CHEVRON ON STILTS: A RESPONSE TO JONATHAN SIEGEL

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I. *CHEVRON* LEAVES ROOM FOR SOME JUDICIAL INTERPRETATION 79
II. *CHEVRON* IS JUSTIFIABLE WITH A "CONCEPTUAL SHIFT" FROM INTERPRETATION TO LAWMAKING 80
III. STATUTES THAT SAY NOTHING ABOUT AUTHORIZING RULEMAKING ARE ESSENTIALLY THE SAME AS STATUTES THAT SAY THEY ARE AUTHORIZING RULEMAKING 82
A. Imaginary Chevron *Statute* 84
IV. CONGRESS CAN INSTRUCT COURTS HOW TO INTERPRET ITS STATUTES 85
A. Control over Interpretation Is Control over the Judiciary 85
B. Judicial Duty 86
C. Chevron *Is Not Like the Constitution's Allocation of Power to Other Branches* 86
D. Definitional and Liberal-Construction Clauses 87
V. THE COST OF A VOLTE-FACE 88
A. Nondelegation Doctrine 88
B. Precedents 89
C. Fictions 90
CONCLUSION 91

Whither *Chevron*?[1] For several years, some justices of the Supreme Court have been questioning *Chevron* deference, partly on the

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

basis of my constitutional critique of it.[2] It was inevitable that someone would stand up in defense of that doctrine, and I am glad to say that my estimable former colleague Jonathan Siegel has stepped up to the plate.[3] But the defense of the indefensible is not easy.

Although the long-standing conventional critique of *Chevron* was that it violates the separation of powers and federalism, my criticism is that *Chevron* deference corrupts the judicial process. As adumbrated in my 2014 book *Is Administrative Law Unlawful?* and developed in an article Chevron *Bias*, the constitutional problem with *Chevron* deference is twofold: its departure from independent judgment and its embrace of judicial bias.[4]

First, *Chevron* requires judges to abandon their duty of independent judgment. Judges have an office of judgment—an office in which they have a duty to exercise their own independent judgment in the cases that come before them.[5] This is implicit in the very concept of a court with judges established by Article III.[6] As John Marshall famously said in *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is."[7] Nonetheless, in asking judges to defer to agency interpretations of statutes, *Chevron* demands that judges abandon their independent judgment about what the law is.

Second, where the government is a party to a case, *Chevron* requires judges to favor the government's interpretation.[8] That is, it asks judges to be systematically biased in favor of the legal position of one of the parties—the most powerful of parties—in violation of the Fifth Amendment's due process of law.[9] The courts themselves thus stand accused.

Since 2014, at least the first of these arguments has found its way into the opinions of two Supreme Court justices. Justice Thomas and Justice Gorsuch (while on the Tenth Circuit) have taken the view that *Chevron* is incompatible with a judge's independent judgment.[10]

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2. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 314–15 (2014); Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016)

3. Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937 (2018).

4. HAMBURGER, *supra* note 2, at 314–15; Hamburger, *supra* note 2.

5. Hamburger, *supra* note 2, at 1189.

6. *Id.*

7. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

8. Hamburger, *supra* note 2, at 1189.

9. *Id.*

10. Michigan v. EPA, 135 S. Ct. 2699, 2712 (Thomas, J., concurring) (partly quoting Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1217); Guitierrez-Brizuela v. Lynch, 834 F.3d 1142 (Gorsuch, J., concurring) (10th Cir. 2016).

Moreover, the Wisconsin Supreme Court recently discarded its *Chevron*-style deference on grounds of both independent judgment and judicial bias.[11] Indeed, the Wisconsin court challenged the U.S. Supreme Court to follow suit with the reminder that "[t]he abdication of core judicial power to the executive is a concern not just of our court, but of the federal judiciary as well."[12] The dual critiques of *Chevron* are thus taking a toll.

Siegel is therefore justified in thinking that *Chevron* is at risk. But can *Chevron* really be propped up? Consider Siegel's four arguments, and then, fifth, the costs of his proposed volte-face.

