

# The “Ambiguity” Fallacy

Ryan D. Doerfler\*

## ABSTRACT

*This Essay considers a popular, deceptively simple argument against the lawfulness of Chevron. As it explains, the argument appears to trade on an ambiguity in the term “ambiguity”—and does so in a way that reveals a mismatch between Chevron criticism and the larger jurisprudence of Chevron critics.*

## TABLE OF CONTENTS

INTRODUCTION .....	1110
I. THE ARGUMENT .....	1111
II. THE AMBIGUITY OF “AMBIGUITY” .....	1112
III. “AMBIGUITY” IN <i>CHEVRON</i> .....	1114
IV. RESOLVING “AMBIGUITY” .....	1114
V. JUDGES AS UMPIRES .....	1117
CONCLUSION .....	1120

## INTRODUCTION

Along with other, more complicated arguments, *Chevron*<sup>1</sup> critics offer a simple inference. It starts with the premise, drawn from *Marbury*,<sup>2</sup> that courts must interpret statutes independently. To this, critics add, channeling James Madison, that interpreting statutes inevitably requires courts to resolve statutory ambiguity. And from these two seemingly uncontroversial premises, *Chevron* critics then infer that deferring to an *agency’s* resolution of some statutory ambiguity would involve an abdication of the judicial role—after all, resolving statutory ambiguity *independently* is what judges are supposed to do, and deference (as contrasted with respect<sup>3</sup>) is the opposite of independence.

As this Essay explains, this simple inference appears fallacious upon inspection. The reason is that a key term in the inference, “ambiguity,” is critically ambiguous, and critics seem to slide between one sense of “ambiguity” in the second premise of the argument and an-

---

\* Professor of Law, Herbert and Marjorie Fried Research Scholar, The University of Chicago Law School. Thanks to Jonah Gelbach for helpful comments.

1 467 U.S. 837 (1984).

2 5 U.S. (1 Cranch) 137 (1803).

3 See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

other in the conclusion. In other words, the charge is that *Chevron* critics are committing the fallacy of equivocation.

Devoting an essay to a single inference might seem excessive, especially if, as is the case here, that argument is one among many. There are, though, at least two reasons to attend carefully to this specific argument. The first is that, in contrast to the other arguments against *Chevron*, which are based largely upon contestable, intellectual historical claims,<sup>4</sup> the argument considered here is simple and intuitive, and, hence, more likely to persuade. Second and more important, explaining the apparent fallacy reveals the mismatch between the modest law-identification conception of judging to which *Chevron* critics generally adhere and the more interventionist conception needed to make the argument logically valid.

### I. THE ARGUMENT

While the argument at issue is suggested in various places, it is articulated most explicitly and most clearly in two concurring opinions by two of *Chevron*'s most vocal critics. In *Perez v. Mortgage Bankers Ass'n*,<sup>5</sup> Justice Thomas sets out his case against agency deference in a sweeping concurrence.<sup>6</sup> In so doing, Justice Thomas draws extensively on Founding-era history and, in particular, the scholarly work of Philip Hamburger.<sup>7</sup> Along the way, Justice Thomas also pieces together the inference described above, emphasizing again and again the importance of judges exercising "independent judgment" when making sense of the law.<sup>8</sup> Quoting Federalist 37, Justice Thomas then adds that making sense of the law inevitably involves resolving ambiguity, for "[a]ll new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal."<sup>9</sup> For this reason, Justice Thomas explains, "The judicial power was understood to include the power to resolve these ambiguities over time."<sup>10</sup> And from this, Justice Thomas concludes that a "doctrine [that] demands that courts accord 'controlling weight' to the agency interpretation" in situations

---

<sup>4</sup> See *infra* note 7.

<sup>5</sup> 575 U.S. 92 (2015).

<sup>6</sup> *Id.* at 112–33 (Thomas, J., concurring).

<sup>7</sup> See *id.* at 120–21, 124–25 (citing PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 200-02, 507–21 (2008)).

<sup>8</sup> *Id.* at 119–26.

<sup>9</sup> *Id.* at 119 (quoting THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961)).

