

Vive la Deference?: Rethinking the Balance Between Administrative and Judicial Discretion

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ABSTRACT

America’s constitutional structure relies on checks and balances to prevent a concentration of excessive discretionary power in the hands of any individual governmental official or body, promoting effective government while protecting individual liberty and state sovereignty. Federal courts have been sensitive to threats to upend this balance of power where one branch of the federal government intrudes on powers assigned to another, but less so to changes that increase federal power overall—including, notably, unchecked discretionary power of administrative officials. An elastic Commerce Clause and ineffective nondelegation doctrine leave judicial review an especially important safeguard, effectively the law’s last chance for restraining official action. The Chevron doctrine, however, as it has often been deployed, grants deference to a large number of administrative actions on a fictive supposition that Congress intentionally conferred discretionary authority for those actions. Although the doctrine is defended, reasonably, as constraining a different sort of discretionary government authority—resting in the hands of judges rather than administrators—Chevron deference has reduced the effectiveness of judicial review as a limitation on administrative power. This Essay addresses the changes in constitutional limits on official power, the function of the Chevron doctrine, and potential alternatives as a check on discretionary administrative power. It concludes that a stronger requirement of actual grants of discretion is more legally defensible and more consistent with the rule of law.

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INTRODUCTION: *CHEVRON*'S CONTEXT

Limiting discretionary government power is critical to protection of liberty even as a measure of discretion in the exercise of government authority is inevitable and often desirable.¹ As thoughtful observers of government's relation to liberty have long been aware, the tension between discretion and constraint requires a government structure that does not prevent the exercise of power but that divides and channels power.² That is the essence of the American constitutional structure as originally conceived, one that for the most part has functioned exceptionally over more than 200 years. Maintaining the balance represented by that structure puts a premium on confining government power within established limits, which at a minimum requires identifying the scope of a given government power, the degree to which it confers discretion to exercise that power, and the agents authorized to exercise that discretion.³

One aspect of this task—specifying the bounds of administrators' authority to interpret legislative commands that frame the terms of administrative power and the reciprocal degree of “deference” the

¹ See, e.g., RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 4–20, 28–29 (2001); LON L. FULLER, *THE MORALITY OF LAW* 46–94, 209–13 (rev. ed. 1969); FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 80–87 (1944); MICHAEL OAKESHOTT, *The Rule of Law*, in *ON HISTORY AND OTHER ESSAYS* 119, 130–32, 136–40 (1983); JOSEPH RAZ, *The Rule of Law and its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 213–14 (1979); Michael C. Dorf, *Prediction and the Rule of Law*, 42 *UCLA L. REV.* 651, 680–89 (1995); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. CHI. L. REV.* 1175, 1178–83 (1989); see also PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994) (generally advocating increased discretion as a way to improve administrative decisions).

² See, e.g., ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 112–21, 246–71 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835); *THE FEDERALIST* NOS. 47–51 (James Madison).

³ See, e.g., CASS, *supra* note 1, at 4.

courts owe to administrative decisions—has come to dominate legal discourse on the subject. The *Chevron* doctrine (at least loosely based in the United States Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁴) is the poster child for attempts to work out the particulars of the relationship between administrative authority and judicial power.⁵ Its two-step test (or its one-step or three-step test, depending on how one reads the succeeding cases interpreting and applying *Chevron*)⁶ frames the Möbius-like arguments on what judges will review de novo and what they will review less critically, for reasonableness rather than rightness.⁷ *Chevron* is the most cited and most written about administrative law decision, and one of the most noted decisions in any field of law.⁸ Its impact on administrative behavior and on judicial review of administrative decisionmaking, its contribution to public values, and its consistency with or infringement of statutory command and constitutional structure continue to provide grist for debate.⁹ *Chevron* deference, good or

4 *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). The disconnect between the original decision and the present form of the doctrine that bears its name has been described by others. See, e.g., Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 3–5 (2013); Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINSTRATIVE LAW STORIES 398, 398–402 (Peter L. Strauss ed., 2006)

5 See, e.g., Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 781–87 (2010); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1256 (1997); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 833–34 (2001); Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 301–02 (1988); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 190–91 (2006).

6 See, e.g., Kenneth Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611, 611 (2009); Merrill & Hickman, *supra* note 5, at 834; Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 597–98 (2009); Sunstein, *supra* note 5, at 190–91.

7 See *Chevron*, 467 U.S. at 842–45.

8 See, e.g., Beermann, *supra* note 5, at 782; Lawson & Kam, *supra* note 4, at 2; Thomas W. Merrill, *Justice Stevens and the Chevron Puzzle*, 106 NW. U. L. REV. 551, 552–53 (2012); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight,"* 112 COLUM. L. REV. 1143, 1144 n.1 (2012).

9 In addition to the works cited in notes 4–8 above, see, for example, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 365–67 (1986); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255, 262–63, 266–67 (1988); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 115, 120 (1998); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1087–89 (2008); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453–56 (1989); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine*

bad, remains a popular topic for administrative law conferences and symposia, and discussion of its contours takes up a significant share of instructional space in administrative law courses.¹⁰

Though attention to the details of *Chevron*'s application is unsurprising, the issues of deference and allocation of interpretive authority that *Chevron* raises must be understood in their larger context. Narrow issues of statutory interpretation are critical to individual decisions, but the degree to which courts defer to administrative determinations across a range of cases has implications for the distribution of power in our society¹¹—and the ways in which government legitimately can impose burdens on individuals and enterprises—that cannot be addressed without advertence to the structure of government. These issues have roots going back well before *Chevron* and generated controversy long before that decision. For example, the Administrative Conference of the United States, whose fiftieth anniversary is being celebrated in this volume, addressed questions related to high-profile political attempts to limit judicial deference to administrative interpretations of law in reports and recommendations issued in 1979 and 1981.¹² And before *Chevron*, scholars were penning thoughtful commentary on exactly the same issues raised by that case and its progeny, albeit without reference to “step one,” “step two,” or “step zero,” and at a conspicuously lower volume.¹³

in the U.S. Courts of Appeals, 15 YALE J. ON REG. 1, 3–5 (1998); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 986–88; see generally Honorable Antonin Scalia, Assoc. Justice, United States Supreme Court, Duke Law Journal Administrative Law Lecture: Judicial Deference to Administrative Interpretations of Law (Jan. 24, 1989), in 1989 DUKE L.J. 511.

¹⁰ See generally RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 159–98 (6th ed. 2011) (textbook for Administrative Law course); *Chevron v. NRDC: A Thirtieth Anniversary Commemoration*, 66 ADMIN. L. REV. 235 (2014) (symposium publication addressing *Chevron* decision).

¹¹ See Ralph F. Fuchs, *Administrative Determinations and Personal Rights in the Present Supreme Court*, 24 IND. L.J. 163, 167 (1949) (“The problem is the old one of judicial regard for administrative determinations. . . . [T]he central issue continues to be the fascinating one of the proper distribution, or separation, of the powers of government”); Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive’s Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141, 146–51 (2012) (analyzing the implications of *Chevron* and judicial deference on distribution of powers between branches).

¹² See ACUS Recommendation 79-6, 1 C.F.R. § 305.79-6 (1988); ACUS Recommendation 81-2, 1 C.F.R. § 305.81-2 (1988). The Conference took a similar position following the decision in *Chevron* in ACUS Recommendation 89-5, 1 C.F.R. § 305.89-5 (1993).

¹³ See, e.g., Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985); Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239 (1955); Nathaniel L. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470 (1950).

Deeper concerns about the threat to liberty from excessive administrative discretion were central to choices made in framing our constitutional structure, in observations about the threat of despotism in democracy, and, as Professor Hamburger's recent work reminds us, to a history of disputes across Europe that informed debate over administration for three centuries.¹⁴ The assignment of policymaking and law-enacting functions to the political branches within defined contours, and of law-interpreting functions to the courts, did not leave obvious room for large-scale administrative entities with broad discretionary powers, particularly powers divorced from service functions such as mail delivery or benefits distribution.¹⁵

Aspects of constitutional structure designed to protect against expansive government power (such as limitations on the federal sphere to certain enumerated powers and confinement of all federal legislative power to the Congress, enforced through the nondelegation doctrine), however, have proven difficult to enforce.¹⁶ Further, the softening of some constraints has not led courts to see increased importance in enforcement of other constraints.¹⁷ Although meaningful restraint on the reach of federal power has been all but abandoned, and the nondelegation doctrine remains on life-support, vague delegations of authority with virtually no determinate legislative instructions frequently have been upheld.¹⁸ With the nondelegation doctrine's quiescence, if not desuetude, standards for review of administrative actions have taken on greater importance as the last line of legal restraint on most officials in the federal government. Practical constraints—rooted in widespread commitment to a framework of controlled political power—remain the most important limitation on expansive national power, but the legal framework, and fidelity to it,

¹⁴ See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 473–78 (2014); see also, e.g., DE TOCQUEVILLE, *supra* note 2, at 690–94; THE FEDERALIST NOS. 47–51 (James Madison).

¹⁵ See, e.g., HAMBURGER, *supra* note 14, at 4–8.

¹⁶ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 373–74, 412 (1989) (discussing the Court's "approval" of "broad delegations" of authority). Similarly, the Supreme Court has struggled to put meaningful bounds around what was initially a limited federal power over interstate commerce. See, e.g., *Perez v. United States*, 402 U.S. 146, 150–55 (1971) (discussing the growth of the federal government's commerce power and its relationship to "loan sharks").

¹⁷ See *infra* Part III.

¹⁸ See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486 (2001) (upholding the Clean Air Act), *aff'g in part, rev'g in part*, *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999); *Mistretta*, 488 U.S. at 374 (upholding Sentencing Reform Act); *Yakus v. United States*, 321 U.S. 414, 420–23 (1944) (upholding Emergency Price Control Act of 1942); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 214–17, 224 (1943) (upholding the broad regulatory powers given to the Federal Communications Commission by the Federal Communications Act). For a review of the doctrine more generally, see, for example, CASS ET AL., *supra* note 10, at 16–33.

cannot be dismissed.¹⁹ In that context, how much leeway judges give to administrative exercises of discretion is critically important. Indeed, it is effectively the last opportunity for law to constrain official power.

