutes independently. Second, the legal justification for *Chevron*—that Congress implicitly delegates interpretive authority to the agency through organic statutes—rests on a fiction[36] and raises nondelegation concerns.[37] Third, requiring courts to defer to agency interpretations is

32. Barron & Kagan, *supra* note 18, at 212–14 (discussing the shift in justification of deference away from functional considerations).

33. *See* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996) ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency . . . ."). One reason for the switch in justifications is the increasing perception that although the institutional advantages of agencies might support judicial consideration of agency interpretations, these advantages are insufficient to support a universal rule that requires courts to defer to agency interpretations. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (arguing that expertise is not a basis for mandatory deference); Sunstein, *Constitutionalism After the New Deal*, *supra* note 5, at 466 ("Because these [institutional] factors have different force in different contexts, the appropriate degree of deference cannot be resolved by a general rule."). But in *Barnhart v. Walton*, 535 U.S. 212 (2002), the Court once again suggested that these institutional considerations underlie *Chevron* deference. *Id.* at 222 (pointing to the "expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time").

34. This Article does not seek to prove that these arguments against *Chevron* are correct. Instead, its aim is to justify judicial deference even if these arguments are correct.

35. *See infra* Section I.B.1.

36. *See, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (acknowledging that this argument rests on a "legal fiction"); Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297, 305 (2017) (noting that this argument rests on a fiction).

37. Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 112–13 (2018) (recounting this nondelegation argument).

inconsistent with the APA, which requires courts to interpret statutes de novo.[38]

1. Article III Judicial Power

Article III provides that the "judicial Power . . . shall be vested in one supreme Court, and in such inferior Courts" that Congress creates.[39] Some have argued—most notably Justices Thomas and Gorsuch—that this judicial power includes the power to interpret the law independently.[40] Thus, they argue, requiring Article III courts to defer to agency interpretations of the law is unconstitutional. There is significant support for this argument.

Although neither Article III nor any other portion of the Constitution defines the "judicial power," there was a general understanding of its outlines at the Founding.[41] One aspect of the judicial power was the ability to interpret the law independently.[42] For example, in the 1768 edition of his digest, Matthew Bacon said not only that "[e]very [q]uestion of [l]aw is to be tried by the Court" but also that "[i]t is the Province of the Justices to determine, what the [m]eaning of a [w]ord or [s]entence in an Act of Parliament is."[43] Blackstone offered a similar description of the courts' power to interpret the law, stating that the "judicial power" included the power "to determine the law arising upon [the] fact[s]" of a case.[44]

The Founders adopted the same position on the judiciary's power to interpret the law. In Federalist No. 78, Alexander Hamilton

38. Philip Hamburger argues that applying *Chevron* deference in suits in which the government is a party also violates the Due Process Clause because it biases the outcome in favor of the government. Hamburger, *supra* note 11, at 1211–12. This argument questionably assumes that the procedure the agency itself has already employed is inadequate, and it is inconsistent with the traditional limits on mandamus, which was unavailable to challenge government actions based on reasonable interpretations. *See infra* notes 100–08 and accompanying text.

39. U.S. CONST. art. III, § 1.

40. Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws."); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); *see also* Hamburger, *supra* note 11, at 1205 ("When a judge defers to an agency's interpretation of a statute, he . . . violates his office or duty to exercise his own independent judgment.").

41. SAMUEL MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 313 (New York, Banks & Bros. 1891) (stating that an "exact definition" cannot be found in "the old treatises, or any of the old English authorities").

42. PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 549–53 (2008) (arguing that courts historically exercised independent judgment in interpretation).

43. 5 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 217 (London, 3d ed. 1768).

44. 4 WILLIAM BLACKSTONE, COMMENTARIES *25.

stated that "[t]he interpretation of the laws is the proper and peculiar province of the courts."[45] In other Federalist Papers, Hamilton again stressed the courts' power to interpret the law when he explained why the Constitution did not include a council of revision to review proposed legislation. He explained that, because the judges "are to be interpreters of the law," permitting them to serve on a council of revision might lead to "an improper bias from having given a previous opinion in their revisionary capacities."[46] Other proponents of the Constitution expressed similar views.[47]

Opponents of the Constitution also understood the judiciary to have independent interpretive power. Illustrative is the objection of the Federal Farmer, who argued that federal judges posed more of a threat than Congress to liberty because of their power to interpret the laws.[48]

Statements following the adoption of the Constitution further indicate that the judicial power included the power to interpret the law independently. For example, during a debate in the House of Representatives in the First Congress, Madison stated that "in the ordinary course of government, . . . the exposition of the laws and Constitution devolves upon the Judiciary."[49] Chief Justice Marshall echoed these sentiments in *Marbury v. Madison* when he said that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[50]

45. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

46. THE FEDERALIST NO. 73, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]he judges, who are to be interpreters of the law, might receive an improper bias from having given a previous opinion in their revisionary capacities . . . [or] be induced to embark too far in the political views of [the Executive] . . . .").

47. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 98 (Max Farrand ed., 1966) (statement of Rufus King) (opposing a council of revision on the ground that "[j]udges ought to be able to expound the law as it should come before them").

48. *See, e.g.*, Letters from the Federal Farmer to the Republican (XV) (Jan. 18, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST 315, 315 (Herbert J. Storing ed., 1981) ("[J]udges and juries, in their interpretations . . . have a very extensive influence for preserving or destroying liberty, and for changing the nature of the government.").

49. 1 ANNALS OF CONG. 500 (1789) (Joseph Gales ed., 1834). The statement is particularly revealing because Madison made it in the context of arguing for an exception to this rule for interpretations of constitutional provisions delineating the powers of the respective branches. *See id.* The statement was a concession that Madison sought a unique exception. Benjamin Kleinerman, *The Madisonian Constitution: Rightly Understood*, 90 TEX. L. REV. 943, 961 (2012).

50. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Today, although courts often defer to agency interpretations of statutes, courts refuse to defer to others' interpretations of the Constitution. *See* F. Andrew Hessick, *Rethinking the Presumption of*

Consistent with this view, many pre-*Chevron* Supreme Court decisions rejected judicial deference to interpretations rendered by administrative agencies.[51] The most significant decision on the matter is *Crowell v. Benson*.[52] There, the Court held that Congress could authorize nonjudicial agencies to facilitate Article III adjudications by making initial fact and legal determinations.[53] The Court explained that such preliminary adjudications by these so-called judicial adjuncts did not violate Article III so long as the Article III courts retained the essential characteristics of the judicial power, one of which was de novo review of questions of law.[54]

To be sure, not all decisions adhered to this view. A different line of decisions held that courts should defer to agencies' interpretations of statutes that they administer.[55] That line of cases directly conflicted with the decisions holding that courts should interpret statutes de novo.[56] *Chevron* resolved this conflict by following the latter line of cases, holding that courts must defer to reasonable agency interpretations of statutes that the agency administers.[57]

If the judicial power includes the power to render independent interpretations of laws, *Chevron* deference violates Article III.[58] Under *Chevron*, courts do not interpret statutes independently; they are bound by reasonable interpretations of statutes rendered by

Constitutionality, 85 NOTRE DAME L. REV. 1447, 1488 (2010). That arrangement is a reversal of the past. In the nineteenth century, courts interpreted statutes de novo, *see* Brown v. United States, 12 U.S. (8 Cranch) 110, 127–28 (1814), but reviewed constitutional interpretations deferentially, *see* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810) (stating that a court may declare an act of a legislature unconstitutional only when "[t]he opposition between the constitution and the law [is] such that the judge feels a clear and strong conviction of their incompatibility with each other").

51. *See, e.g.*, FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981); NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 499 (1960).

52. 485 U.S. 22 (1932).

53. *See id.* at 50.

54. *Id.*

55. *See, e.g.*, Gray v. Powell, 314 U.S. 402, 411–12 (1941); Rochester Tel. Corp. v. United States, 307 U.S. 125, 146 (1939).

56. *See* Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976) (describing the conflict).

57. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) ("[F]ederal judges . . . have a duty to respect legitimate policy choices made by [the agency].").

58. This power to interpret the law independently does not bar Congress from enacting a new law directing how to interpret an old law. *E.g.*, Bank Markazi v. Peterson, 136 S. Ct. 1310, 1324 (2016). But agencies do not have the power to pass new laws. Their interpretations are implementations of existing law; even Congress cannot direct how to interpret an existing law without amending that law. *See id.* (stating Congress exceeds its power by "attempt[ing] to direct the result without altering the legal standards").

agencies. Neither *Chevron* nor its predecessors deferring to agency interpretations explained how that deference is consistent with the judicial power to interpret laws independently.

Nor do any of the theories offered to justify *Chevron* explain how it is consistent with the judicial power. None claims to reinterpret the judicial power in a way that permits judicial deference to nonjudicial interpretations, nor does any provide a reason to think that courts exercise something other than the judicial power when they defer to agency interpretations. Instead, those theories only provide reasons for requiring judicial deference to agency interpretations, *assuming that such deference is constitutionally permissible*.

2. Delegations of Interpretive Power

A second set of objections to *Chevron* challenges the legal justification for *Chevron*—that, by enacting various statutes for agencies to administer, Congress implicitly delegates interpretive authority to an agency. This theory faces two criticisms. First, it rests on a fiction.[59] As has long been suspected and as recent studies confirm, for most statutes delegating power to agencies, members of Congress do not give any thought to whether the statute confers interpretive authority on the agency that administers the statute.[60] Second, some have argued that this delegation theory raises nondelegation concerns. Article I vests Congress with "[a]ll legislative [p]owers."[61] That legislative power cannot be delegated.[62] According to some, the delegation theory underlying *Chevron* violates this restriction because it results in Congress delegating lawmaking power to federal agencies.[63]

59. *See, e.g.*, Bressman, *supra* note 10, at 2033 (arguing the delegation theory "impairs the legitimacy of the Court's interpretive framework because it is a fiction"); Breyer, *supra* note 36, at 370 (acknowledging this argument rests on a "legal fiction").

60. Gluck & Bressman, *supra* note 4, at 996–97 (reporting from an empirical study on Congress that "decisions to leave statutory terms ambiguous are typically made without regard to whether the courts will later defer to an agency interpretation"); Scalia, *supra* note 33, at 517 ("In the vast majority of cases I expect that Congress . . . didn't think about the matter at all.").

61. U.S. CONST. art. I, § 1.

62. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("[Article I] permits no delegation of those powers . . . .").

63. *See* Hamburger, *supra* note 11, at 1198 ("[T]o the extent executive interpretations are a form of binding lawmaking, they usurp the power of Congress . . . ."); Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 990 (2018) (describing nondelegation objections to *Chevron*); *see also* Egan v. Del. River Port Auth., 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring) (arguing that *Chevron* results in courts "largely 'abdicat[ing] [their] duty to enforce [the] prohibition' against Congressional delegation of legislative

3. Inconsistency with the APA

The third legal objection to *Chevron* deference is that it conflicts with section 706 of the APA. That section controls judicial review of agency action. It provides that a "reviewing court shall decide all relevant questions of law" and "interpret constitutional and statutory provisions."[64] By requiring courts "to interpret statutes," section 706 suggests that courts should not defer to agency interpretations;[65] instead, courts should interpret statutes independently.[66]

To reconcile *Chevron* with section 706,[67] commentators have argued that, if a statute delegates to an agency the discretion to choose among reasonable interpretations of that statute, a reviewing court properly "interpret[s]" that statute by determining only whether the agency's interpretation is reasonable.[68] But this argument rests on the fiction identified earlier.[69] Most administrative statutes do not signify a decision to confer interpretive authority.[70] Moreover, even when Congress does mean to delegate interpretive authority to an agency, it rarely does so explicitly; instead, courts have held that agencies' interpretive authority is implicitly conferred in statutes that

power to executive agencies" (quoting Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring))). This objection applies more sensibly to agency rulemaking, which is legislative in nature, than to adjudication, which entails the exercise of a judicial power.

64. 5 U.S.C. § 706 (2012).

65. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 473 n.85 (1989) ("That section 706 *appears* to contemplate de novo judicial determination of questions of statutory meaning is generally acknowledged.").

66. Merrill, *Judicial Deference to Executive Precedent*, *supra* note 15, at 995 (stating that section 706 of the APA "suggests that Congress contemplated courts would always apply independent judgment on questions of law"); Metzger, *supra* note 13, at 38 (arguing that *Chevron* stands in tension with the APA's instruction that courts "shall decide all relevant questions of law" and "interpret constitutional and statutory provisions").

67. Most commentators who have acknowledged the tension between *Chevron* deference and section 706 have not sought to resolve the conflict. Instead, they have offered reasons for *Chevron* deference despite section 706. *See, e.g.*, Smith, *supra* note 12, at 822 (discussing commentators' focus on justifying *Chevron* despite section 706).

68. Sunstein & Vermeule, *supra* note 36, at 303–04 (stating that section 706's directive that "the court shall 'interpret' questions of law is not decisive in favor of independent judicial review, if it is also the case that under organic statutes, the correct interpretation of law depends on the agency's interpretation of law" (emphasis omitted)); Manning, Chevron *and the Reasonable Legislator*, *supra* note 13, at 459 ("[W]here Congress has delegated to the agency rather than the reviewing court the discretion to choose among reasonably available interpretations . . . , the reviewing court fulfills its duty to 'interpret' the statute by determining whether the agency has stayed within the bounds of its assigned discretion.").