I. *CHEVRON* LEAVES ROOM FOR SOME JUDICIAL INTERPRETATION

Siegel's first argument is that *Chevron* does not entirely bar judges from interpreting.[13] His argument is that judges acting under *Chevron* merely recognize that some statutes vest decisionmaking power in an agency, and that once *Chevron* is understood this way, it becomes clear that the case "does not prevent a court from interpreting statutes."[14] On this basis, Siegel concludes that *Chevron* does not require judges to give up their independent judgment or otherwise "shirk" their duty.[15]

But this misses the point. Of course, judges under *Chevron* still interpret; *Chevron* explicitly requires them to interpret statutes on questions of rulemaking authority. The problem is that after the judges interpret those questions—on the authority of agencies to make rules interpreting statutes—they often feel compelled by *Chevron* to defer to the agencies' interpretation of the substance of the statutes. To say that judges interpret the shell while deferring to agencies about the meat inside actually makes my point: *Chevron* requires judges on some issues—the central ones—to give up their independent judgment and be biased in favor of one of the parties.

If judges have a duty to exercise their own independent judgment about what the law is, they cannot defer to the judgments of agencies on any issues, let alone those that are most substantive. And if judges have a duty to avoid being systematically biased in their decisions—as is clear from the Fifth Amendment's guarantee of due process—then in cases in which the government is a party, they cannot

11. Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 914 N.W.2d 21 (Wis. 2018).
12. *Id.* at 46.
13. Siegel, *supra* note 3, at 942.
14. *Id.* at 962.
15. *Id.* at 956.

defer to any agency interpretations, as this would be systematic bias in favor of one party's legal position.

These problems do not go away just because the judges engage in some initial interpretation about the authority of agencies. Even if the judges engage in independent judgment and avoid bias on one issue, this does not excuse them from living up to such standards on other issues—indeed, on the statutory meat.

II. *CHEVRON* IS JUSTIFIABLE WITH A "CONCEPTUAL SHIFT" FROM INTERPRETATION TO LAWMAKING

Siegel's second move is to try to recast *Chevron* away from interpretation. As he puts it, his argument "require[s] a conceptual shift in the understanding of the *kind* of discretion conferred on an administrative agency by an ambiguous statute."[16] To be precise, he thinks that *Chevron* should be understood to concern delegated policy choices rather than statutory interpretation. On this basis, he concludes that when judges defer to agency interpretations of ambiguous statutes under *Chevron*, they are not really refusing to interpret, but rather are recognizing that the statutes are giving agencies something akin to legislative power.

Chevron, however, notoriously takes a dual vision of what agencies are doing.[17] On the one hand, the case recognizes the reality that the agencies, in their *Chevron*-justified rules, are making law. On the other hand, the case relies on a theory of interpretation to justify such rulemaking.

That *Chevron* at least involves interpretation is abundantly clear from the opinion. A key paragraph in the decision begins by discussing statutes that *expressly* delegate rulemaking authority; but rather than say that they involve policy choices or legislation, the paragraph says that they "express[ly] delegat[e] . . . authority to the agency to elucidate a specific provision of the statute by regulation."[18] That is, to justify *Chevron*, the paragraph starts by suggesting that agencies merely *elucidate* or interpret such statutes. Only then, the paragraph turns to statutes that do not obviously authorize rulemaking, and it concludes that "a court may not substitute its own construction . . . for a reasonable interpretation made by the administrator of an agency."[19] In short, *Chevron* bluntly justifies what

16. *Id.* at 942.
17. Hamburger, *supra* note 2, at 1220–23.
18. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).
19. *Id.*

it is doing in terms of interpretation. And to this end, it even begins by recasting statutes that expressly authorize rulemaking to suggest that they are really authorizing interpretation!

Why does *Chevron* simultaneously recognize the reality of agency lawmaking and yet rely on a theory of interpretation? Some authorizing statutes actually state that the authorized agency may make rules, and other authorizing statutes do not say this. Against this backdrop, it is difficult to conclude that the silent statutes are authorizing rulemaking, unless one takes for granted that such statutes assume agencies must interpret the statutes in order to carry them out. It is thus no accident that *Chevron* relies on a theory of interpretation. In the absence of express statutory authorization to make rules, the justices in *Chevron* could not have easily reached their conclusions without arguing that statutory indeterminacy is an invitation to agencies to interpret and that judges, in their interpretation of the statute, must ordinarily defer to the agencies' interpretations.