Looking at the scope of administrative discretion as a matter of judicial *deference* to administrators' interpretations of law, however, is misleading. The best way to understand the concept of "deference" within the constitutional structure is that laws can give administrators leeway to make certain choices, such as choosing criteria for selecting among competing applicants for a radio broadcast license.²⁰ Courts alone can decide whether the law does that.²¹ When it does, the law generally requires a second judgment whether the discretion has been exercised in accord with generally applicable principles and specific additional procedural or substantive requirements. That was the set of review mandates adopted in the Administrative Procedure Act ("APA"),²² which largely synthesized prior practices.²³ The nature of the commitment of a decision to an administrator's discretion may not always have been in the most obvious terms. However, before deciding whether more deferential review of a policy decision was in order, the courts first considered the nature and extent of the discretion in choosing the reading of the relevant statute.²⁴

Despite the APA's instruction on the choice of review standards, depending on the nature of the decision being reviewed, the absence of obvious, direct commitments of discretion in many cases where a degree of policy discretion seems a plausible presumption has given judges difficulty assessing the appropriate intensity of review for ad-

¹⁹ See, e.g., Cass, *supra* note 1, at 19; Scalia, *supra* note 1, at 1182–83.

²⁰ See Communications Act of 1934, 47 U.S.C. § 307 (2012) (providing for allocation of broadcast outlets in a "fair, efficient, and equitable" manner and award of broadcast licenses to advance "public interest, convenience, and necessity").

²¹ See, e.g., Scalia, *supra* note 9, at 516; Strauss, *supra* note 8, at 1163; see also *Stern v. Marshall*, 131 S. Ct. 2594, 2609, 2620 (2011) (noting that non-Article-III decisionmaking on matters within the scope of judicial power is limited to advisory, not final, status, and cannot be effectively insulated against full review).

²² Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–559, 701–706 (2012)).

²³ See 5 U.S.C. § 706 (2012); Beermann, *supra* note 5, at 790; Duffy, *supra* note 9, at 131. The APA's general restatement of earlier decisions does not deny the importance of political forces contending for particular treatment of rules for agency action and for judicial supervision. See generally McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999) (discussing political impetus for the APA); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. REV. 1557 (1996) (providing political background to enactment of the APA).

²⁴ See, e.g., *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 130–31 (1944).

ministrative actions.²⁵ *Chevron* is the Court's principal effort to address that issue. The question at bottom is one of balance: how clear must Congress be in its assignment of authority for courts to conclude that a matter is within the scope of administrative discretion? Support for the *Chevron* formulation of instructions to courts has drawn in part on legitimate concerns that the alternative necessarily is a more complex, less clear set of directives to judges, with concomitant increases in commitment of discretion to officials who are even less democratically accountable than the administrators whose discretion would be curtailed.²⁶

Certainly, concerns over expansive judicial power that support *Chevron* have weight: some alternative tests for reviewing executive action are unquestionably more complex than *Chevron* and probably increase the risks of judicial misbehavior in ways that should give observers pause.²⁷ But the concept of *Chevron* deference likely has increased discretionary power in administrative hands while also deflecting attention from the real constraints that should function to limit expansion of unaccountable and unconstrained government power. This Essay briefly compasses that argument, looking at *Chevron* in the context of structural restraints on federal administrative power (and their current vitality). The Essay reviews the basic constitutional design limiting power in particular officials' hands,²⁸ the demise of effective limits on federal power (especially the commerce power),²⁹ and the abandonment of serious constraints on the delegation of broad policymaking power to administrators.³⁰ Then, the Essay turns to the importance and nature of judicial review of

²⁵ Remarks by the Honorable Antonin Scalia for the 25th Anniversary of *Chevron v. NRDC*, delivered at the American University Washington College of Law (Apr. 2009), in 66 ADMIN. L. REV. 243, 247 (2014).

²⁶ See, e.g., Scalia, *supra* note 9, at 516; Remarks by the Honorable Antonin Scalia, *supra* note 25, at 244. Compare Pierce, *supra* note 5, at 310 (noting that the *Chevron* two-step "allocate[s] policy making responsibility from judges to agencies—an effect with significant benefits"), and Scalia, *supra* note 9, at 516 (stating that *Chevron* replaced the statute-by-statute evaluation "with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant"), with *United States v. Mead Corp.*, 533 U.S. 218, 238 (2001) (denying *Chevron* deference because "different statutes present different reasons" for granting or denying deference, and Justice Scalia's approach impermissibly simplifies the test), and Breyer, *supra* note 9, at 379 (arguing for a more multifaceted test for the applicability and scope of deference).

²⁷ See Remarks by the Honorable Antonin Scalia, *supra* note 25, at 247–50 (highlighting varying results reached by courts purporting to apply the same levels of deference).

²⁸ See *infra* Part I.

²⁹ See *infra* Part II.

³⁰ See *infra* Part III.

administrative decisions.³¹ After considering the debates over principles of deference in judicial review associated with *Chevron*,³² the Essay concludes that it is time to return the focus of government power where it belongs: to effective restraints on discretion that reflect rule-of-law considerations embedded in constitutional design.³³

I. CONSTRAINING GOVERNMENT: UNDERLYING STRUCTURE

The basic predicate of American constitutional government is that government can function effectively without threatening individual liberty if power is allocated among government levels and agents in a manner that deprives any government officer (and any single institution of government) of substantial, unchecked discretionary power.³⁴ To that end, the Constitution creates a limited sphere of national-federal authority that includes powers designed to check tendencies toward self-interested (and nationally harmful) state action (such as some state impositions on interstate commerce).³⁵ It assigns the federal government authority to fund and oversee nationally helpful collective action, e.g., the common defense and currency.³⁶ It maintains state power over more locally significant matters and over certain inputs to federal power (such as the election of senators and of the President).³⁷ It inhibits federal actions most feared as entrenching excessive national power or imposing disproportionate burdens on particular states.³⁸ And it divides power among the three branches of the national government, requiring each to depend in important ways on the others.³⁹

³¹ See *infra* Part IV.

³² See *infra* Part IV.

³³ See *infra* Part V.

³⁴ See, e.g., THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961) (“[T]he constant aim [of the subordinate distributions of power] is to divide and arrange the several offices in such a manner as that each may be a check on the other . . .”).

³⁵ See, e.g., U.S. CONST., art. I, § 8 (describing Congress’s powers to regulate interstate commerce, regulate the value of money, and issue patents, among others); U.S. CONST., art. I, § 10 (limiting states’ powers to enter into treaties and lay duties on imports and exports, among others).

³⁶ See, e.g., U.S. CONST., art. I, § 8, cls. 5, 12.

³⁷ See, e.g., U.S. CONST., art. I, §§ 3, 4; U.S. CONST., art. II, § 1. Despite amendments altering important aspects of the initial constitutional structure, the basic design giving greater state control to some aspects of selection of federal officials remains in place.

³⁸ See, e.g., U.S. CONST., art. I, § 9 (preventing, for example, the passage of any bill of attainder or capitation tax); U.S. CONST., art. IV, § 3 (preventing, for example, new states from being formed within jurisdiction of current states and prejudice against any “[c]laims . . . of any particular State”).

³⁹ See, e.g., U.S. CONST., art. I, § 1 (granting the legislative power to the Congress); U.S.

The Supreme Court has been reasonably vigilant in recent years in checking some of the avenues by which this constitutional structure can be undermined. For instance, it has struck down congressional efforts to by-pass executive authority over appointments of “officers of the United States”⁴⁰ and over their removal as well.⁴¹ The Supreme Court also found unconstitutional laws that created a “legislative veto” over decisions of executive departments, finding those provisions contrary to the requirement that laws be presented to the President for approval or veto.⁴² It found efforts to give the President a “line item veto” impermissibly changed the constitutional structure allowing the President to approve or disapprove legislation, but not to amend it as he sees fit.⁴³ The Court similarly held invalid a legal provision that instructed courts to reopen already issued judgments in order to apply a different decisional rule.⁴⁴ Additionally, the Court struck down a regime that assigned essentially final and binding adjudicatory authority over private disputes to officials who were not appointed or tenured in conformity with Article III’s requisites.⁴⁵ Both of those initiatives transgressed structural commitments of judicial power conferred to Article III courts.⁴⁶ And just recently, the Court held unconstitutional presidential appointments made during a purported congressional “recess” that were found to have stretched that term beyond its received meaning in order to bypass senatorial resistance to approving the President’s specific choices.⁴⁷ Although the results in any of these decisions might be challenged, it is significant that the Court has tried to enforce the constitutional structure that separates and delimits government power when the issue involves interfer-

CONST., art. II, § 1 (granting the executive power to the President); U.S. CONST., art. III, § 1 (granting the judicial power to the Supreme Court).

⁴⁰ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 143 (1976).

⁴¹ See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 514 (2010); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

⁴² See, e.g., *INS v. Chadha*, 462 U.S. 919, 955–58 (1983). The legislative veto provision at issue in *Chadha* had the additional defect of declaring that disapproval of the relevant executive action by a single house of Congress would suffice to alter the action’s legal status. See *id.* at 925 (explaining the operation of the “one-House veto” at issue).

⁴³ See *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998).

⁴⁴ See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995).

⁴⁵ See *Stern v. Marshall*, 131 S. Ct. 2594, 2601, 2620 (2011); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982).

⁴⁶ See, e.g., *Stern*, 131 S. Ct. at 2609 (“Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges.”).

⁴⁷ See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2577 (2014).

ence by one branch of the federal government with the authority reserved to another of the branches.⁴⁸

II. LOOSENED CONSTRAINTS: FEDERAL POWER

The Court has been less attentive, however, to alterations of the governing constitutional structure that expand federal authority into spheres formerly reserved for state action. That is true even when the expansion also increases executive power in relation to the other branches or, in a much smaller class of cases, when it tilts power toward the legislature. The most obvious examples of erosion of constraints on federal power involve the Interstate Commerce Clause. Supreme Court precedent expanded Commerce Clause power from narrow regulation of commerce that moved between states to broad regulation of strictly local commercial activities, even trivially valued ones, if they could be said to be part of a class of activities that, in total, could exert a significant impact on national commerce. For example, in *Wickard v. Filburn*⁴⁹ the Court approved federal directives limiting the precise acreage a farmer could devote to growing wheat, even if planting yielded a tiny amount of wheat used strictly for home consumption.⁵⁰ Although the 239 bushels of wheat at issue in *Wickard* were a mere rounding error in the national wheat market, it was enough that all wheat consumed was a potential replacement for wheat that could have moved in interstate commerce and that wheat farmers as a class could grow enough “home use” wheat to have a significant market effect.⁵¹ The Court declared that

even if [the] appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’⁵²

The Court relied on the *Wickard* formulation later in *Perez v. United States*⁵³ to uphold federal criminal penalties for local “loan-

⁴⁸ That does not mean that the Supreme Court has been uniformly diligent in combatting actions that are at a minimum incredibly difficult to square with constitutional structure. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 412 (1989); *Morrison v. Olson*, 487 U.S. 654, 696–97 (1988); *infra* text accompanying notes 68–75.