69. *See supra* note 60 and accompanying text.

70. *See supra* note 60 and accompanying text.

the agency is charged with administering.[71] But that conclusion is inconsistent with section 559 of the APA, which states that another statute may not be held to supersede or modify the requirements of the APA "except to the extent that it does so expressly."[72]

II. REMEDIAL *CHEVRON*

Despite its legal shortcomings, *Chevron* deference serves useful purposes. Interpretations of ambiguous regulatory statutes involve policy judgments on technical matters, and agencies are better suited than courts to make those judgments.[73] Moreover, overturning *Chevron* would jeopardize countless agency regulations, many of which regulators promulgated in reliance on *Chevron*.[74] It would also undermine congressional expectations in drafting statutes. As recent research reveals, although Congress does not intentionally delegate interpretive power to agencies, it does often operate on the assumption that agencies will play a significant role in resolving ambiguities.[75] These considerations counsel against discarding *Chevron* wholesale based on legal concerns. They suggest instead that *Chevron* should be modified to minimize these objections.

One approach is to refashion *Chevron* as a remedial doctrine.[76] Under this approach, courts would not defer to agency interpretations of the law. Instead, Remedial *Chevron* would limit the circumstances under which a court could vacate an agency action on the ground that it is based on an erroneous interpretation of a statute. A court could vacate such an agency action only if the agency's interpretation of the statute is unreasonable. This approach would satisfy both pragmatic reasons for *Chevron* and also avoid the formalist objections to it. Remedial *Chevron* would preserve the courts' judicial power to interpret the law while functionally requiring judicial deference to agency interpretations in challenges to agency actions.

71. Manning, Chevron *and the Reasonable Legislator*, *supra* note 13, at 459 ("[O]rganic acts often delegate interpretive discretion without specifying explicitly to which institution the delegation runs . . . .").

72. 5 U.S.C. § 559 (2012).

73. *See supra* notes 27–28 and accompanying text.

74. *See* Walker, *Inside Agency Statutory Interpretation*, *supra* note 4, at 1061–62 (concluding in an empirical study that ninety percent of agency drafters rely on *Chevron*).

75. Gluck & Bressman, *supra* note 4, at 996 (concluding based on an empirical study that *Chevron* "affects the degree of specificity [drafters] use while drafting" but this assumption does not reflect an intent to delegate interpretive authority to agencies).

76. A remedy is the relief awarded by a court, such as damages or an injunction. Vacating an administrative action is a type of remedy. Remedial *Chevron* limits the circumstances under which a court can award that remedy.

A. Distinguishing Remedial Chevron *from Current* Chevron

To understand how Remedial *Chevron* differs from the current *Chevron* doctrine, it may be useful to begin with an overview of remedies. Remedies are the means by which courts vindicate rights.[77] Examples of remedies include damages, injunctions, and declaratory judgments. Remedies are awarded after a court has determined that a violation of substantive law that forms the basis for the plaintiff's claim has occurred.

Although remedies are awarded only after a court determines that a substantive violation has occurred, not all violations of rights entitle individuals to remedies. To the contrary, the law routinely limits the remedies available to plaintiffs who demonstrate that they have been, or are about to be, wronged.[78]

Injunctions provide an example. To obtain an injunction, a plaintiff must establish that the defendant has violated, or is on the verge of violating, the plaintiff's rights. But that showing is not sufficient by itself. The plaintiff must also establish that he will suffer irreparable harm if the court does not grant an injunction, that the costs of an injunction do not substantially outweigh the benefits, and that the injunction is in the public interest.[79] If a plaintiff does not make these additional showings, a court cannot award an injunction, even if the plaintiff's rights will be violated without one.[80]

The law also imposes limits on damages. For example, the victim of a tort is not necessarily entitled to all the damages required to compensate him for the injuries he has suffered.[81] Some laws impose

77. Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 384 (1918) ("[A] remedy is the means employed to enforce a right.").

78. *See* JOSEPH STORY, THE MISCELLANEOUS WRITINGS, LITERARY, CRITICAL, JURIDICAL, AND POLITICAL OF JOSEPH STORY 281 (Boston, James Munroe & Co. 1835) ("There are many cases, in which the parties are without remedy at law, or in which the remedy is wholly inadequate to the attainment of justice.").

79. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). This is the default standard. Congress has altered the requirements for some injunctions. *See, e.g.*, Tenn. Valley Auth. v. Hill, 437 U.S. 153, 193–95 (1978).

80. *eBay Inc.*, 547 U.S. at 392.

81. *See* 3 DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 4 (3d ed. 2018) (stating that "the aim of damages is compensation for the plaintiff's loss" caused by violations of rights).

caps on damages.[82] Others prohibit recovery of damages for certain types of injuries, such as economic[83] or emotional harms.[84]

Even violations of constitutional rights often do not have a remedy. For example, a person cannot automatically obtain damages for a constitutional violation at the hands of a federal official. Courts will create a *Bivens*-type damages remedy[85] only if there are no special factors counseling hesitation.[86] If creating a damages remedy threatens overdeterring federal officials or would impose undue costs on the government, a court will not authorize the damages award.[87]

Remedial *Chevron* is a limitation on the remedial power of this sort. Remedial *Chevron* limits the circumstances under which a court can grant the remedy of vacating an agency action. In a challenge alleging that an agency action rests on an erroneous interpretation of a statute, a court can vacate an agency action only if the agency's interpretation of the statute is unreasonable.

Remedial *Chevron* thus markedly differs from the current *Chevron* doctrine. The current doctrine is not a remedial doctrine. Instead, it focuses on substantive law. It requires that, in determining the meaning of substantive statutes that form the basis for claims, courts defer to reasonable agency interpretations of those statutes. The focus is on what the statute means, not on whether the court has the power to vacate an agency action.

82. *E.g.*, 15 U.S.C. § 1692k(a)(2)(B)(ii) (2012) (capping class action damages under the Fair Debt Collection Practices Act at the lesser of $500,000 or 1% of the defendant's net worth); *id.* § 1640(a)(2)(B) (capping Truth in Lending damages in class actions at the lesser of $1,000,000 or 1% of the creditor's net worth).

83. *E.g.*, Glob. Quest, LLC v. Horizon Yachts, Inc., 849 F.3d 1022, 1030 (11th Cir. 2017) (discussing the "economic loss rule" limiting recovery for economic harms in negligence actions).