And it is not just *Chevron*, for that case has a context. As Siegel himself concedes, "the question of the degree of respect to be given by courts to an agency's interpretation of a statute 'produced a large number of statutory interpretation opinions that defy easy reconciliation.' "[20] Indeed, "as late as 1983—just a year before *Chevron*—the Court reiterated the view that an agency's interpretation, though entitled to respect, was not controlling."[21] And, since then, numerous cases have developed and expanded upon *Chevron*'s approach to agency interpretations. *Chevron*, in other words, does not stand alone; it is one of many cases, spanning many decades, on judicial deference to agency interpretation.

Accordingly, if *Chevron* does not concern interpretation, what is to be said of the myriad other cases? Put another way, what is to be said about the cognate doctrines such as *Auer* and *Mead-Skidmore*, let alone *Brown & Williamson*, *Brand X*, and *Arlington*?[22] And if those cases and doctrines concededly involve interpretation—indeed, in some instances, necessarily involve interpretation—why is *Chevron* an outlier? One cannot deny that *Chevron* concerns interpretation without also denying the role of interpretation elsewhere. Siegel's reconceptualization of *Chevron* thus denies something central about both the case and its jurisprudential context.

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20. Siegel, *supra* note 3, at 944.

21. *Id.*

22. City of Arlington v. FCC, 133 S. Ct. 1863 (2013); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); United States v. Mead Corp., 533 U.S. 218 (2001); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Auer v. Robbins, 519 U.S. 452 (1997); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

To suggest that *Chevron* does not concern agency interpretation is as one-sided as it would be to suggest that it does not concern agency policymaking. To understand this, consider an analogy to judicial lawmaking. As I wrote in "Chevron *Bias*," "[i]t is widely recognized that judges often use their interpretation as a mode of lawmaking. It would be a gross overstatement, however, to conclude from this that judicial interpretation is not at all interpretation—that it is merely lawmaking."[23] Similarly, it is gross overstatement to take the reality of agency policymaking under *Chevron* to mean that there is no agency interpretation. That is simply wrong.

III. STATUTES THAT SAY NOTHING ABOUT AUTHORIZING RULEMAKING ARE ESSENTIALLY THE SAME AS STATUTES THAT SAY THEY ARE AUTHORIZING RULEMAKING

Chevron is based on the contrast between statutes that allegedly authorize rulemaking through mere ambiguity and those that expressly authorize rulemaking. Nonetheless, Siegel urges that "policymaking power conferred by statutory ambiguity is no different than policymaking power conferred by express statutory language."[24] As he elaborates, "an ambiguous agency statute is simply another way of doing something that Congress does all the time—namely, authorize an agency to make a policy choice."[25] Siegel is correct that many statutes expressly authorize rulemaking, but that is precisely what the statutes involved in *Chevron* do not do.

Siegel brushes this aside by arguing: "If Congress can delegate power to administrative agencies to make policy decisions, the precise form that the delegation takes should be of little importance."[26] But the form matters. One sort of statute authorizes rulemaking; the other does not. This is why *Chevron* focuses on interpretation. To avoid resting on a theory of interpretation, *Chevron* would have had to ignore the difference between statutes that say agencies may make rules and those that do not. Of course, an academic can blithely ignore this difference, but a court cannot.

Siegel's suggestion that *Chevron* can be justified by simply assimilating two distinct types of statutes, as if Congress's authorization of rulemaking did not make a difference, is a reminder of how much *Chevron* is a judicial creation—a deliberate judicial effort to

23. Hamburger, *supra* note 2, at 1223.
24. Siegel, *supra* note 3, at 942.
25. *Id.* at 960.
26. *Id.* at 961.

expand the administrative state. Exactly why the judiciary for more than a century has repeatedly upheld this unconstitutional mode of governance is too broad a topic to be explored here. But at least in most of its administrative cases, the Supreme Court was merely upholding unconstitutional ventures initiated by Congress. In contrast, in *Chevron,* the Court itself took the initiative. Rather than merely defend the indefensible, it went out of its way to expand the administrative state.