⁴⁹ *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁵⁰ *Id.* at 127–28.

⁵¹ See *id.* at 114, 128–29.

⁵² *Id.* at 125.

⁵³ *Perez v. United States*, 402 U.S. 146 (1971).

sharking” activities, not using interstate commerce or interstate communications or involving any interstate conduct, on the assertion that such local activities could, as a class, affect interstate lending.⁵⁴ And *Hodel v. Virginia Surface Mining & Reclamation Ass’n*⁵⁵ approved federal regulation of strip mining because of its asserted contributions to erosion, flooding, harm to “fish and wildlife habitats,” “impairing natural beauty,” “degrading the quality of life in local communities,” and imposing costs on “commercial waterway users.”⁵⁶ Despite the local concentration of these effects, the Court deemed Congress’s conclusion that they had an impact on interstate commerce rational and upheld the regulation.⁵⁷

The approach approved in cases such as *Wickard*, *Perez*, and *Hodel* essentially eliminate any meaningful limitation on substantive congressional power. As Justice Clarence Thomas has pointed out, this reading of the Interstate Commerce Clause is impossible to square with the language of the clause as a whole, with contemporary exposition of its meaning, and with almost the entirety of the constitutional provision in which the Commerce Clause is found (Article I, Section 8).⁵⁸ Specific grants of authority, for instance, to coin money, establish rules for bankruptcy, punish counterfeiting, fix standard weights and measures, and almost all other enumerated powers would have been surplus under the *Wickard-Perez-Hodel* interpretation of the commerce power.⁵⁹

Concerns about the tensions between the *Wickard* test, constitutional text, and about giving the national government essentially plenary power, in contrast to the predicate of limited powers, have supported periodic efforts to reassert limiting concepts around federal power. In *United States v. Lopez*,⁶⁰ a bare majority of the Court found that the Commerce Clause could not authorize Congress to criminalize possession of guns in school zones.⁶¹ *United States v. Morrison*⁶² invalidated a provision creating a federal civil action for victims of “gender-motivated” crimes of violence.⁶³ The law reached the cate-

⁵⁴ See *id.* at 154–55.

⁵⁵ *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1981).

⁵⁶ See *id.* 277–80.

⁵⁷ *Id.* at 280.

⁵⁸ See *United States v. Lopez*, 514 U.S. 549, 585–89 (1995) (Thomas, J., concurring).

⁵⁹ See *id.* at 588–89.

⁶⁰ *United States v. Lopez*, 514 U.S. 549 (1995).

⁶¹ See *id.* at 549–50.

⁶² *United States v. Morrison*, 529 U.S. 598 (2000).

⁶³ See *id.* at 626–27.

gory of noneconomic, local, violent criminal conduct that historically had been understood to be reserved to the states; such a highly attenuated connection of this conduct to interstate commerce did not suffice for the majority to bring this within Congress's power.⁶⁴ More recently, in *National Federation of Independent Business v. Sebelius*,⁶⁵ five Justices stated that the Commerce Clause could not sustain legislation requiring purchases of healthcare insurance, reaching even strictly local health-related conduct that did not constitute commercial activity or, indeed, activity at all.⁶⁶ In the words of the four-Justice dissent, "[w]hatever may be the conceptual limits upon the Commerce Clause . . . they cannot be such as will enable the Federal Government to regulate all private conduct"⁶⁷

Despite these efforts to fashion at least a modest constraint on federal power, the Supreme Court, and more broadly the majority of federal courts, have proven both an inconstant and ineffective defense against federal expansionism. The explanation is not hard to find. While, as Justice Thomas asserts, the notion of "commerce" does have some touchstones, Congress and the President often are rewarded for expanding the scope of their office, and the linguistic tethers to support judicial restriction are relatively weak.⁶⁸ Beyond that, past judicial efforts to restrain expansion often have been met with strong attacks on the Court, including Franklin Roosevelt's famous Court-packing plan in response to several pre-*Wickard* decisions striking down legislation as beyond constitutional permit.⁶⁹

Concern over raw politics may not be the only reason for hesitation. Justice Breyer, dissenting in *Lopez* along with Justices Stevens, Souter, and Ginsburg, adds a theoretical basis for less muscular judicial enforcement of constraints on Congressional assertions of power,

⁶⁴ See *id.* at 612–19.

⁶⁵ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

⁶⁶ See *id.* at 2577, 2587 (Roberts, C.J.) (writing for himself, discussion not joined by other Justices joining remainder of opinion for the Court); *id.* at 2642 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). The discussion of the Commerce Clause issue in Chief Justice Roberts's opinion, however, appears to be dictum, in contrast to the discussion in the Scalia-Kennedy-Thomas-Alito joint dissent. The four Justices concurring in the outcome and joining other portions of the Chief Justice's opinion dispute both the degree of effect on commercial activity needed to sustain legislation under the commerce power and the significance of the distinction between action and inaction. See *id.* at 2609 (Ginsburg, J., concurring).

⁶⁷ *Id.* at 2643 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

⁶⁸ *Id.* at 2677 (Thomas, J., dissenting).

⁶⁹ See, e.g., William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347.

at least of commerce-based power.⁷⁰ The *Lopez* dissenters' argument cautions against judicial intrusion on decisions—such as the assessment of the significance of a threat to public concerns and the best means for addressing it—that rest more within the competence of political branches than of the judiciary.⁷¹ Other Justices and scholars have emphasized another branch of judicial restraint theory. In particular, they assert that other forces, such as the participation of state representatives in the federal decisional process—individuals whose federal offices are subject to direct or indirect control of the states and state subdivisions that select them—provide more effective (and sufficient) safeguards against intrusion on state prerogatives than judicial enforcement.⁷²

However much one agrees or disagrees with these arguments for limiting judicial efforts to restrict federal government expansionism, they contribute to the prevailing norm against aggressive judicial policing of federalism issues.⁷³ They point to practical and theoretical reasons for expecting pushback whenever courts intrude on federal initiatives.⁷⁴ This is, no doubt, part of the reason courts have exercised so little influence on this margin. In any event, the result has been that, more often than not, a majority of the Supreme Court, as well as the lower federal courts, has accepted the notion caricatured by the dissenting Justices in *National Federation of Independent Business* as assuming that the Courts' job when confronting an assertion of federal power is to seek any rational basis for confirming that the issue addressed by the assertion falls within "the unenumerated 'problems'

⁷⁰ See *United States v. Lopez*, 514 U.S. 549, 615–18 (1995) (Breyer, J., dissenting).

⁷¹ See *id.* at 616–17 (noting that courts must be deferential to Congress in examining link between regulated activity and interstate commerce "because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy").

⁷² See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–52 (1985) (describing "the principal means chosen by the Framers" to prevent Congressional overreach as giving "the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government"); Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1556–57, 1594–96 (1977) (asserting it is politically wise for Congress not to overstep its bounds); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954) (discussing the tendency of Congress to preserve state power). But see John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1312–13 (1997) (generally disagreeing with both the predicates and the conclusions of commentators such as Dean Choper and Professor Wechsler).

⁷³ See, e.g., Yoo, *supra* note 72, at 1311–12.

⁷⁴ See, e.g., *id.* at 1316–17 (discussing the theoretical and "functional and political" justifications for limiting judicial review advanced by proponents of the "political safeguards of federalism" theory).

that the Constitution authorizes the Federal Government to solve.”⁷⁵ That may not always be the case, but it is a safer betting proposition that courts will find ways to uphold questionable exercises of federal power than that they will unreasonably limit it.

III. LOOSENED CONSTRAINTS: DELEGATION

The Court also has been less than fully engaged over time in responding to challenges to broad commitments of discretionary authority to administrative officials. As already noted, the Court has found constitutionally impermissible the assignment to non-Article-III personnel of substantial, binding adjudicative authority within the ambit of federal judicial power.⁷⁶ Allocations of authority to perform executive functions, however, have been less critically and less consistently policed. The Supreme Court at times has approved assignment of these functions to officials who are insulated from presidential control in various ways, often after determining that the functions are not strictly executive in nature.⁷⁷

The basis for that decision is of questionable import. The assertion in *Humphrey's Executor v. United States*⁷⁸ that the authority at issue constituted the exercise of “quasi-legislative or quasi-judicial powers,”⁷⁹ while distinguishing that case from the earlier decision in *Myers v. United States*,⁸⁰ blinks the reality that executive authority commonly has attributes of rule-crafting and of adjudication.⁸¹ Deciding what considerations should guide decisions on prosecution or li-

⁷⁵ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2650 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); see *id.* at 2616 (Ginsburg, J., concurring) (“When appraising [economic or social] legislation, we ask only (1) whether Congress had a ‘rational basis’ for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a ‘reasonable connection between the regulatory means selected and the asserted ends.’”).

⁷⁶ See *supra* note 45 and accompanying text.

⁷⁷ See, e.g., *Humphrey's Executor v. United States*, 295 U.S. 602, 629–30 (1935); *Wiener v. United States*, 357 U.S. 349, 355–56 (1958).

⁷⁸ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

⁷⁹ *Id.* at 628 (emphasis added).

⁸⁰ *Myers v. United States*, 272 U.S. 52 (1926). In *Humphrey's Executor*, the Court distinguished the Federal Trade Commission from the Post Master reviewed in *Myers v. United States*. *Humphrey's Executor*, 295 U.S. at 627–28. The Court found that the Postmaster was solely executive because the Postmaster is restricted to the performance of executive functions with no duties related to the legislative or judiciary. *Id.* The Federal Trade Commission, although an executive authority, also performed legislative functions by making reports for Congress, and also performed judiciary functions by acting as master in chancery. *Id.* at 628.