<sup>10</sup> *Id.*

of ambiguity “amounts to a transfer of the judge’s exercise of interpretive judgment to the agency.”<sup>11</sup>

Similarly, in his concurring opinion in *Gutierrez-Brizuela v. Lynch*,<sup>12</sup> then-Judge Gorsuch argues that deferring to agency interpretations is fundamentally at odds with our separation of powers.<sup>13</sup> Like Justice Thomas, then-Judge Gorsuch insists upon the judicial duty “to exercise . . . independent judgment about what the law *is*,” invoking *Marbury*.<sup>14</sup> So too, then-Judge Gorsuch reasons that the duty to say what the law is independently includes resolving statutory ambiguity independently, explaining:

At *Chevron* step one, judges decide whether the statute is “ambiguous,” and at step two they decide whether the agency’s view is “reasonable.” But where in all this does a court *interpret* the law and say what it *is*? When does a court independently decide what the statute means and whether it has or has not vested a legal right in a person?<sup>15</sup>

Formalizing the argument, Justice Thomas and then-Judge Gorsuch thus appear to advance the following inference:

It is the role of the judiciary to interpret statutes independently;  
Interpreting statutes inevitably involves resolving statutory ambiguity;

So, deferring to an agency’s resolution of statutory ambiguity would be an abdication of the judicial role.

## II. THE AMBIGUITY OF “AMBIGUITY”

The inference above is appealing in that its form is simple, its premises seem obvious, and yet it delivers a legally significant conclusion. It is, as a result, more difficult to shrug off than, say, pure intellectual historical arguments, to which one might respond either ‘Are you sure?’ or ‘Who cares?’ So what to say in response?

The argument’s first premise is relatively settled within our legal system, and, for that reason, this Essay treats it as true. Moving on to the second premise and the conclusion, both include critical reference to statutory “ambiguity.” The worry, as this Part explains, is that the term “ambiguity” is relevantly ambiguous, and it is not at all obvious

---

<sup>11</sup> *Id.* at 123–24.

<sup>12</sup> 834 F.3d 1142 (10th Cir. 2016).

<sup>13</sup> *See id.* at 1150 (Gorsuch, J., concurring).

<sup>14</sup> *Id.* at 1158.

<sup>15</sup> *Id.* at 1152.

that “ambiguity” as used in the second premise means the same thing as in the conclusion.<sup>16</sup>

In a weak sense, to say that some statutory provision is “ambiguous” is to claim that its meaning is *non-obvious* or *difficult to know*. When courts talk about using legislative history to “clear up ambiguity,” for example, the idea is that statutory meaning is not apparent looking just at the text, but that viewing text and legislative history together makes it so.<sup>17</sup> Similarly, when courts say that attending to other parts of the statute “eliminates . . . ambiguity” in the operative term or phrase, the idea is that this additional evidence reveals statutory meaning that was previously hidden.<sup>18</sup>

By contrast, to say that a statute is “ambiguous” in a strong sense is to claim that its meaning is not just difficult to know, but *unknowable*. In applying the rule of lenity, for example, courts resolve statutory “ambiguity” in favor of criminal defendants “only if, ‘after seizing everything from which aid can be derived,’ [they] can make ‘no more than a guess as to what Congress intended.’”<sup>19</sup> In other words, only if statutory meaning remains uncertain after considering *all available evidence* does a provision count as “ambiguous” for lenity purposes. Or consider, by analogy, the rule of *contra proferentem* in contracts. Under that rule, juries are supposed to resolve contractual “ambiguities . . . against the drafter of the contract.”<sup>20</sup> At the same time, “this rule is only to be applied if *all conventional means of contract interpretation*, including the consideration of relevant extrinsic evidence, have left the jury unable to determine what the parties intended their contract to mean.”<sup>21</sup> Here again, we see that a contract is “ambiguous” under *contra proferentem* only if contractual meaning is still a mystery after considering every possible clue.