And the Court did this precisely by playing upon the difference between statutes that expressly authorize rulemaking authorization and those that do not.[27] The only way the Court could extract rulemaking authority out of statutes that were silent about it was to suggest that statutory ambiguity constituted authorization to agencies to resolve the ambiguity, which is exactly the sort of argument that is not necessary when statutes expressly authorize rulemaking. It is therefore difficult to justify *Chevron* by blurring the difference between statutes with express rulemaking authorization and those without it, for the logic of *Chevron* actually rests on the difference.

Of course, having played upon the difference between the two sorts of statutes, one might want to cover one's tracks by suggesting that there is little significant difference between them. Recall that the Court in *Chevron* did this by suggesting that both sorts of statutes authorize interpretation.[28] Now that judicial deference to such interpretation looks unconstitutional, Siegel takes the opposite view: that both sorts of statutes authorize rulemaking, not interpretation.

Either way, *Chevron* fundamentally rests on the difference between the two types of statutes. If there were no basic difference between statutes containing words authorizing rulemaking and statutes without such words, then there would have been no need for the *Chevron* doctrine. It is therefore nearly comic—in fact, rather unreal—to attempt to escape *Chevron*'s constitutional problems by assimilating the two sorts of statutes.

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27. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.")

28. See *supra* notes 18–19 and accompanying text.

A. Imaginary Chevron *Statute*

Siegel is particularly inventive when he imagines a *Chevron* Implementation Statute, which would expressly authorize agencies to make rules in circumstances in which *Chevron* currently allows them to do so. [29] He carefully frames his hypothetical statute to authorize agencies to make policy choices rather than interpretations—as he puts it, the statute "does not authorize the agency to *interpret* an ambiguous agency statute," in the sense of giving an authoritative or binding interpretation of it.[30] The effect is to suggest that the statutes subject to *Chevron* are analogous to express statutory authorization for rulemaking, and that *Chevron* can be reconceptualized to avoid having anything to do with interpretation.[31]

But, lo and behold, Siegel could not draft his statute without framing it in terms of interpretation:

> Any provision of a statute that is administered by an agency and that is susceptible of more than one reasonable interpretation shall be deemed to set out the provision's possible, reasonable interpretations as permitted alternatives and to authorize and direct the agency to choose and implement one of the permitted alternatives.[32]

Like a magician making a body disappear, Siegel proclaims that this imaginary statute does "not confer interpretive power on agencies." And he is right. With sufficient deftness, one could draft an authorizing statute that produces the same results as *Chevron* without giving agencies a power to interpret.

As with the magician, however, Siegel's statute has not really made interpretation disappear. Even Siegel could not draft his statute without twice mentioning interpretation, for in order to mimic *Chevron* he had to use the notion of interpretation to define the scope of agency legislation. The cleverness is in the illusion, not the reality. Interpretation does not really go away.

To this, one must add the obvious: Congress has not adopted Siegel's statute. Nor would it. If Congress had wanted to confer rulemaking authority on agencies, it would have simply said so. Which is exactly what it has not done.

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29. Siegel, *supra* note 3, at 974.
30. *Id.* at 974.
31. *Id.* at 972.
32. *Id.* at 974.

IV. CONGRESS CAN INSTRUCT COURTS HOW TO INTERPRET ITS STATUTES

Last but not least, Siegel argues that "Congress may prescribe rules of interpretation for the statutes it passes."[33] Indeed, he declares that, "[l]ike any giver of instructions, Congress may say how its instructions are to be understood."[34] Really?

A. Control over Interpretation Is Control over the Judiciary

If Congress could instruct the courts on how its words are to be understood, what would be the implications for the courts? In a profound work of political theory—*Through the Looking-Glass*—Humpty Dumpty tells Alice:

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."[35]

Congressional control over Congress's words would make Congress master—not only over lawmaking, but also over judging. And this is improbable, as the judicial power belongs to the courts, which form an independent branch of government.