84. *See, e.g.*, FAA v. Cooper, 566 U.S. 284, 304 (2012) (holding that violations of the Privacy Act permit recovery of damages for pecuniary losses, but not for emotional, reputational, or other nonpecuniary harms).

85. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court created a damages action against federal officers who violate the Fourth Amendment. *Id.* at 389. Courts have extended *Bivens* to violations of various other constitutional rights. *See, e.g.*, Carlson v. Green, 446 U.S. 14, 17–18 (1980); Davis v. Passman, 442 U.S. 228, 245–47 (1979).

86. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) ("[A] *Bivens* remedy will not be available if there are 'special factors counselling hesitation in the absence of affirmative action by Congress.'" (quoting *Bivens*, 403 U.S. at 396)).

87. *See id.* at 1858 (considering "the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government" in deciding whether to recognize a *Bivens* action).

B. Consistency with the Judicial Power

Remedial *Chevron* avoids violating the judicial power of Article III. Under this approach, courts would have plenary authority to determine the meaning of statutes. They would not be obliged to defer to agency interpretations of statutes. Instead, Remedial *Chevron* would simply limit the circumstances under which a court could grant the remedy of vacating an agency's action.

Crafting remedies is the job of Congress.[88] That is because determining what remedies should be available to vindicate rights involves a variety of policy determinations. Remedies do not simply vindicate rights. They also incentivize behaviors by imposing costs on those who may have to pay those remedies, and they create transaction costs for litigants and the judicial system.[89] Congress accordingly has broad authority to regulate the relief for the violations of rights. Congress can impose caps on damages, restrict the availability of injunctions, and even refuse to create a cause of action to vindicate a right.[90]

Restricting the availability of a remedy does not interfere with the judicial power. It does not direct courts on how to interpret the law, what facts to find, or how to apply the law to the facts.[91] The restriction dictates only when relief is available under the law when a court determines that a legal violation has occurred.[92]

Remedial *Chevron* is simply a restriction on the courts' remedial power. It limits a reviewing court's ability to award the remedy of overturning an agency's action based on an erroneous interpretation to instances where the interpretation is unreasonable.

88. Switchmen's Union of N. Am. v. Nat'l Mediation Bd., 320 U.S. 297, 301 (1943) ("[I]t is for Congress to determine how the rights which it creates shall be enforced."). Of course, Congress must comply with the Constitution in framing remedies.

89. *Ziglar*, 137 S. Ct. at 1856.

90. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953) ("Congress necessarily has a wide choice in the selection of remedies . . . .").

91. *See* Crowell v. Benson, 285 U.S. 22, 60–65 (1932) (identifying these characteristics as the features of the judicial power); *see also* 4 BLACKSTONE, *supra* note 44, at *25 (defining "judicial power" as the power "to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain and by [its] officers to apply the remedy").

92. To be sure, courts have the power to fashion common law remedies when Congress has not acted. But that power is to fill gaps in the law that Congress has not yet addressed. Congress has the power to overturn common law determinations by statute. Once Congress has determined the remedy to vindicate legal rights, the courts ordinarily cannot provide a different one. *See Switchmen's Union*, 320 U.S. at 301 ("[T]he specification of one remedy [by Congress] normally excludes another.").

This type of remedial limitation—a limitation on the judiciary's ability to award a remedy based on the reasonableness of another's interpretation of the law—is common in the law. For example, under the doctrine of qualified immunity, public officials who violate a person's constitutional rights are immune from damages if the constitutional right was not clearly established at the time of the violation.[93] Qualified immunity limits the remedy based on the officer's interpretation of the law. It assumes that a plaintiff's right was violated but precludes the remedy of damages for that violation if a reasonable official could have thought his actions were legal.[94]

The law governing federal habeas corpus relief for state court convictions follows a similar scheme. The violation of a constitutional right in a state criminal proceeding does not entitle the person convicted in that proceeding to federal habeas relief. Instead, federal law limits the availability of the remedy of habeas corpus to instances where the state court's decision turns on an unreasonable application of clearly established law, as determined by the Supreme Court.[95]

Remedial *Chevron* accordingly does not impair the judicial power.

C. Avoiding the Delegation Objections

Remedial *Chevron* also avoids the objections to the delegation theory of *Chevron*.[96] Remedial *Chevron* does not depend on the theory that Congress has delegated to agencies the authority to render binding interpretations of statutes. Instead, the theory underlying Remedial *Chevron* is that the remedial power of the courts to overturn agency actions has been restricted. It accordingly does not require courts to adopt the fiction that Congress delegates interpretive authority,[97] nor does it raise the concern that Congress

93. White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam) ("Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

94. *Id.*

95. 28 U.S.C. § 2254(d)(1) (2012).

96. For objections to the delegation theory of *Chevron*, see *supra* Section I.B.2.

97. One might argue that these delegations are no longer fictions because Congress has acquiesced by not legislating to overturn *Chevron*. But one cannot put much stock in acquiescence by silence. *See, e.g.*, William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 554–56 (1992) (arguing that "Congress's failure to object" often "means virtually nothing"). That is particularly so for *Chevron* deference because the Court has not consistently applied *Chevron* to agency interpretations. *See infra* Section III.B. This inconsistency creates additional uncertainty about how to interpret congressional silence. Moreover, *Chevron* does not rest on the interpretation of a single statute. *Chevron* depends on the fiction that Congress delegates interpretive

impermissibly delegates its legislative authority by authorizing agencies to render binding interpretations.

D. Better Consistency with the APA

Remedial *Chevron* also aligns better than the current doctrine with section 706 of the APA. The current doctrine conflicts with two provisions of section 706: the preamble in section 706 and section 706(2)(A). Remedial *Chevron* avoids one of these conflicts entirely, and there is a much better case that Remedial *Chevron* avoids the conflict with the other provision than there is for the current *Chevron* doctrine. In other words, Remedial *Chevron* presents at most one of the two inconsistencies with the APA that the current doctrine does.

Unlike the current *Chevron* doctrine, Remedial *Chevron* does not violate section 706's preamble. That preamble requires "reviewing court[s]" to "decide all relevant questions of law" and to "interpret constitutional and statutory provisions."[98] Remedial *Chevron* does not require courts to defer to agency interpretations of statutes but instead limits the remedial power of the courts.

The current *Chevron* doctrine also conflicts with section 706(2)(A), which requires courts to "set aside" agency actions that are "not in accordance with law."[99] Under the current doctrine, a court cannot vacate an agency action based on its disagreement with the agency's interpretation of a statute it administers if the agency's interpretation is reasonable. One might argue that Remedial *Chevron* also conflicts with this provision because it prevents courts from setting aside agency actions that rest on interpretations of the law that conflict with the courts' interpretation of that law if that agency interpretation is reasonable.[100] It results in courts upholding agency actions that they think are not in accordance with the law.