⁸¹ See *Humphrey's Executor*, 295 U.S. at 628 n.* (dismissing a provision of the Federal Trade Commission Act that authorized the President to order investigations and reports as “col-lateral”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2322 (2001).

cense awards or any of a range of other administrative actions necessarily encompasses policymaking of some variety. Similarly, the disposition of applications for administrative action on veterans' benefits, exemption from filing requirements, or determination of tax liability requires individualized adjudication. Those attributes alone do not bring the conduct within either the legislative or judicial powers of the federal government, vested by the Constitution in the Congress and the Article III courts, respectively. If *all* conduct that is analogous in some degree to policymaking and adjudicating is beyond the Constitution's description of executive power, no executive power of any significance could exist. In other words, the distinction in *Humphrey's Executor* always has been one that lacked a meaningful purpose.⁸²

The Court essentially admitted as much in more recent cases, upholding limitations on presidential control even where conceding that the conduct at issue is within the executive power. The Court's nearly unanimous but much regretted decision in *Morrison v. Olson*,⁸³ upholding the byzantine structure of the independent counsel created by the Ethics in Government Act of 1978, is the clearest example.⁸⁴ As Justice Scalia says in dissent: "Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing But this wolf comes as a wolf."⁸⁵ It is debatable how much later decisions undercut the force of *Morrison* as a precedent,⁸⁶ but the case remains a potential impediment to efforts to enforce constitutional strictures against efforts to reallocate power within the federal sphere.

The most obvious illustration of the softness of judicial enforcement of structural limitations is the "nondelegation doctrine."⁸⁷ The doctrine, which the Supreme Court once deemed "a principle univer-

⁸² For broader discussion of the problem of interference with presidential control of exercises of executive power, see, for example, Stephen G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Kagan, *supra* note 81, at 2322 (suggesting that lower courts have down played the distinction between the legislative, executive, and judiciary attributes in more recent cases); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 94 (discussing how the "weakness of the opinion" can be partly attributed to the historical importance of the New Deal at the time).

⁸³ *Morrison v. Olson*, 487 U.S. 654 (1988).

⁸⁴ *Id.* at 659–60.

⁸⁵ *Id.* at 699 (Scalia, J., dissenting).

⁸⁶ See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501–02 (2010) (adopting a much more skeptical approach to the question of interference with presidential control of executive decisionmaking in place of the balancing approach of *Morrison*); *Edmond v. United States*, 520 U.S. 651, 661–63 (1997) (adopting the position respecting definition of "inferior officers" taken in the *Morrison* dissent).

⁸⁷ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–73 (2001).

sally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution,”⁸⁸ states simply that “Congress cannot delegate legislative power.”⁸⁹ This should be a simple, obvious reading of Article I, Section 1’s declaration that “[a]ll legislative Powers” granted by the Constitution “shall be vested in a Congress.”⁹⁰ The provision implies that no other entity should enjoy the sort of broad, binding, rulemaking authority that characterizes legislation.⁹¹ Congress cannot deputize another body to perform its functions of adopting a budget, appropriating funds, declaring war, or enacting other binding governance rules,⁹² even though it historically has granted a degree of discretion to those performing executive functions.⁹³

The hard question, of course, is when a grant of discretion over some particular determination should be deemed to be a delegation of power broad enough to require exercise directly by Congress. One possible approach is, at a minimum, to require that the exercise of discretion be tied to a concrete form of executive action (if the body making the determination is executive) or of judicial action (if the body is judicial in nature).⁹⁴ So, for example, Justice Scalia’s objection to the creation of a sentencing commission in essence was that it did not prescribe sentences to be applied in any case before it (as courts would in cases within the judicial power under Article III), nor did it instruct executive officers on decisions respecting prosecution (as could be part of the executive power under Article II); instead, the commission exercised a naked policymaking function.⁹⁵ An alternative, proposed by Professor David Schoenbrod, would require that Congress adopt rules directed to private conduct, rather than goals for such rules, giving an administrative officer authority to exercise discretion in implementing the rule rather than freedom to craft a rule loosely based on Congress’s articulated goals.⁹⁶

⁸⁸ *Field v. Clark*, 143 U.S. 649, 692 (1892).

⁸⁹ *Id.*

⁹⁰ U.S. CONST. art. I, § 1.

⁹¹ For a discussion of both the textual implication and the historical background for this construction, see, for example, HAMBURGER, *supra* note 14, at 377–402; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335–53 (2002).

⁹² See *Field*, 143 U.S. at 692.

⁹³ See, e.g., Peter L. Strauss, Foreword, *Overseer or “The Decider”? The President in Administrative Law*, 75 GEO. WASH L. REV. 696, 704–05 (2007) (emphasizing discretionary authorizations to other administrative officials).

⁹⁴ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 420–21 (1989) (Scalia, J., dissenting).

⁹⁵ See *id.* at 413, 420–21.

⁹⁶ See David Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional*

The test that the Court has adopted instead is that Congress must express “an intelligible principle” to guide the exercise of discretion pursuant to its delegation of authority.⁹⁷ Although the Supreme Court on occasion has tailored statutory directives to avoid the broadest, most unconditional delegations of authority,⁹⁸ only two congressional delegations of authority failed to pass muster over the more than 120 years since the Court first articulated the nondelegation doctrine.⁹⁹ A vast array of extraordinarily broad, vague, airy instructions has been found to present a sufficiently intelligible principle to satisfy the Court, including: giving the President the power to impose duties on a variety of imported goods “for such time as he shall deem just” if and when he decides that the nations exporting those goods treat imports from the United States in a “reciprocally unequal and unreasonable” manner;¹⁰⁰ authorizing the Federal Communications Commission (“FCC”) to select broadcast licensees “as public convenience, interest or necessity requires”;¹⁰¹ directing the Administrator of the Office of Price Administration to set “generally fair and equitable” maximum rent and price levels;¹⁰² telling the Administrator of the Environmental Protection Agency (“EPA”) to adopt a National Ambient Air Quality Standard for pollutants at the level of concentration “requisite to protect the public health” but with “an adequate margin of safety”;¹⁰³ and granting nearly plenary power to the United States Sentencing Commission to establish rules governing terms of criminal

Purposes of the Delegation Doctrine, 36 AM. U. L. REV. 355, 358–59 (1987); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1253 (1985).

⁹⁷ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (laying down the “intelligible principle” test and applying it to uphold delegation of broad authority to the President and Tariff Commission to set tariff rates, formerly a legislative function).

⁹⁸ See, e.g., *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (“we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold [the exercise of a constitutionally protected activity]”); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 318 (2000).

⁹⁹ See *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 421, 433 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935).

¹⁰⁰ *Field v. Clark*, 143 U.S. 649, 680–83, 690–92 (1892) (analyzing whether the Tariff Act of October 1, 1890 impermissibly grants the President both legislative and treaty-making powers).

¹⁰¹ See *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 214, 224–27 (1943) (determining whether the standards in the Federal Communications Act of 1934 are so vague and indefinite to be an impermissible delegation of power to the Federal Communications Commission).

¹⁰² See *Yakus v. United States*, 321 U.S. 414, 420, 423–26 (1944) (examining whether the amended Emergency Price Control Act of 1942, in granting the Administrator of the Office of Price Administration authority to promulgate regulations that “in his judgment will be generally fair and equitable,” is an impermissible grant of legislative authority to the executive branch).

¹⁰³ See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 465, 472–76 (2001) (determining

punishments essentially on whatever terms its members thought best.¹⁰⁴

Some administrative law scholars have defended the general abandonment of efforts to constrain delegations of broad, discretionary authority on the ground that unelected administrators are better able, by virtue of their greater insulation from immediate political pressures and their institutional setting, to make well-informed and broadly public-interested decisions in many circumstances.¹⁰⁵ Others have offered a softer defense predicated on the difficulty of crafting a test for excessive commitment of discretion to administrators and the inevitable shift of unstructured judgment on that issue from legislators to judges.¹⁰⁶ Even some of the most zealous protectors of constitutional structure have concluded that only a very modest nondelegation doctrine can be effectively administered by the courts.¹⁰⁷ The fact remains, however, that the Court has reduced the nondelegation doctrine to a talking point rather than a meaningful restriction on assignment of the sort of broad discretionary authority that the framers of the Constitution sought to prevent.¹⁰⁸

IV. REVIEW'S RESTRAINT: *Chevron* Deference

A. *Judicial Review's Tradition and the APA*

Judicial review of official actions is the law's last line of defense against excessive concentrations of discretionary power in the hands of administrative officials. Traditionally, courts entertained actions challenging official conduct in the ordinary course, under standard causes of action.¹⁰⁹ In some instances, the individual official defending an action enjoyed a specific defense tied to his official duties, but the

whether the scope of discretion given to the Environmental Protection Agency by the Clean Air Act is a permissible delegation of legislative authority).

¹⁰⁴ See *Mistretta v. United States*, 488 U.S. 361, 365–68, 374, 377–79 (1989) (reviewing Congress's delegation of power to an independent commission with no other function through the 1984 amendment to the Parole Commission and Reorganization Act).

¹⁰⁵ See, e.g., Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 99 (1985).

¹⁰⁶ See, e.g., Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 392–93, 417–18 (1987); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 331, 334 (1987).

¹⁰⁷ See, e.g., *Mistretta*, 488 U.S. at 415–16 (Scalia, J., dissenting).

¹⁰⁸ See, e.g., Lawson, *supra* note 91, at 371–72.

¹⁰⁹ See HAMBURGER, *supra* note 14, at 283–96 (discussing actions challenging official conduct in both England and America); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 949–53 (2011).

general rule was judicial disposition of claims on the basis of established law without any particular deference to prior administrative determination.¹¹⁰ Where the law gave an official absolute discretion over a specific determination, the courts would respect that assignment of authority, but otherwise would not refrain from deciding issues of fact or of law and would not give weight to administrative determinations.¹¹¹

With the expansion of the administrative state and rising numbers of administrative actions that substantially affect individuals, statutes gave rights to contest administrative action directly through appeals to the courts. The generally applicable provision for review of federal administrative actions is section 702 of the APA, which grants a right of review against the United States to any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.”¹¹² Section 706 of the APA provides the standards for review, including a direction the courts shall:

hold unlawful and set aside agency action, findings, and conclusions found to be [] (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law¹¹³

Two other subsections instruct reviewing courts to strike down agency action “(E) unsupported by substantial evidence” for matters required to be determined formally on the record, or

¹¹⁰ See HAMBURGER, *supra* note 14, at 288–95; Merrill, *supra* note 109, at 953.