It is worth noting, doctrines like the rule of lenity that are triggered by statutory “ambiguity” in the strong sense are thus not tools for *discovering* or *identifying* statutory meaning.<sup>22</sup> Rather, they are de-

---

16 This ambiguity in the term “ambiguity” mirrors an ambiguity when courts talk about “clear” statutory text. See generally Ryan D. Doerfler, *Going “Clear”* (Univ. of Chi., Pub. Law Working Paper No. 720, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3326550](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3326550) [<https://perma.cc/K62K-FTW5>].

17 See *Milner v. Dep’t of the Navy*, 562 U.S. 562, 574 (2011).

18 See *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997).

19 *Reno v. Koray*, 515 U.S. 50, 65 (1995) (citations omitted) (quoting *Smith v. United States*, 508 U.S. 223, 239 (1993); *Ladner v. United States*, 358 U.S. 169, 178 (1958)).

20 *Klapp v. United Ins. Grp. Agency, Inc.*, 663 N.W.2d 447, 454 (Mich. 2003).

21 *Id.* at 455 (emphasis added).

22 See Doerfler, *supra* note 16 (manuscript at 12–16).

fault rules that courts apply to decide statutory cases when statutory meaning proves unknowable even after thorough investigation. By contrast, when attending to nontextual sources like legislative history as a way of resolving statutory “ambiguity” in the weak sense, courts are attempting to figure out which meaning Congress intended.

### III. “AMBIGUITY” IN *CHEVRON*

Having identified the ambiguity in “ambiguity,” the question then becomes whether *Chevron* critics are using the term in the same sense in both the second premise of the inference and the conclusion. If not, of course, the argument fails, and those critics are committing the logical fallacy of equivocation.

Start with the conclusion. In *Chevron* itself, Justice Stevens famously wrote that courts are to defer to agencies only if the statute at issue remains “ambiguous” after employing all the “traditional tools of statutory construction.”<sup>23</sup> On its face, then, *Chevron* deference seems triggered by statutory “ambiguity” in the strong sense. If statutory meaning is merely opaque at the outset, but by considering legislative history, statutory structure, or whatever else, a court is able to “ascertain[ ] . . . Congress[’s] . . . intention,” then the role of that court is simply to say what the law is.<sup>24</sup> This reading of *Chevron* is bolstered by Justice Stevens’s characterization of what agencies do in the relevant cases as filling “gap[s] left open by Congress.”<sup>25</sup>

If, then, courts defer to agencies under *Chevron* only if statutory meaning is unknowable, then “ambiguity” as used in *Chevron* critics’ conclusion must be heard in the strong sense. Otherwise, the conclusion would have no doctrinal relevance, because *Chevron* does not instruct courts to defer if statutory meaning is merely difficult to know.

### IV. RESOLVING “AMBIGUITY”

So, what about the second premise? Again, for the argument to be logically valid, “ambiguity” as used in the second premise has to have the same sense as “ambiguity” as used in the conclusion. And because “ambiguity” as used in the conclusion has to be heard in the strong sense, the same must be true of “ambiguity” as used in the second premise.

---

<sup>23</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 866; see also *id.* at 843–44 (reasoning that courts should understand congressional “silen[ce]” as an implied delegation of authority to the agency).

But here’s the potential fallacy: there are various reasons to think that *Chevron* critics are using “ambiguity” in the weak sense in stating the second premise, or, at the very least, that the argument’s intuitive appeal depends upon audiences hearing it that way.

One reason to hear “ambiguity” as used in the second premise in the weak sense is that, if heard in the strong sense, the premise is much less obviously true. Heard in the weak sense, the second premise states merely that courts are tasked with making sense of statutes that are difficult to parse. No one thinks that all statutory cases are easy. To the contrary, courts very often must appeal to statutory structure, apparent purpose, and other contextual cues to determine what Congress meant with the words that it used. In other words, courts sometimes must put in serious work to *discover* or *identify* statutory meaning. Again, this comes as news to no one.

In contrast, hearing “ambiguity” in the strong sense, the second premise amounts to a much bolder and much more controversial claim that courts inevitably must *decide* how to proceed in cases in which statutory meaning proves unknowable. In other words, even if courts are not sure what the law is, they must nevertheless render judgment by “filling in the gaps,” as it were.