---

authority to agencies in *each* organic statute. Thus, *Chevron* would no longer rest on a fiction only if Congress acquiesced in every statute involving *Chevron* deference.

98. 5 U.S.C. § 706 (2012).

99. *Id.* § 706(2)(A) (requiring courts to vacate agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). The various organic statutes specific to agencies contain similar language relating to judicial review. *See, e.g.*, *id.* § 7703(c) (authorizing the Federal Circuit to "hold unlawful and set aside" any action of the Merit Systems Protection Board that is "not in accordance with law").

100. *See* Euken v. Sec'y of Dep't of Health & Human Servs., 34 F.3d 1045, 1047 (Fed. Cir. 1994) (describing a "not in accordance with the law" standard as requiring "de novo" review). Section 706(2)(A)'s directive that courts vacate actions that are an "abuse of discretion" supports this conclusion, because abuse of discretion review entails de novo review of legal questions. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 448 (1996) (Stevens, J., dissenting) ("[I]t is a familiar, if somewhat circular, maxim that deems an error of law an abuse of discretion.").

But the conflict between Remedial *Chevron* and section 706(2)(A) is not as clear as it initially appears. Categorical statutes like section 706(2)(A) are frequently read to include implicit limitations.[101] For example, courts regularly interpret statutes addressing an issue previously governed by the common law to retain the substance of the common law.[102] Two strands of law support reading section 706(2)(A) to limit the power of courts to overturn agency actions based on legal errors.

The first derives from the historical limitations on the courts' power to vacate agency actions. Historically, the principal way by which courts reviewed executive actions was through a writ of mandamus.[103] This writ requires an official to take an action required by law. But that writ carried a deferential standard of review. Courts could enter mandamus against an official only if the law plainly required the official to take that action. If the official's inaction rested on a plausible interpretation of the law, mandamus would not lie.[104]

For example, in *Wilbur v. United States ex rel. Kadrie*,[105] the Court refused to issue a writ of mandamus against the Secretary of the Interior directing him to disburse funds to individuals claiming to be members of an Indian tribe.[106] The Court explained that the Secretary's decision not to pay those individuals involved "questions of law, the solution of which requires a construction of [various] acts," and that "the construction of the acts . . . is sufficiently uncertain" that

101. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 50 (2018) ("Legal texts that seem categorical on their faces are frequently . . . subject to implicit exceptions . . . ."); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1101 (2017) (discussing the theory underlying this phenomenon).

102. Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 538 (2013) ("'[W]hen a statute covers an issue previously governed by the common law,' we must presume that 'Congress intended to retain the substance of the common law.'" (alteration in original) (quoting Samantar v. Yousuf, 560 U.S. 305, 320 n.13 (2010))); Baude, *supra* note 101, at 50 ("[L]egal provisions are often subject to defenses derived from common law.").

103. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 166, 176–77 (1965). Review could also be obtained through a writ of certiorari. *Id.* at 166. The principal distinction between certiorari and mandamus lies in the formality of the agency action under review: certiorari was appropriate for formal actions on the record, while mandamus extended to more informal proceedings. *Id.* at 177. As with mandamus, a court would not issue a writ of certiorari based on "mere" error of law. *Id.* at 167.

104. *See* Decatur v. Paulding, 39 U.S. 497, 515 (1840) (refusing to grant mandamus against an official who "must exercise his judgment in expounding the laws and resolutions of Congress" when "the law authorized him to exercise discretion, or judgment").

105. 281 U.S. 206 (1930).

106. *Id.* at 222.

it left "discretion" to the Secretary.[107] Accordingly, the Court concluded, "[T]he case is not one in which mandamus will lie."[108]

This deferential standard in mandamus did not reflect judicial deference to the official's interpretation. Rather, it was a limitation on the court's ability to provide the *remedy* of mandamus.[109] Mandamus thus did not oblige courts to defer to another official's interpretation; instead, it restricted the circumstances under which courts could provide mandamus.[110] This historical backdrop supports reading section 706 to limit courts' ability to vacate agency actions.

The second strand of law supporting deferential review of agency action is the law relating to collateral review. Although it is often treated like an appeal, a challenge to "set aside" an agency action is not "a mere appeal."[111] Agencies are outside the judicial branch. A challenge is accordingly "a new proceeding" more akin to a collateral attack.[112] The law has long imposed higher standards in reviewing judgments on collateral attack than on appeals. For example, not all errors of law are a basis for a collateral attack; only if the error resulted in a "miscarriage of justice" can the judgment be set aside.[113] The reasons for this reluctance to set aside judgments are to promote comity[114] and to avoid upsetting settled expectations and the costs of unnecessary litigation.[115]

Similar logic applies to judicial review of agency actions. Judicial second-guessing leads to uncertainty about the validity of agency actions and, accordingly, discourages individuals from relying on

107. *Id.* at 221.

108. *Id.* at 222.

109. *See* Bamzai, *supra* note 9, at 951–52.

110. *Id.*; *see also* Decatur v. Paulding, 39 U.S. 497, 515 (1840) (stating that, if the Court could exercise mandamus jurisdiction, it "certainly would not be bound to adopt the construction given by the head of a department"). For this reason, Justice Scalia's dissent in *United States v. Mead Corp.*, 533 U.S. 218 (2001), stating that the restrictive mandamus standard justified *Chevron* deference, is unsound. *Id.* at 242–43 (Scalia, J., dissenting).

111. Morgan v. Daniels, 153 U.S. 120, 124 (1894).

112. *Id.* One might think that use of the term "set aside," in contradistinction to "vacate," implies collateral review. To "vacate" means to nullify or make void, *Vacate*, BLACK'S LAW DICTIONARY (10th ed. 2014), while to "set aside" means not to destroy but to preserve and disregard, *see Set Aside*, BLACK'S LAW DICTIONARY (10th ed. 2014). But the law has not carefully distinguished between "set aside" and "vacate." *See, e.g.*, HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS INCLUDING THE DOCTRINE OF RES JUDICATA § 297, at 372 (1891) (using "set aside" and "vacate" interchangeably).