¹¹¹ See HAMBURGER, *supra* note 14, at 288, 292–93.

¹¹² 5 U.S.C. § 702 (2012). The two clauses were intended to provide review both for individuals who had a claim that the official conduct violated a protected legal right and for individuals who lacked a legal right to a particular outcome (or process) but whose interests were provided for by law (which could recognize the harm as sufficient to merit review). Compare *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 120–21, 125 (1940) (finding no invasion of the legal rights of steel producers seeking to enjoin the federal government from setting industry-wide minimum wages), with *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476–77 (1940) (holding that the Communications Act of 1934 recognized harm in adverse decisions of the Federal Communications Commission sufficient to warrant judicial appeal). But see *Ass’n Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970) (finding plaintiffs “within that class of ‘aggrieved’ persons” entitled to review when the relevant acts did “not in terms protect a specified group”).

¹¹³ 5 U.S.C. § 706(2) (2012).

“(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.”¹¹⁴

The evident meaning of the APA’s command is that reviewing courts decide matters of law de novo, without any deference to the administrators’ views.¹¹⁵ Subsections (E) and (F), dealing with review of facts, draw a clear distinction between matters where some deference is due—those in which a determination has been made formally on the basis of a record compiled by the administrative decisionmaker—and other settings where no deference is due.¹¹⁶ In sharp contrast, the first four subsections, (A) through (D), contain no language of deference respecting legal commands.¹¹⁷ Not only is the most obvious “plain meaning” of the law inconsistent with deference respecting matters of law, but the history of the Act’s adoption is as well.¹¹⁸

The “arbitrary, capricious” provision, of course, expressly contemplates areas of legally conferred discretion within which administrators are authorized to function, with the courts reviewing for abuse of discretion rather than for the rightness of the action.¹¹⁹ It is quite understandable that, in these contexts, the court would show a measure of deference to the administrative decision, a deference that is bounded by the notion of abuse of discretion, of action that so stretches ordinary conceptions of proper action that it cannot be said to be authorized by law. Imagine, for example, that the FCC, enjoying wide latitude in selecting criteria for broadcast licenses, decides to select applicants from the FCC Chairman’s hometown or, failing that, the town closest to it; or that the FCC adopts a strategy of awarding licenses to applicants who have made the biggest contributions to the Chairman’s political party, or to the licensee who promises to air the greatest number of hours of movies based on Robert Ludlum’s *Bourne* trilogy or of *Duck Dynasty* or *Iron Chef* or any other class of programs adored by the Commissioners but not easily related to substantial public interests—well, maybe *Duck Dynasty* should be an exception, but the basic point remains. Despite the lottery-like quality to many of the decisions actually made by the Commission over

¹¹⁴ *Id.*

¹¹⁵ *See id.*

¹¹⁶ *See id.*

¹¹⁷ *See id.*

¹¹⁸ *See, e.g.,* Beermann, *supra* note 5, at 788–90; Duffy, *supra* note 9, at 193–94; McNollgast, *supra* note 23, at 215; Shepherd, *supra* note 23, at 1582–83.

¹¹⁹ *See, e.g.,* Duffy, *supra* note 9, at 184–85.

time,¹²⁰ none of these selection criteria is apt to be credited as within the range of decisions authorized by law.

The approach outlined in the APA leaves the courts as arbiters of the law, as the final word on the contours and outer limits of the legal commitments of discretion to administrators.¹²¹ The question remains how the courts determine the bounds of that discretion. After all, it is rare that legislation expressly details the range of discretion permitted or the precise boundaries for its exercise.

B. *Chevron: Discretion and Deference*

The Supreme Court's *Chevron* decision answered the question of how to determine the scope of administrative discretion by stating that courts look first to see if the law authorizing administrative action provides a clear answer to the meaning of a statutory term, as used by Congress (*Chevron's* step one); if there is no clear answer, at least in the context of administering a "technical and complex" regulatory scheme, the courts should construe the law as giving discretion to the administrator to make any reasonable policy choice (*Chevron's* step two).¹²² *Chevron*, in other words, treats silence or ambiguity as equivalent to a conscious congressional grant of discretionary authority to the administrator.¹²³

Although Justice Stevens' opinion for the Court spoke in terms of a court "substitut[ing] its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency"¹²⁴—seemingly suggesting that the Court was admonishing the court of appeals for failing to defer to the agency's reading of the law—the opinion stresses at great length the policy arguments being

¹²⁰ See, e.g., *Cowles Fla. Broad., Inc.*, 60 F.C.C.2d 372, 444–45, 445 n.23 (1976) (Robinson, Comm'r, dissenting) (justifying a lottery approach to awarding licenses when "meaningful distinctions between applicants" do not exist); Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 239–40 (1978) (same). The Commission ultimately was authorized to use an actual lottery, one that, unlike the hypothetical examples in the text above, does not turn on caprice or on discriminants unacceptable to the law and to rule-of-law values. See CASS ET AL., *supra* note 10, at 882–83. Cf. Dorf, *supra* note 1, at 681–82 (emphasizing the importance of decisional rules that operate regardless of the identity of the decisionmaker).

¹²¹ See, e.g., Beermann, *supra* note 5, at 788; Byse, *supra* note 9, 262–64; Duffy, *supra* note 9, at 189–211 (contrasting the APA's mandate with *Chevron's* test); Farina, *supra* note 9, at 472–75; Gary S. Lawson, *Reconceptualizing Chevron and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377, 1377–78 (1997).

¹²² See *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43, 863 (1984).

¹²³ See, e.g., Scalia, *supra* note 9, at 516–17 (recognizing the fictitious quality of the characterization, but accepting it as a proper choice); Strauss, *supra* note 8, at 1144–45.

¹²⁴ *Chevron*, 467 U.S. at 844.

advanced before the Court and the essentially policy-based choice at issue in the contest over the agency's authority to require permits for, and set rules limiting, pollution from any "stationary source."¹²⁵ Rather than saying the law's use of the term "stationary source" for permitting means whatever the agency says it does (a statement of deference on legal interpretation), *Chevron* appears plainly to be saying that the law means 'stationary source' covers several meanings and the agency is free to choose among them on any reasonable basis¹²⁶ (a statement of deference within a legally circumscribed zone of discretion).¹²⁷ Had the Court intended to recognize broader law-interpret-ing power for administrators, it would not have felt compelled to note that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent" or to instruct that conclusions respecting that intent reached by "a court, employing traditional tools of statutory construction" declare what "is the law and must be given effect."¹²⁸

Understanding *Chevron* as predicated on the concept of implicit grants of discretion is uncontroversial, but there is a sharp division over both the meaning and propriety of its test. Having articulated slightly different variations of the test for when courts should decide matters de novo and when they should defer to reasonable administrative judgments, *Chevron* generated even more division over its application than needed to accompany efforts at devising a formula for statutory construction.¹²⁹

Among the margins that the *Chevron* decision left unclear are whether a court needs to find absolute clarity or simply ample evi-

¹²⁵ See *id.* at 865–66.

¹²⁶ See *id.* at 844–45.

¹²⁷ In making these statements, the Court evidently did not see its decision as changing the nature of judicial review of agency action. See Lawson, *supra* note 121, at 1379; Levin, *supra* note 5, at 1257; Merrill, *supra* note 8, at 554; Merrill, *supra* note 4, at 421. That reading is entirely consistent with the Court's understanding that the agency is not bound to stick with any one policy choice based on its initial conclusion that the choice is permitted under the law. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (drawing the conclusion that the FCC's choice among policies was permitted under the law and that the discretion to make that choice survives judicial affirmance of a different choice so long as the court did not conclude it was legally mandated).

¹²⁸ *Chevron*, 467 U.S. at 843 n.9.

¹²⁹ See, e.g., Beermann, *supra* note 5, at 832 ("The only positive effect of *Chevron* may have been to provide fodder for scholarly analysis."); Farina, *supra* note 9, 455–56; Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 187–90 (1992); Levin, *supra* note 5, at 1253–56; Scalia, *supra* note 9, at 513; Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 291 (1986).

dence of a specific meaning, whether the legislative pronouncement needed to speak to the *precise* question at issue—the law’s answer to the exact sort of situation presented for review—or something slightly more remote, whether the question for the court to resolve without deference must be a “pure question of statutory construction” or whether it merely has to be one that at its core presents a question of statutory meaning where a commitment of discretion does not appear to have been contemplated, and how exactly the courts should judge the permissibility of an agency’s action within the sphere of discretion.¹³⁰ *Chevron* has, quite reasonably, been criticized for leaving so many questions unresolved.¹³¹

The more serious concern, however, has been that, whatever the details of the test’s application, *Chevron* deference is simply too deferential.¹³² Before taking that question on directly, it should be recognized that the test in practice is far from completely deferential.

C. *Chevron and Non-deferential Legal Determinations*

The Supreme Court has decided a significant number of cases involving review of administrative decisions in the *Chevron* era on the basis of de novo readings of the law. For example, in *INS v. Cardoza-Fonseca*,¹³³ the Court reversed a decision of the Immigration and Naturalization Service predicated on its reading of the Refugee Act of 1980, construing the Act as both unambiguous and less restrictive than the agency’s interpretation.¹³⁴ In *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,¹³⁵ the Court found the Com-

¹³⁰ See, e.g., *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011) (suggesting that *Chevron*’s step two is identical to the APA’s “arbitrary, capricious” standard); Bamberger & Strauss, *supra* note 6, at 613–14; Beermann, *supra* note 5, at 810; Byse, *supra* note 9, at 261–63; Lawson & Kam, *supra* note 4, at 55; Stephenson & Vermeule, *supra* note 6, at 597–98; Note, “How Clear is Clear” in *Chevron’s Step One?*, 118 HARV. L. REV. 1687, 1691 (2005).

¹³¹ See, e.g., Beermann, *supra* note 5, at 783 (“The *Chevron* opinion was poorly constructed and unclear on basic issues such as the proper role of interpretation, legislative history, and policy arguments.”); Merrill & Hickman, *supra* note 5, at 848–52 (identifying fourteen questions *Chevron* left unresolved).