As for reasons to doubt that much bolder claim, *Chevron* critics again ground the second premise partially in Madison’s statement in Federalist 37 that the “meaning” of “obscure and equivocal” statutes must be “liquidated and ascertained” over time.<sup>26</sup> Concededly, one can—and some have—interpreted Madison as saying that post-enactment practice can, in limited circumstances, make law.<sup>27</sup> On that reading, Madison envisioned courts and other actors engaging in interstitial lawmaking through the setting of precedent, producing unwritten law in those areas where the meaning of written law is unclear.<sup>28</sup>

There is, however, a more modest way of reading Federalist 37. First and most obvious, Madison’s talk of “ascertain[ing]” the meaning of written laws over time fits much more neatly with a conception of judging as discovering the law as opposed to creating it. Indeed, the

---

<sup>26</sup> THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob Ernest Cooke ed., 1961).

<sup>27</sup> See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 20–21 (2019).

<sup>28</sup> See *id.* (“On Madison’s model, the people had already provided a set of direct rules for governance in the clear text of the Constitution . . . . Interstitial interpretations or questions left unresolved by the text could be answered by any officer into whose jurisdiction they fell. But those answers would become binding constitutional law—that is, would become liquidated—only once indirectly endorsed by the people who had the authority to promulgate binding constitutional norms in the first place.”).

relevant portion of Federalist 37 mentions repeatedly the imprecision of *language*, implying that the role of a court is to identify the *idea* a law's drafter was attempting to communicate, however imperfectly.<sup>29</sup> Madison's reference to "liquidat[ion]" can be read the same way—on one standard usage, to "liquidate" is to make "clear" or "plain,"<sup>30</sup> which is consistent with, but, does not necessarily compel, a discovery conception of judging. More still, even if one hears "liquidat[ion]" as referring more ambitiously to "settlement,"<sup>31</sup> Madison is very plausibly expressing the thought that postenactment practice would determine, *practically* speaking, what norms would prevail in areas ungoverned by written law. In the separation of powers context, for example, the concept of "liquidation" is sometimes invoked to explain why post-enactment political branch practice settles questions unanswered by constitutional text.<sup>32</sup> In those situations, however, it is plausible to understand political branch practice as settling not a legal, but a *political* question, establishing a convention that supplements law.

Settling which is the best understanding of Federalist 37 goes beyond the scope of this Essay. The only claim here is that the correct reading of Madison is contestable.

Madison aside, the strong reading of the second premise is independently dubious. Again, the thought that *Chevron* critics seem to express is that judges *cannot help* but resolve statutory "ambiguities" in the course of deciding statutory cases. And in a close statutory case, one might think that absent some default rule like *Chevron* or the rule of lenity, a court would be forced to declare some reading of the statute "best" even if that reading were less than "clear." In so doing, that court would, seemingly, be resolving "ambiguity" in the strong sense, in effect *deciding* what the statute now means—after all, by the court's own lights, Congress's intended meaning remains less than clear, which is to say, uncertain.

Attractive as this 'there are no ties in statutory cases' rationale might seem, it is, upon reflection, mistaken. As Judge Easterbrook argued decades ago, there *is* a way for courts to dispense with statu-

---

<sup>29</sup> See THE FEDERALIST NO. 37, *supra* note 26, at 236–37 (James Madison).

<sup>30</sup> Baude, *supra* note 27, at 12.

<sup>31</sup> *Id.*

<sup>32</sup> See NLRB v. Noel Canning, 573 U.S. 513, 525 (2014) ("We recognize, of course, that the separation of powers can serve to safeguard individual liberty, and that it is the 'duty of the judicial department'—in a separation-of-powers case as in any other—'to say what the law is.' But it is equally true that the longstanding 'practice of the government' can inform our determination of 'what the law is.'" (citations omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819))).

tory cases without saying what the law is, namely by declaring that there is no identifiable law to apply.<sup>33</sup> In a statutory case, like any other, the moving party asks for a court to intervene. Assuming a court in a statutory case is supposed to identify, rather than create, the applicable law, it stands to reason that courts are justified in intervening only if there is applicable law to be identified. In other words, if the role of a court is to *say* what the law is in a statutory case, a court should intervene in some case only if it *knows* the answer to the question presented, which is to say, only if the law is “clear.”<sup>34</sup> If, in turn, a court finds itself unable to answer the question presented without qualification, it can simply decline to intervene. In so doing, the court would leave the status quo unchanged, resolving the case, in effect, on jurisdictional grounds.