113. United States v. Addonizio, 442 U.S. 178, 185 (1979) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

114. RESTATEMENT (SECOND) OF JUDGMENTS § 86 cmt. d (AM. LAW INST. 1982).

115. *See, e.g.*, BLACK, *supra* note 112, § 245, at 299 (stating that broad collateral attacks would lead to "no end to litigation and no fixed established rights").

those actions.[116] It also imposes unwarranted costs on the development of policy. The role of agencies is to implement policy through rulemaking and other agency actions. Interpretation of statutes is one step in the process to implement those policies, and agencies are better suited to make those determinations. Moreover, agencies may be more concerned about adopting interpretations with which the courts agree than about fulfilling their task of making optimal policy judgments—and even then, agencies may inaccurately predict how a court will interpret the statute.[117] Judicial review of agency action also poses acute comity concerns because of separation of powers. Instead of one part of the judiciary reviewing the work of another part of the judiciary, as in a usual collateral attack, challenges to agency action require the judiciary to review the work of another branch of government. Indeed, invoking precisely these considerations, in a pre-APA decision the Supreme Court stated that courts should be extremely reluctant to overturn agency determinations.[118]

These two historical strands provide some basis for interpreting section 706(2)(A) to limit the courts' remedial power—especially if one accepts the argument made by some that the APA sought to embrace common law flexibility instead of providing "firm expressions of legislative direction."[119] Still, it is admittedly far from the most natural reading.[120] Nevertheless, Remedial *Chevron* comports better with the APA than the current doctrine. The current doctrine conflicts with two provisions of section 706. Remedial

116. Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 9 (2015) ("Judicial review adds a level of unpredictability and uncertainty about the validity of agency action, which undermines reliance by all interested parties.").

117. VERMEULE, *supra* note 30, at 210 (stating that it is "difficult" for agencies "to predict what the eventual fate of an agency interpretation will be").

118. Morgan v. Daniels, 153 U.S. 120, 124 (1894) (imposing a heightened standard of review for assessing agency determination).

119. Manning, *Constitutional Structure and Judicial Deference*, *supra* note 28, at 635–36.

120. One might argue that prohibiting courts from vacating agency action based on erroneous but reasonable interpretations violates the APA's directive that courts "shall" set aside actions that violate section 706. 5 U.S.C. § 706 (2012). But this objection misconstrues the argument. Under Remedial *Chevron*, courts would be required to set aside actions that violate section 706. Remedial *Chevron* refines what violates section 706 to include only unreasonable, not merely erroneous, interpretations. In any event, one can plausibly argue that, because vacaturs of agency actions are similar to injunctions, courts should have discretion not to set aside all unlawful agency actions, just as they have discretion to withhold equitable relief. *See* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 292 (2003) (constructing such an argument to justify remands without vacaturs).

Chevron entirely avoids one of these conflicts and aligns better with the other one than the current *Chevron* doctrine.

III. IMPLEMENTING REMEDIAL *CHEVRON*

Remedial *Chevron* would largely retain the basic structure of the current *Chevron* doctrine. Courts would ask whether a statute is unambiguous and, if not, whether the agency's interpretation of the statute is reasonable. But the reason for the inquiry would be different. Courts would not follow these two steps to determine whether to defer to an agency's interpretation of the statute. Instead, courts would ask whether the interpretation is reasonable only to determine whether to uphold the agency rulemaking, adjudication, or other action subject to judicial review. Still, converting *Chevron* to a remedial doctrine would result in some substantial changes to how *Chevron* operates. This part discusses three of those changes.

A. Suits that Do Not Challenge Agency Action

The first significant change is that Remedial *Chevron* would narrow the situations in which *Chevron* applies. Currently, when an agency interpretation warrants *Chevron* deference, courts afford that deference in all suits, including suits that do not seek to vacate an agency action. For example, if a suit between two private individuals turns on a statute that an agency has interpreted, courts will afford *Chevron* deference to that interpretation.[121] Under Remedial *Chevron*, courts would consider the reasonableness of an agency interpretation only when adjudicating challenges to that agency's action—such as an adjudication or rulemaking. But courts would not be bound by agency interpretations in suits that do not challenge agency actions (though they could still give some weight to the interpretation under *Skidmore*).[122]

To understand the significance of the doctrinal difference, consider the following. A federal statute requires the Department of Transportation to regulate "vehicles." Interpreting the term "vehicle" to include bicycles, the Department promulgates a regulation requiring bicycles to be registered. Two lawsuits are filed. The first is

121. *See, e.g.*, Cuomo v. Clearing House Ass'n, 557 U.S. 519, 525 (2009) ("Under the familiar *Chevron* framework, we defer to an agency's reasonable interpretation of a statute it is charged with administering.").

122. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that courts should consider an agency interpretation based on "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").

a suit brought by Paul against the Department, arguing that the regulation is unlawful because "vehicles" do not include bicycles. The second is a suit by Sam against Dan, arguing that Dan violated the federal regulation by failing to register his bicycle.

Under current law, *Chevron* deference would apply in both suits. In both cases, the court would ask whether the interpretation is reasonable. If so, it would defer to the Department's interpretation in assessing whether the regulation is lawful, and it would defer to the interpretation in determining whether Dan's conduct was illegal. Things would be different under Remedial *Chevron*, because Remedial *Chevron* does not require courts to defer to agency interpretations but instead limits the circumstances under which a court can vacate an agency action. Thus, because the first case seeks to vacate a regulation, Remedial *Chevron* would apply, and the court would lack the power to vacate the regulation if it concluded that the interpretation of "vehicle" was reasonable. By contrast, Remedial *Chevron* would not apply to Sam's suit against Dan, because the lawsuit does not seek to vacate an agency action.

B. Chevron *Step Zero*

A second consequence of reframing *Chevron* as a remedy is that it would eliminate *Chevron* step zero. *Chevron* step zero limits the agency interpretations that receive *Chevron* deference. In particular, *Chevron* applies only when Congress delegates authority to the agency to make interpretations carrying the force of law and the interpretation is the product of that power.[123] Accordingly, *Chevron* deference does not extend to an agency's interpretation of a statute that it is not charged with administering[124] because, under current law, an agency's authority to interpret a statute implicitly derives from its power to administer the statute.[125] Nor, as the Court stressed in

123. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (stating that *Chevron* applies only when the interpretation is rendered based on "delegated authority to the agency generally to make rules carrying the force of law"); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 873–89 (2001) (exploring the contours of *Chevron* step zero).

124. Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 138 n.9 (1997) (stating that *Chevron* does not apply to agency interpretations of the APA because "the APA is not a statute that the [agency] is charged with administering"); Dep't of Treasury v. FLRA, 837 F.2d 1163, 1167 (D.C. Cir. 1988) ("[W]hen an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to [*Chevron*] deference.").

125. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996) ("We accord . . . [*Chevron* deference] because of a presumption that Congress, when it left ambiguity in a

United States v. Mead Corp.[126] and *Christensen v. Harris County*,[127] does an agency receive *Chevron* deference when it interprets a statute through a procedure that does not produce rules carrying the force of law—such as when an agency issues an interpretation in an informal opinion letter that lacks the force of law.[128] Instead, those interpretations receive only the lesser *Skidmore* deference, which is not binding.[129]

Applying *Chevron* step zero has proven difficult.[130] Although it is often easy to determine whether a statutory provision that an agency has interpreted is one that the agency is charged with administering,[131] these are not the only interpretations that fail *Chevron* step zero. For example, the Court has refused to extend *Chevron* deference to agency interpretations of statutes that they are charged with administering if those interpretations involve issues of broad "economic and political significance."[132] Thus, in *King v. Burwell*[133] the Court refused to defer to the IRS's interpretation of the Affordable Care Act's provision authorizing federal subsidies for insurance purchased on health care exchanges "established by the State[s]" to permit subsidies for insurance purchased on an exchange established by the federal government.[134] Although the IRS was charged with administering the statute, the Court stated that because the subsidies involve "billions of dollars in spending each year and affect the price of health insurance for millions of people," Congress "surely" would have "expressly" assigned interpretation of that provision to the IRS had it meant to do so.[135] But it is entirely unclear

statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency . . . .").

126. 533 U.S. 218 (2001).

127. 529 U.S. 576 (2000).

128. *Id.* at 587.

129. *Mead*, 533 U.S. at 234 ("*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form . . . .").

130. Merrill & Hickman, *supra* note 123, at 849–52 (identifying fourteen unanswered questions about *Chevron* step zero).

131. This is often true, but not always. For example, justices have disagreed about whether agencies are charged with administering their own jurisdictional statutes. *Compare* City of Arlington v. FCC, 569 U.S. 290, 297–301 (2013) (holding that the agency is charged with administering such a statute), *with id.* at 319–24 (Roberts, C.J., dissenting).

132. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

133. 135 S. Ct. 2480 (2015).

134. *Id.* at 2489.

135. *Id.*; *see also Brown & Williamson*, 529 U.S. at 160 (refusing to extend *Chevron* deference to the FDA's interpretation of "drugs" under the Food and Drug and Cosmetic Act to include tobacco under the major questions doctrine).

which interpretations raise sufficiently major economic and political concerns to preclude *Chevron* deference.[136]

Determining whether an agency's interpretation is the product of a procedure that has the force of law has also proved difficult to resolve. Some agency actions—such as notice-and-comment rulemaking and formal adjudication—clearly have the force of law. But the Court has explicitly said that those actions are not the only ones that trigger *Chevron* deference.[137] Yet the Court has given little guidance in determining which agency actions carry the force of law. It has suggested only that courts should look to the formality of the procedures that the agency employed.[138] These uncertainties surrounding *Chevron* step zero have generated substantial confusion in the lower courts[139] and have even led some courts to seek ways to decide cases in ways that avoid *Chevron* altogether.[140]

Remedial *Chevron* would obviate *Chevron* step zero. Courts would no longer have to resolve whether agencies have the authority to issue binding interpretations of statutes, because remedial *Chevron* does not rest on the theory that Congress has delegated interpretive power to the agencies. Instead, it rests on the idea that the APA restricts a reviewing court's ability to vacate an agency's action as contrary to law. A court may do so only if the agency acted based on an unreasonable construction of the law. That limit on courts' remedial power is not limited to statutes that the agency is charged with administering. It applies to an agency's interpretations of all laws that underlie its action. This includes interpretations of statutes that the agency is not charged with administering. For example, if an EPA rulemaking rests on a reasonable interpretation of a statute that the Secretary of the Interior is charged with administering, a reviewing

136. Sunstein, Chevron *Step Zero*, *supra* note 13, at 194 ("Major questions are not easily distinguished from less major ones . . . .").

137. Barnhart v. Walton, 535 U.S. 212, 221 (2002) ("[T]hat the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of [*Chevron*] deference . . . ." (citation omitted) (citing 5 U.S.C. § 553 (2012))).

138. United States v. Mead Corp., 533 U.S. 218, 230 (2001) ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure . . . .").

139. *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1445 (2005); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 361 (2003) (concluding that *Chevron* step zero has "sent the lower courts stumbling into a no-man's land").

140. Daniel S. Brookins, *Confusion in the Circuit Courts: How the Circuit Courts Are Solving the* Mead*-Puzzle by Avoiding It Altogether*, 85 GEO. WASH. L. REV. 1484, 1486 (2017); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1127–29 (2009) (documenting *Chevron* avoidance).

court should not overturn that rule as inconsistent with the statute. It likewise includes interpretations of statutory provisions of major economic and political significance.[141] Thus, a court should not overturn a rule authorizing the regulation of alcohol based on a reasonable construction of an ambiguous statutory provision authorizing the regulation of "beverages."[142]

Nor would courts be required to consider the procedure through which an agency arrived at its interpretation. Because courts do not defer to agency interpretations, it is irrelevant whether an interpretation was the result of a procedure carrying the force of law. Instead, the question under Remedial *Chevron* is whether the agency relied on an unreasonable interpretation of the law in taking that action.[143]

Applying Remedial *Chevron* to *Mead* illustrates the difference in the inquiries. There, Mead Corp. challenged a classification ruling by the Customs Service classifying day planners as bound notebooks.[144] The Court refused to extend *Chevron* deference to the interpretation, concluding classification rulings were insufficiently lawlike.[145] Remedial *Chevron* would lead to a different result. Because the suit challenged an agency action, a court would be prohibited from overturning the ruling if the interpretation was reasonable.[146]

141. Some have argued that the Court's refusal to afford *Chevron* deference to statutes raising major economic and political questions is a doctrine of constitutional avoidance. *See* Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 60–61 (2010); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 260. The theory is that, even if the nondelegation doctrine does not prohibit *all* delegations of interpretive authority to agencies, it could well prohibit delegations of that authority for questions that have a significant effect on society. But these concerns do not apply to Remedial *Chevron* because it does not confer interpretive authority on agencies but instead simply limits the remedial power of the courts.

142. Of course, a court could vacate the agency action if it concluded that the term "beverage" unambiguously excluded alcohol. *Cf.* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000) (concluding that Congress unambiguously excluded tobacco from "drugs" in the Food and Drug and Cosmetic Act).

143. This is not to say that an agency should be able to support its action by pressing an interpretation for the first time before the court. To avoid being deemed arbitrary and capricious, agency actions must be reasonable for the reasons that they were taken instead of based on "post hoc rationalizations." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983). Nor is it to say that agencies should be able to adopt their interpretations through an unreasonable process. *See* TNA Merch. Projects, Inc. v. FERC, 616 F.3d 588, 591–93 (D.C. Cir. 2010) (holding agency action arbitrary and capricious because it did not explain its interpretation).