¹³² See, e.g., Byse, *supra* note 9, at 264–65; Duffy, *supra* note 9, at 118; Farina, *supra* note 9, at 456; Herz, *supra* note 129, at 189; see also John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 612–19 (1996) (adding a special criticism to the extension of *Chevron* deference to an agency’s interpretation of its own previously adopted rules). But see E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 18 (2005) (arguing that increased deference is a “healthy development”).

¹³³ *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

¹³⁴ See *id.* at 430–32, 449–50.

¹³⁵ *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994).

munications Act's provision authorizing the FCC to "modify" requirements for tariff filings did not extend to eliminating a statutory requirement for common carriers to file tariffs.¹³⁶ The Court in *FDA v. Brown & Williamson Tobacco Corp.*¹³⁷ held that the Food and Drug Administration ("FDA") lacked the authority to regulate tobacco products because the Court disagreed that the term "drug delivery devices" in the Federal Food, Drug, and Cosmetic Act included nicotine contained in tobacco products, despite a plausible textual argument in support of the FDA.¹³⁸ The Court's decision in *Massachusetts v. EPA*¹³⁹ overturned an EPA decision on treatment of new car production as not requiring regulation to prevent certain greenhouse gas emissions, despite a clear grant of discretion on the matter to the EPA, because the majority concluded that the agency had misunderstood the meaning of "air pollutant" as used in the relevant section of the Clean Air Act.¹⁴⁰

Further, even some cases that are framed in language that seems deferential to agency interpretation of legal commands at times appear to invoke the same canons of construction as courts would use in non-deferential review. So, for instance, in *Utility Air Regulatory Group v. EPA*,¹⁴¹ while speaking in terms of permissible constructions of statutory mandates, the Court cited ordinary construction principles in holding that the term "air pollutant" in the context at issue did not include greenhouse gases and that the EPA could not revise clear commands of other parts of the law to make inclusion of greenhouse gases workable.¹⁴²

D. *Chevron Supreme: Deference at Law's Core*

Yet it is undeniable that *Chevron* analysis has supported deference to administrative decisions in a wide array of settings. *Young v. Community Nutrition Institute*¹⁴³ is illustrative. Section 346 of the Federal Food, Drug, and Cosmetic Act¹⁴⁴ instructed the FDA (as the dele-

¹³⁶ See *id.* at 220, 234.

¹³⁷ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

¹³⁸ See *id.* at 127, 131–39, 161.

¹³⁹ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

¹⁴⁰ See *id.* at 506, 528–32. For critical review of this decision, see, for example, Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. IN BRIEF 75 (2007). For a more sympathetic view, see, for example, Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51.

¹⁴¹ *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

¹⁴² See *id.* at 2434, 2439–42, 2449.

¹⁴³ *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974 (1986).

¹⁴⁴ Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 346 (2012).

gated authority within the Department of Health and Human Services)¹⁴⁵ that, when substances found in foods can be “poisonous or deleterious” but cannot be eliminated following good practices, the Administrator “shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health.”¹⁴⁶ The question was whether that provision required adoption of limiting regulations reducing harm to the extent the FDA Administrator finds necessary or whether instead it instructed the Administrator to adopt regulations to the extent he finds necessary.¹⁴⁷ Traditionally, this would have been seen as a question of law for courts to resolve *de novo*. Applying *Chevron*, however, the Supreme Court found the statute’s direction ambiguous and, moving on to *Chevron* step two, also found “the FDA’s interpretation of [section] 346 to be sufficiently rational to preclude a court from substituting its judgment for that of the FDA.”¹⁴⁸

Similarly, the Court in *National Cable & Telecommunications Association v. Brand X Internet Services*¹⁴⁹ deferred to the FCC on a question of basic statutory interpretation (the meaning of statutory terms, including “telecommunications” and, especially, “offering” a service directly to the public).¹⁵⁰ The Court decided that the Commission reasonably could conclude that cable modem (Internet connection) service did not constitute a telecommunications service, as the connection service would be used in tandem with the computing and related services provided via the Internet, services that fit comfortably into the “information service” category.¹⁵¹

Apart from its questionable fit with statutory language, the Court’s *Brand X* decision struck a jarring note in reversing the court of appeals for insisting that the appellate court’s own prior determination on the question trumped subsequent agency action.¹⁵² That would seem evident, but the majority declared that unless the court of appeals had found its construction of the law to be the *only* reasona-

¹⁴⁵ See *Young*, 476 U.S. at 979–80 (discussing whether the decision to set regulations at all was under the discretion of the FDA).

¹⁴⁶ 21 U.S.C. § 346.

¹⁴⁷ See *Young*, 476 at 976–79.

¹⁴⁸ *Id.* at 981.

¹⁴⁹ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

¹⁵⁰ See *id.* at 980, 989. The Communications Act, as amended in 1996, differentiated between “telecommunications service” (which primarily meant providing communications connections to users) and “information service” (principally, data processing, storage, and related activities). See *id.* at 975–77.

¹⁵¹ See *id.* at 979, 985–87, 996–97.

¹⁵² See *id.* at 979–80.

ble interpretation, the agency was free to use a different interpretation so long as it passed *Chevron* analysis¹⁵³—that is, that the legal provision at issue was unclear and that the agency interpretation was reasonable.¹⁵⁴

Brand X makes plain that the dominant interpretive commitment at present allows judicial deference—in a very strong sense—to administrative decisions on core questions of law, not merely on matters plainly committed to the policy judgment of administrators. The commitment is not one that extends across all cases, as decisions such as *Massachusetts v. EPA* evidence,¹⁵⁵ and the exact impact of *Chevron* and its progeny on the intensity of and impact of judicial review remains a matter of debate,¹⁵⁶ but the broad range of judicial decisions upholding administrative decisions indicates a considerably reduced inclination to constrain exercises of government power.¹⁵⁷

V. ALTERNATIVE CHECKS ON POWER IN A *Chevron*-esque World

The apparent decline in the intensity of judicial review after *Chevron*'s embrace by the courts—and its certain contribution to a widely shared sense that the courts are less inclined to scrutinize a variety of administrative determinations that once would have been likely to generate a judicial “hard look” at the least¹⁵⁸—are the most significant changes created by the shift in review standards post-*Chevron*.¹⁵⁹ Although many commentators see changes brought about by the *Chevron* regime as positive,¹⁶⁰ largely because of the increase in

¹⁵³ See *id.* at 982, 984.

¹⁵⁴ See *id.* at 980. Justices Scalia, Souter, and Ginsburg, dissenting, came to a different conclusion on the meaning of the law, which they found unambiguous and inconsistent with the reading offered by the agency and accepted by the Court. See *id.* at 1005, 1013–14 (Scalia, J., dissenting). Justice Scalia, writing only for himself on this point, see *id.* at 1005, also objected to the proposition that an agency could reverse a prior determination of an Article III court on a point of statutory interpretation. See *id.* at 1017–18.

¹⁵⁵ See *supra* note 140 and accompanying text.

¹⁵⁶ See, e.g., Elliott, *supra* note 132, at 1–2.

¹⁵⁷ See, e.g., *id.* at 4; Herz, *supra* note 129, at 188–89; Kerr, *supra* note 9, at 11, 30, 47, 58.

¹⁵⁸ See, e.g., Beermann, *supra* note 5, at 781–82, 811; Byse, *supra* note 9, at 256; Elliott, *supra* note 132, at 2–3; Farina, *supra* note 9, at 455; Herz, *supra* note 129, at 188–89; Lawson, *supra* note 121, at 1378–79; Levin, *supra* note 5, at 1255; Merrill & Hickman, *supra* note 5, at 833–34; Pierce, *supra* note 106, at 411; Stewart, *supra* note 106, at 333; Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1095, 1117–18 (1987).

¹⁵⁹ For a comprehensive discussion of additional problems associated with *Chevron* review, see, for example, Beermann, *supra* note 5, at 782–84 (providing a list of ten ways that *Chevron* has failed).

¹⁶⁰ See, e.g., Levin, *supra* note 5, at 1259–60; Pierce, *supra* note 5, at 303–04; Scalia, *supra* note 9, at 516–18; Starr, *supra* note 129, at 307–12; Strauss, *supra* note 158, at 1121–22; see also

deference to those who have special familiarity with the complex statutory or technical matters at issue in many administrative decisions,¹⁶¹ the reduction in judicial review should be seen not in isolation but in the context of a series of decisions abdicating responsibility for legal constraints on exercises of federal power.¹⁶² With little bite to the limitations imposed in Article I respecting Congress's (and, more broadly, the federal government's) enumerated powers and an even more toothless nondelegation doctrine, judicial review has added importance for keeping official power within legal bounds.¹⁶³

A primary academic defense of *Chevron* deference—better decisionmaking by more expert deciders with more information and better equipped staff—represents a policy preference, not a legal argument.¹⁶⁴ And it is a preference that cannot connect to a legal argument without a means of showing that deference is being given to decisions over which the politically responsible officials who have the constitutional authority to assign (within limits) functions within the government have granted discretion to the administrators whose decisions now receive deference.¹⁶⁵ Where legal interpretation is the crux of the issue, rather than policy prescriptions within a field marked out by the law, it is hard to accept statutory silence or ambiguity as meaningful evidence of that commitment.¹⁶⁶

A. *Restraining Deference: Mead's Wrong Turn*

Judicial efforts to limit *Chevron* deference to instances in which there is better evidence of a genuine congressional commitment of discretion to administrators, however, have not been successful. The Supreme Court's decision in *United States v. Mead Corp.*¹⁶⁷ endeavors to step back from *Chevron* by asking what evidence actually exists

Diver, *supra* note 13, at 592–93 (writing before *Chevron* but sympathetic to the changes *Chevron* would make).

¹⁶¹ See, e.g., Starr, *supra* note 129, at 309–10.

¹⁶² See *supra* Parts II & III; see also HAMBURGER, *supra* note 14, at 5 (generally critiquing administrative law doctrine's demise as a serious impediment to misuse of power).

¹⁶³ The importance of this constraint in the realm of statutory interpretation is the focus of this Essay. The same arguments, however, apply with at least equal force where interpretation of an agency's own regulations is at issue. See, e.g., Manning, *supra* note 132, at 613.