Again, settling whether Judge Easterbrook was right about what courts should do in the absence of “clear” statutory meaning is not the aim of this Essay. Instead, the point is that there are, seemingly, ways for courts to resolve statutory cases *other than* declaring that statutes mean this or that.

## V. JUDGES AS UMPIRES

Regardless of whether courts must, in fact, resolve statutory “ambiguity” in the strong sense, it would be an odd claim for *Chevron* critics to make. Generally speaking, such critics skew formalist as to separation of powers, emphasizing the qualitative difference between judging and legislating. In his concurrence in *Gutierrez-Brizuela*, for example, then-Judge Gorsuch explained the importance of judicial independence by contrasting our “avowedly political legislature” with the judiciary, composed of “individuals insulated from political pressures.”<sup>35</sup> As then-Judge Gorsuch continued, being so insulated is what permits the judiciary to act as “neutral decisionmakers who will apply the law as it is, not as they wish it to be.”<sup>36</sup>

In telling this story, then-Judge Gorsuch was very obviously offering a picture of judging as law identification or discovery as opposed to lawmaking. The same was true of Chief Justice Roberts when he infamously remarked, “Judges are like umpires. Umpires don’t make

---

<sup>33</sup> See Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 535 (1983).

<sup>34</sup> Absent knowledge of the law, a court could only *guess* or *opine* as to its content. See Timothy Williamson, *Knowing and Asserting*, 105 PHIL. REV. 489, 492 (1996) (arguing that it is appropriate to assert something without condition only if one knows it to be true).

<sup>35</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>36</sup> *Id.*



the rules; they apply them.”<sup>37</sup> Or consider Justice Thomas, who opined, “federal courts interpret, rather than author, the federal . . . code.”<sup>38</sup>

Chief Justice Roberts’s comments, in particular, were widely mocked.<sup>39</sup> Much of that response was owed to the obvious mismatch between the image of judges as “calling balls and strikes” and observable judicial behavior.<sup>40</sup> Thus, insofar as Chief Justice Roberts intended his remarks as an accurate *descriptive* account, the subsequent ridicule was basically justified.

Still, as an *ideal*, judging as law identification has a lot going for it. Varying slightly then-Judge Gorsuch’s reasoning, that ideal helps to make sense of our insulating judges from political pressures. If judges were *intended* to be lawmakers, after all, it would be hard to explain not holding them to democratic account, whether directly or indirectly. Assuming, though, that courts are supposed to be apolitical, insulation from politics makes perfect sense.

More fundamentally, that claims of “politicization” even register as *criticism* suggests broad acceptance of the law identification ideal. It makes no sense to complain that some legislator acted on his or her best policy judgment. Nor is it especially disturbing that members of Congress vote predictably according to party affiliation. By contrast, as Lee Epstein and Eric Posner remark, for the judiciary to “sustain public confidence,” it must not be seen as “rigidly divided by both ideology and party.”<sup>41</sup> And while much of legal scholarship goes to demonstrating courts’ actual division along ideological and partisan

<sup>37</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of John G. Roberts, Jr.) (“Judges are like umpires. Umpires don’t make the rules, they apply them. . . . They make sure everybody plays by the rules. . . . [A]nd I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”).

<sup>38</sup> *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 494 n.7 (2001).

<sup>39</sup> *See, e.g.,* Dahlia Lithwick, *This Court Erred*, SLATE (Sept. 30, 2014, 2:36 PM) <https://slate.com/news-and-politics/2014/09/the-case-against-the-supreme-court-erwin-chemerinsky-says-justices-side-with-powerful-and-privileged.html> [<https://perma.cc/GD7Z-UXCB>] (quoting Erwin Chemerinsky as saying, “[The analogy] is a grossly inaccurate description of what Supreme Court justices do. Supreme Court justices do not simply call balls and strikes. They determine the rules and the strike zone.”).