144. United States v. Mead Corp., 533 U.S. 218, 224–25 (2001).

145. *Id.* at 231.

146. In *Christensen v. Harris County*, 529 U.S. 576 (2000), the Supreme Court refused to defer to an interpretation rendered in an opinion letter because the letter "lack[ed] the

This approach not only avoids *Chevron* step zero questions but also clearly delineates the line between *Skidmore* and *Chevron*.[147] Under Remedial *Chevron*, *Skidmore* would apply whenever a court is deciding whether to defer to an agency interpretation. *Chevron* would describe limitations on the court's power to vacate an agency action.

C. The Effect of Judicial Precedent

A third change is that, if a court interprets an ambiguous statute, an agency could not adopt an interpretation contrary to that interpretation. That change would be a significant departure from current law. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[148] the Supreme Court held that if a court interprets a statute that an agency is charged with administering but that it has not yet interpreted, the agency is bound by the court's interpretation only if the court rendering that earlier interpretation holds the statute to be unambiguous.[149] By contrast, if the court holds that its interpretation is merely the best reading of an ambiguous statute, the agency may subsequently adopt a different interpretation, and courts are required to defer to that new agency interpretation so long as it is reasonable.[150] This doctrine rests on the theory that statutes confer primary interpretive authority on agencies, not courts, and agencies therefore are not bound by interpretations rendered by a court, unless the court held the statute unambiguous.[151]

Remedial *Chevron* does not depend on the theory that agencies have primary interpretive authority. It accepts the premise that the judicial power includes the power to interpret statutes. Accordingly, *Brand X* would no longer apply. If a court interprets a statute that an agency has not yet interpreted, that interpretation is the law, and an agency cannot adopt an interpretation that conflicts with the court's (though the agency could adopt any other interpretation that is consistent with the court's). More generally, anytime a court renders an interpretation of a statute as part of its holding, that interpretation becomes law that binds agencies. A consequence of this change is that

force of law." *Id.* at 587. Applying Remedial *Chevron* would lead to the same result, because *Christenson* did not involve a challenge to an agency action but was a suit between state officials.

147. *See* Strauss, *supra* note 13, at 1146 (describing the confusion between *Chevron* and *Skidmore*).

148. 545 U.S. 967 (2005).

149. *Id.* at 984.

150. *Id.*

151. *Id.* at 982 ("*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps.").

it poses the risk over time of restricting agency discretion to take actions. As courts render more interpretations, those interpretations will limit the ability of agencies to adopt different interpretations of statutes to justify their actions.[152]

These interpretations would be inevitable in suits that do not challenge the agency's action but nevertheless turn on a statute that the agency administers. Remedial *Chevron* does not apply in those suits.[153] But in suits challenging agency actions as unlawful, courts would have no need to render those interpretations. In such a suit, a court would first consider if the statute is unambiguous. If it is, the court would vacate the agency action if the agency's interpretation is inconsistent with that unambiguous meaning. But if the court concludes that the statute is ambiguous, the court would assess whether the interpretation of the statute was reasonable. That assessment does not require the court to settle the meaning of the statute through its own interpretation. Instead, as under the current *Chevron* doctrine, the court must determine only whether the agency's interpretation falls within the range of permissible interpretations.[154]

To be sure, although courts need not provide their own interpretations, they could choose to do so. Such an interpretation could remove ambiguity from a statute and accordingly provide a basis for vacating an otherwise reasonable agency interpretation because of the rule against prospective-only application.[155] But separation of powers considerations suggest that courts should generally avoid unnecessarily resolving the meaning of ambiguous statutes that agencies administer.[156] Congress regularly confers broad

152. *See id.* at 1016 (Scalia, J., dissenting) (explaining how statutory ambiguities "resolved finally, conclusively, and forever, by federal judges" produce an ossification of statutory law).

153. To avoid limiting agencies' interpretive options, courts in these suits could adopt a doctrine akin to constitutional avoidance: if a case involving a statute that an agency administers could be decided on another ground, the court should decide the case on that other ground.

154. Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 651 (2015) (explaining that when a court determines whether an interpretation of a law is reasonable, it does not settle the meaning of law).

155. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 216 (1995) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." (quoting Rivers v. Roadway Express, Inc., 511 U.S. 298, 312–13 (1994))).

156. Some judges might be inclined to interpret ambiguous statutes because they believe that agencies have too much power and judicial interpretations help constrain that power. *Cf.* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment) (advocating constraining agency

discretion on agencies so that they have the flexibility to adopt effective policies. The breadth of authority derives not only from expansive terms in statutes directed at agencies but also from ambiguity in statutory terms. Unnecessary judicial interpretations of these ambiguous terms thus can impair an agency's ability to carry out its duties.[157]

These considerations do not apply to agency interpretations of statutes that agencies are not charged with administering (such as the APA). Those statutes are not designed to confer policy discretion on the agencies. Accordingly, there is less reason for courts to avoid interpreting those statutes, though they still could choose to assess only the reasonableness of agency interpretations of those statutes if doing so made sense.

CONCLUSION

Under Remedial *Chevron*, courts would no longer defer to agencies' interpretations of statutes that they administer. Remedial *Chevron* would instead limit the ability of courts to provide the remedy of vacating agency action. In a challenge to an agency action alleging that the action rests on an erroneous interpretation of the law, a court could vacate the agency action only if the agency's interpretation of the statute was unreasonable.

Refashioning *Chevron* in this way would capture the institutional reasons for *Chevron* deference, while also avoiding the objections that *Chevron* deference violates Article III and the nondelegation doctrine and depends on a fiction. It would also create less tension with the APA, obviate difficult *Chevron* step zero questions, and draw a clear line between *Chevron* and *Skidmore*.

power). But it is possible that the concerns of those judges might be allayed by the reduction of agency power under Remedial *Chevron* compared to the current *Chevron* doctrine.

157. This argument finds support in the Court's approach to qualified immunity. Whether an official is entitled to qualified immunity depends on two questions that closely track the inquiry under Remedial *Chevron*: first, whether the officer violated the law; and second, whether the officer's actions were clearly prohibited by law. Although the Court once held that courts must answer the first question before addressing the second, Saucier v. Katz, 533 U.S. 194, 201 (2001), it has dispensed with that obligatory order of operations, Camreta v. Greene, 563 U.S. 692, 707 (2011). It now has adopted the opposite presumption, stressing that courts should "think hard, and then think hard again" before unnecessarily addressing the merits of a constitutional claim because resolving whether a right is clearly established has less consequence than resolving a constitutional issue. *Id.*