¹⁶⁴ See Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 568 (2009) (explaining congressional decisions to delegate through the lens of positive political theory).

¹⁶⁵ See Byse, *supra* note 9, at 261 (noting that the “vital pre-condition” to *Chevron* deference—that the agency has been delegated power—is itself assumed under *Chevron*).

¹⁶⁶ See, e.g., Beermann, *supra* note 5, at 796–99; Bressman, *supra* note 164, 574–75; Byse, *supra* note 9, at 261; Duffy, *supra* note 9, at 192; Farina, *supra* note 9, at 476; Herz, *supra* note 129, at 214; Merrill & Hickman, *supra* note 5, at 871–72.

¹⁶⁷ *United States v. Mead Corp.*, 533 U.S. 218 (2001).

that Congress intended to grant an administrator discretionary authority over a particular decision.¹⁶⁸ Justice David Souter's opinion for the Court at the outset states that tariff classification rulings from the Customs Service have "no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the force of law."¹⁶⁹ The decision suggests a number of criteria that might provide sufficient evidence of an intent to confer discretion on the administrator of a sort that would support *Chevron* deference.¹⁷⁰ In one sense, this is just the sort of engagement with the question of actual statutory commitment of authority to an administrator that could appropriately limit judicial deference to instances where it is legally justified.

Unfortunately, the test laid down in *Mead* errs in two respects. First, it is too complex to provide real guidance to courts, agencies, and Congress; its litany of potential indicia of congressional delegation of authority is long; there is no metric for combining the disparate factors listed to guide decision; and the Court asserts that the list is merely suggestive, its factors being neither necessary nor sufficient to find the requisite commitment of discretion.¹⁷¹ Second, the test does not require a finding that the Congress actually did commit a matter to an administrator's discretion—that this is in fact the natural meaning of the terms used in the law or the generally understood meaning of Congress's enactment—only that there is sufficient indication to support a (potentially) less fictitious supposition than underlies *Chevron*'s more sweeping assumption.¹⁷² *Mead*, in other words, is a more complicated, less determinate way of looking at evidentiary scraps that might or might not indicate a commitment of discretion to admin-

¹⁶⁸ *Id.* at 231–34.

¹⁶⁹ *Id.* at 221.

¹⁷⁰ *See id.* at 229–31.

¹⁷¹ *See id.* For further criticism of *Mead* along these lines, see, for example Beermann, *supra* note 5, at 823–29; Bressman, *supra* note 164, at 556–57; Frederick Liu, *Chevron as a Doctrine of Hard Cases*, 66 ADMIN. L. REV. 285, 330–32 (2014); Remarks by the Honorable Antonin Scalia, *supra* note 25, at 247–51.

¹⁷² The Justices themselves have made this point repeatedly, though not generally by way of critique. *See, e.g.,* *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 89–90 (2007) ("Considerations other than language provide us with unusually strong indications that Congress intended to leave the Secretary free to use the calculation method before us and that the Secretary's chosen method is a reasonable one."); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (noting that absence of notice-and-comment rulemaking is not dispositive); *Barnhart v. Walton*, 535 U.S. 212, 221–22 (2002) (same); *Mead*, 533 U.S. at 226–27 (remanding on "the possibility that [the agency ruling] deserves some deference under *Skidmore* [*v. Swift & Co.*, 323 U.S. 134 (1944)]").

istrators, and most likely did not indicate that in any meaningful way; it's a shadow form of *Chevron*.¹⁷³

Among the criticisms of *Mead*, the most significant, articulated by Justice Scalia at the time of the decision and picked up by others since, is that it has a strong tension with the rule of law.¹⁷⁴ In the name of making judicial review more faithful to congressional intent, *Mead* has the effect of empowering the courts to decide with little constraint when to grant deference to administrative decisions, how much deference to grant (a lot, invoking *Chevron*, or a little, leaning on the pre-APA doctrine under *Skidmore v. Swift & Co.*¹⁷⁵), and when to decide matters with no deference at all.¹⁷⁶ Judges following *Mead* get to pick and choose among a variety of factors, none of which is dispositive, to decide whether to give *Chevron*-style deference or far less deferential *Skidmore*-style review.¹⁷⁷ As Justice Scalia predicted at the time, the result has been less clarity in the law and more opportunity for judicial decisions to respond to judges' personal sense of what agencies should do.¹⁷⁸

B. Judicial Discretion in the Balance

Limiting uncabined discretion of *all* government officials—judges as well as administrators—is essential to the rule of law.¹⁷⁹ If *Mead* succeeded in generating more significant constraints on administrators, its benefits would have to be weighed against the costs of greater discretion for judges. As it is, however, the result of *Mead* seems to be no greater restraint over administrators and perhaps less restraint,

¹⁷³ For a variety of critiques of *Mead*, see, for example, Beermann, *supra* note 5, at 823–29; Bressman, *supra* note 164, at 556–57; Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1274–75 (2008); William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer is Chevron Step Two, Not Christensen or Mead*, 54 ADMIN. L. REV. 719, 725–26 (2002); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 750–51 (2002); Liu, *supra* note 171, at 330–32; Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 347 (2003).

¹⁷⁴ See *Mead*, 533 U.S. at 241–43 (Scalia, J., dissenting).

¹⁷⁵ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

¹⁷⁶ See *Mead*, 533 U.S. at 234–37 (invoking the rule of *Skidmore*, which essentially grants administrative decisions such deference as the persuasiveness of the decision merits).

¹⁷⁷ See *id.* at 228.

¹⁷⁸ See Remarks by the Honorable Antonin Scalia, *supra* note 25, at 247–48; Liu, *supra* note 171, at 332.

¹⁷⁹ See, e.g., Cass, *supra* note 1, at xvi, 6; Dorf, *supra* note 1, at 689–90; Oakeshott, *supra* note 1, at 146; Scalia, *supra* note 1, at 1176.

given its unpredictability.¹⁸⁰ In this sense, the result has been a step away from, rather than increased fidelity to, the rule of law.

That does not mean that concerns with judicial adventurism invariably should prevail over concerns respecting unchecked exercise of administrative power. Recently, in *City of Arlington v. FCC*,¹⁸¹ the Supreme Court was asked to disapprove the application of *Chevron* to an administrative agency's determinations respecting its own jurisdiction.¹⁸² Justice Antonin Scalia, writing for the Court, refused to draw a distinction between jurisdictional and other issues of statutory interpretation, on the ground that it would invite litigation over the categorization of challenges to administrative action and that it also was unnecessary to effect appropriate control over administrative power.¹⁸³ Essentially, his position was that increased litigation costs and additional degrees of freedom for judges to characterize challenges as "jurisdictional" or "non-jurisdictional" (potentially reducing rule-of-law value from judicial review) were more than counterbalanced by whatever gains might come from increased scrutiny of agency efforts to expand their reach.¹⁸⁴ Justice Stephen Breyer concurred in a separate opinion urging the Court to maintain fidelity to the more complex *Mead* framework,¹⁸⁵ and three Justices (Chief Justice John Roberts and Justices Samuel Alito and Anthony Kennedy) dissented, declaring that the notion of *Chevron* deference is predicated on a commitment of authority to an agency—and without jurisdiction, that authority cannot exist.¹⁸⁶

The important question is one of balance. Justice Scalia is no doubt right that the costs of increased complexity and decreased constraint on judges must be considered against whatever gains exist from greater scrutiny for agency assertions of jurisdiction and that the latter gains may be small.¹⁸⁷ But the dissenters surely are correct in asserting that the predicate for deference depends at a minimum on the existence of jurisdiction and that agencies are far from trustworthy stewards of boundaries around the scope of their own power.¹⁸⁸ Ag-

¹⁸⁰ See *Mead*, 533 U.S. at 228 ("The [*Chevron*] approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other.") (citations omitted).

¹⁸¹ *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

¹⁸² *Id.* at 1867–68.

¹⁸³ See *id.* at 1870–71, 1873–74.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* at 1875–76 (Breyer, J., concurring).

¹⁸⁶ See *id.* at 1877 (Roberts, C.J., dissenting).

¹⁸⁷ See *id.* at 1873.

¹⁸⁸ See *id.* at 1877–78 (Roberts, C.J., dissenting).

gressive assertions of jurisdiction have been a recurrent problem for efforts to keep agency actions within legally prescribed bounds.¹⁸⁹ The FCC's repeated efforts to extend its portfolio into areas of Internet governance is but one case in point.¹⁹⁰

Increasing the prospects for critical judicial attention to agency claims of jurisdiction on balance may yield gains by reducing administrative self-aggrandizement that are worth the costs. That is especially likely because the risk on the other side in this instance seems comparatively small; judges seem relatively disinclined to be overly critical of agency assertions of jurisdiction. For example, the Supreme Court approved FCC extension of its authority over cable television on the flimsiest of explanations and despite repeated failures to obtain congressional approval.¹⁹¹ Resting on such casual empiricism is not the best way to assess the costs and benefits of a shift to consideration of express distinction of jurisdictional assertions, but it does provide some support for that approach.

C. *Giving Congress the Ball*

Another alternative to the *Chevron* regime is to place responsibility on Congress to define the scope of agency authority with greater precision.¹⁹² This is no doubt the structurally correct solution to problems of judicial review. Simply put, the problem of ambiguous statutory instructions to agencies is best cured by clearer instructions, and the specific problems associated with unclear delegations of power to administrators in particular are best dealt with by Congress taking care to give better guidance to administrators wherever possible and to delineate the ambit of discretionary authority when it deems discretion preferable to *ex ante* instruction.

¹⁸⁹ See Ronald A. Cass, *Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law*, 15 *ENGAGE* 14, 17 (2014); see also *City of Arlington*, 133 S. Ct. at 1879 (providing examples of “the danger posed by the growing power of the administrative state”).

¹⁹⁰ See, e.g., *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014); *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010).

¹⁹¹ See *United States v. Sw. Cable Co.*, 392 U.S. 157, 169–70 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649, 673–75 (1972). But see *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (denying FDA authority to regulate tobacco products). In fairness to Justice Scalia, the *Brown & Williamson* decision disapproved an expansion of FDA authority without resting on the characterization of that expansion as jurisdictional. See *id.* at 159–60.

¹⁹² Cf. *supra* note 96 and accompanying text (discussing Professor Schoenbrod’s “rule” and “goal” statutes).