<sup>40</sup> *See, e.g.,* Lee Epstein & Eric A. Posner, *Supreme Court Justices’ Loyalty to the President*, 45 J. LEGAL STUD. 401, 401 (2016) (“[J]ustices more frequently vote for the government when the president who appointed them is in office than when subsequent presidents lead the government.”).

<sup>41</sup> Lee Epstein & Eric Posner, *Opinion, If the Supreme Court Is Nakedly Political, Can it Be Just?*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html> [<https://perma.cc/5D6H-6M7C>].

grounds, that those findings are at all disturbing suggests an ideal of judging as fundamentally different from legislating—an ideal, again, adhered to by the public at large.

Last, looking at courts themselves, judicial discourse reflects a firm, bipartisan commitment to law identification. Judges are, for example, unwilling to openly deviate from “clear” statutory or constitutional text.<sup>42</sup> And even in cases in which courts acknowledge that text is opaque, the adopted reading is characterized systematically as “better” as a matter of interpretive accuracy as opposed to policy wisdom.<sup>43</sup> Needless to say, courts can and do deviate from statutory or—especially—constitutional text,<sup>44</sup> and when they do, it very often seems to be on political grounds. Still, that courts refuse to do so unabashedly amounts to an implicit recognition that judicial policymaking is out of bounds.

Commitment to law identification is thus a serious advantage for formalists—e.g., textualists, originalists—in the broader debate versus functionalists—e.g., purposivists, living constitutionalists. In terms of public acceptance, the picture of judges as “umpires” is both simple and attractive.<sup>45</sup> And even for academics or other elites, that judges are unwilling to openly reject that picture is a serious impediment for those wanting to reject formalism outright.

Coming back to *Chevron*, its critics’ association with formalism and law identification matters for a couple of reasons. First, whatever those critics might intend, being so strongly tied to law identification makes it more or less inevitable that audiences will hear the second premise—that interpreting statutes inevitably involves resolving ambiguity—as about “ambiguity” in the weak sense. Again, to say that judges inevitably resolve statutory “ambiguity” in the strong sense is to claim that judges cannot help but legislate from the bench. For individuals who analogize judges to umpires, that would be an odd claim

---

<sup>42</sup> See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2373–74 (2015) (constitutional); Doerfler, *supra* note 16 (manuscript at 3) (statutory).

<sup>43</sup> See, e.g., Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 41 (2008) (“While both sides present credible interpretations of [the statute], Florida has the better one. To be sure, Congress could have used more precise language . . . and thus removed all ambiguity. But the two readings of the language that Congress chose are not equally plausible . . .”).

<sup>44</sup> See David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 3 (2015) (“If we read the text of the Constitution in a straightforward way, American constitutional law ‘contradicts’ the text of the Constitution more often than one might think.”).

<sup>45</sup> There is a reason, after all, that Chief Justice Roberts used this analogy in his *public* confirmation hearings.

to make. Charity would thus seem to compel the weak reading, letting the audience avoid any impression of inconsistency.

Second, insofar as the strong reading of the second premise involves a step away from law identification, critics of *Chevron* really ought to ask whether that step is worth taking. Again, the commitment to law identification is one of the best things that formalism has going for it. Being able to say that courts should “apply the law as it is, not as they wish it to be”<sup>46</sup> is an important rhetorical advantage, and one that formalists should be reluctant to give away. Thus, if the price of making the argument against *Chevron* logically valid is having to say that “of course judges make law,” *Chevron*’s formalist critics would do well to reconsider.

#### CONCLUSION

Needless to say, the claim here is not that the inference in question is the first or most pressing instance in which formalist judges risk deviating from the law identification ideal. Instead, the point of this Essay is merely to show that what might seem like a simple argument against *Chevron* is surprisingly complicated, and, moreover, that what makes it complicated should give *Chevron* critics reason for pause.

---

<sup>46</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).