Two cautions are, however, in order. First, it must be remembered that the source of the problems *Chevron* addresses stem in the first place primarily from the disinclination of members of Congress to be clearer—both because ambiguity serves their own interests by deflecting responsibility for potentially unpopular outcomes¹⁹³ and because ambiguity can secure agreement among legislators who differ on what exactly should be the content of legislated instructions.¹⁹⁴ Reduced willingness by courts to approve administrative actions on theories of imputed delegations of discretion may raise the cost to legislators who fail to provide greater clarity in their enactments, but that is far from a self-evident proposition.

Second, if Congress does choose to respond to increased judicial scrutiny of administrative actions, not all congressional responses will be salutary. The obvious best response would be an increase in clarity *and* specificity when Congress passes laws. But clarity and specificity are frequently not apt to go hand-in-hand; the more likely outcome will be increases in specificity but not in clarity. Consider, for instance, experience with extremely long, detailed legislation chock-full of specific directives, such as the 66-page Corporate and Auditing, Accountability and Responsibility Act of 2002 (Sarbanes-Oxley),¹⁹⁵ the 848-page Wall Street Reform and Consumer Protection Act (Dodd-Frank),¹⁹⁶ or the almost 1,000-page Patient Protection and Affordable Care Act¹⁹⁷ (colloquially known as Obamacare). The sheer magnitude and complexity of the laws, the number of interrelated and potentially contradictory provisions, and the enormous task of fitting the new laws together with existing law almost inevitably makes such “big bills” less instructive on many points than less detailed laws.¹⁹⁸

Alternatively, Congress might endeavor to use ex post controls in place of ex ante specificity to provide meaningful constraints on unconsented exercises of administrative power. Here, too, however, the

¹⁹³ See, e.g., Alberto Alesina & Alex Cukierman, *The Politics of Ambiguity*, 105 Q.J. ECON. 829, 843 (1990) (“Concretizations must remain general enough so that they cannot be turned from electoral weapons to engines of assault against the party which first mounted them.”).

¹⁹⁴ See Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 596 (2002).

¹⁹⁵ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 and 18 U.S.C.).

¹⁹⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 15 U.S.C.).

¹⁹⁷ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 25, 26, 29 and 42 U.S.C.).

¹⁹⁸ On the more general problem of “rule overload” and its tension with rule-of-law values, see, for example, CASS, *supra* note 1, at 107–10.

result is unlikely to provide the desired corrective. For many years, Congress inserted into legislation provisions for congressional vetoes of administrative actions with which one or both houses of Congress disagreed, even after such provisions were held unconstitutional in *INS v. Chadha*.¹⁹⁹ Apart from its unconstitutionality, the use of vetoes after the fact does not guarantee that the administrative decision was unauthorized, only that it does not comport with current political preferences.²⁰⁰ In addition, the availability of ex post controls may also reduce incentives to constrain administrators in advance through clearer statutory directives. In the end, though greater congressional supervision is the answer that seems most in keeping with constitutional structure, it more often will simply restate the questions (and problems) respecting delegated responsibility.

D. *A Limited Hand-Off*

A different alternative, still consistent with putting the onus on Congress to define the terms of administrative authority, is to recognize that Congress rarely will be clear and cogent in its law-writing but to refrain from assuming that it has given broad discretionary power to the administrators without relatively clear direction. That does not mean that courts should substitute a *Mead*-like framework of snark-hunting searches for hints of legislators' intent. Rather, it means that courts should implement the APA's review provisions as written, saving deferential review for arbitrariness, capriciousness, or abuse of discretion for actions more clearly committed to agency discretion and otherwise non-deferentially asking whether statutory instructions are such that an agency's action is "in excess of statutory jurisdiction, authority, or limitations," or "otherwise not in accordance with law."²⁰¹

¹⁹⁹ *INS v. Chadha*, 462 U.S. 919, 956–59 (1983); see Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 288 (1993) (stating that Congress had enacted over two hundred new congressional vetoes between the time of the *Chadha* decision and October 8, 1992).

²⁰⁰ See, e.g., Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1419 (1977) (noting that in case studies, congressional review of agency rules was based on policy, not on legality of rules, despite characterizations to the contrary by Congressmen); William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165, 179 (1992) (arguing that, even if not a mechanism for determining the law's original meaning, legislative vetoes bring Congress's law-making power closer to that intended by the Constitution's drafters).

²⁰¹ 5 U.S.C. § 706(2) (2012). For similar recommendations, see, for example, Beermann, *supra* note 5, at 844–45; Duffy, *supra* note 9, at 199.

The return to pre-*Chevron* standards for review will not necessarily work a dramatic change. After all, the Court as a whole and some Justices in particular have been willing at times to engage in fairly searching inquiries respecting statutory meaning at *Chevron*'s first step.²⁰² But the message of *Chevron*, frequently confirmed in its implementation, is that deference is the norm, not the exception, where statutes do not plainly and unambiguously command a given result.²⁰³ Reverting to the less systematically deferential APA standards may mean greater degrees of freedom for judicial decision.²⁰⁴ Congress remains free to clarify its understanding (or to substitute a new, clearer one) if courts' reading of a law diverges from Congress's current preference, but that is often an unlikely outcome unless there is a strong, politically significant reason for returning to the subject matter.²⁰⁵ At the same time, that unlikelihood applies as well in cases of administrators' divergence from legislative preferences and quite commonly from presidential preferences as well, which are seldom engaged directly in administrative actions.²⁰⁶ The greater difference is that select

²⁰² See *supra* Part IV.D.

²⁰³ See *id.*

²⁰⁴ See *supra* Part IV.A. The greater degree of judicial discretion may also result in increased litigation. See, e.g., *supra* notes 183–86 and accompanying text (discussing Justice Scalia's argument in *City of Arlington* that distinguishing "jurisdictional" grants of agency authority will invite litigation). Just as the standard for judicial decisionmaking that increases degrees of freedom for judicial decisions might increase litigation by raising the likelihood that parties will have different assessments of success, it also might increase settlement incentives if parties are not both unreasonably optimistic. For explanation of the complex dynamics affecting litigation rates, see generally Lucian Arye Bebachuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404 (1984) (discussing various factors affecting decisions to litigate or settle); Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989) (discussing the economic incentives of adverse parties in legal disputes); Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187 (1993) (discussing the effects of asymmetric information on litigation outcomes); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (arguing that divergent expectations will affect likelihood of litigation or settlement). Given the dispersion of results under *Chevron*, however, there is little reason to expect that this will be a substantial or long-lived result.

²⁰⁵ See, e.g., Matthew D. McCubbins et al., *Structure and Process, Politics and Policies: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 451 (1989) (discussing five-year congressional process to agree on legislative response to D.C. Circuit decision).

²⁰⁶ See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 775–77 (1983) (discussing Congress's decision not to renew funding for Federal Trade Commission in 1979). Recognizing the difficulty of policing actual administrative decisions, legislation is likely in advance to use controls over process and structure, as well as direct instructions and budget constraints, as partial measures to restrain administrators' divergence from legislative preferences. See, e.g., Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Ar-*

political forces—those especially interested in a particular agency or subject and particularly well-organized to be effective in dealing with a specific agency—are more apt to be brought to bear in administrative decisions than in judicial decisions.²⁰⁷ Given the probable disparity between the decisions reached in this shadow political setting and a setting involving the full set of political players, renewed emphasis on APA standards is more likely than not to be positive for public interests broadly conceived. More important, perhaps, it should be positive for consistency with the rule of law.

CONCLUSION

Seen in the context of weakening protections against unchecked federal administrative power, the thirty-year experience with *Chevron* deference should give anyone concerned with the rule of law pause. The problem is not simply excessive deference to administrators on the basis of fictitious assumptions about the political branches' commitment of discretionary authority to administrative officers. The problem is that less searching judicial review exacerbates tendencies toward weakened protections against discretionary federal government power already in play.²⁰⁸

While our governing constitutional structure is long on checks and balances and short on commitment of discretionary power to government officials, the tide has been running against that structure for some time—though fortunately at a rate slow enough to provide continued protection against many potential abuses of power.²⁰⁹ As other legal constraints on government power—limitation to enumerated powers and constraints on unstructured delegations of authority—

rangements and the Political Control of Agencies": *Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 503–04 (1989); McCubbins et al., *supra* note 205, at 440–44.

²⁰⁷ See Horn & Shepsle, *supra* note 206, at 503–04 (highlighting dangers of “bureaucratic drift”). For explanations of the divergence between bureaucratic decisional incentives and those associated with broader political forces, see generally THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 42–63 (2d ed. 1979) (arguing that political resources of interest groups control political decisionmaking); WILLIAM A. NISKANEN, JR., *OFFICE OF MGMT. & BUDGET, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 5–9 (1971) (theorizing that decisionmaking is largely influenced by a bureau’s supply and budget). For a contrasting view of judicial decisionmaking incentives, see, for example, Cass, *supra* note 1, at 46–97.

²⁰⁸ See *supra* Part V.A.

²⁰⁹ See *supra* Part I.

have weakened, the significance of judicial review of administrative actions has grown.²¹⁰

Concerns about unconstrained judicial power justify skepticism about any doctrine that frees courts from meaningful, predictable rules. That concern alone should prompt abandonment of approaches, such as the one advanced in *Mead*, that depend on unstructured balancing of an unspecified set of factors lacking any determinate metric for reaching a decision.²¹¹

Yet, *Chevron*'s greater simplicity is only a partial and modest defense of a doctrine that has been both inconstantly applied and, outside the hands of a few judges who are prepared to be relatively assertive in construing statutory terms, offers margins for abdication of the last effective legal restraint on administrative action.²¹² The actions at issue may not be bold threats to individual liberty in the same manner as unchecked prosecutorial authority or some forms of judicial adventurism. They do, however, form a web of discretionary exercises of power that threaten, over time, to undermine the restraining structure that has constrained power, supported liberty, and provided stability more than tolerably well for over two centuries.²¹³ That should be enough to cause our courts to revisit the balance between administrative and judicial discretion that *Chevron* upset three decades ago.

²¹⁰ See *supra* Part V.A.

²¹¹ See *supra* Part V.A–B.

²¹² See *supra* Part IV.D and note 154

²¹³ See *supra* Part. I.