Of course, as will be seen shortly, Congress can define its words so as to clarify its intent, but this is a far cry from dictating how they are to be understood or interpreted. That is a judgment which belongs to the judges, and any congressional attempt to control that judgment would defeat the independence of the judiciary in its own sphere of power: the decision of cases. Thus, even before one gets to question of judicial office and duty, Siegel's claim that Congress can control the understanding of its words collides with the Constitution's structure of the federal government—in particular, its creation of courts independent of the other branches.

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33. *Id.* at 942.

34. *Id.* Incidentally, Siegel's suggestion that Congress is like any other "giver of instructions" is not persuasive, for the ultimate "giver of instructions" in the government of the United States is the people, who have used their constitution to give judicial power, including the interpretation of law in cases, to the courts. U.S. CONST., art. III. Congress is thus not like any other "giver of instructions." *See id.*

35. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS 124 (The Macmillan Co. 1930) (1871).

B. Judicial Duty

If the Constitution vests judicial power in the courts, and if judicial interpretation is part of that power, how can Congress instruct the courts on how to exercise it? It is one thing to conclude that, in most instances, Congress can withdraw cases from the jurisdiction of the courts, but it is quite another to suggest that, where Congress leaves jurisdiction in the courts, it can bar courts and their judges from exercising their own independent judgment about what the law is.

The judges have a distinctive office of exercising their own independent judgment in cases. Of course, other federal officers can and should exercise their judgment about the law, but the judges stand apart as the only federal officers whose very office is one of judgment—indeed, independent judgment—in the resolution of cases.[36] Accordingly, when a case comes before them, they have a duty, inherent in their very identity as judges, to exercise their own independent judgment about what the law is. John Marshall's words, again, are illuminating: "It is emphatically the province and duty of the judicial department to say what the law is."[37]

Accordingly, it is difficult to understand how Congress, even in a statute, can dictate to the judges how they should interpret statutes. Such a statute would be incompatible with their duty to exercise their own independent judgment. Were they to follow Congress's instructions, they would be neither exercising their own judgment nor preserving its independence.

C. Chevron *Is Not Like the Constitution's Allocation of Power to Other Branches*

In defending congressional interference with the judges' constitutional duty, Siegel argues that *Chevron* is akin to the cases in which the Supreme Court recognizes that the Constitution limits the power of the courts. To be precise, he relies on cases holding that at least some questions about the meaning of the Census Clause and the Apportionment Clause can be resolved by Congress.[38]

But the clauses relied upon by Siegel are instances in which the Constitution itself is said to shift judicial power away from judges—not cases in which Congress takes such authority from judges. The Constitution vests the judicial power in the courts, including the duty

36. PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 316, 545–46, 612–13 (2008).

37. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

38. *See* Siegel, *supra* note 3, at 966–71; *See also* U.S. CONST. art. I, § 2; Utah v. Evans, 536 U.S. 452 (2002); U.S. Dep't. of Commerce v. Montana, 503 U.S. 442 (1992)).

in cases to say what the law is—subject to some variations stated in the Constitution itself.[39] Put another way, the Constitution's separation of powers is a default rule, from which the Constitution makes some exceptions.[40] But it does not follow that mere statutes can also make exceptions. Constitutional exceptions from the Constitution's separation of powers are no justification for statutory exceptions.

D. Definitional and Liberal-Construction Clauses

Along the way, Siegel relies on the clauses of statutes that define their terms or that say they should be liberally construed.[41] But it does not follow that Congress can instruct courts to defer to agency interpretations of their ambiguous authorizing statutes.

The statutory definitions are drafting mechanisms for demarcating the contours of statutorily created powers and duties. They are more clearly indications of congressional intent or meaning than instructions to judges about interpretation.

As for the statutes that say that they should be liberally construed to effectuate their purposes, such provisions may indeed be congressional instructions about interpretation. But it is therefore telling that Siegel cites only one Supreme Court case (on RICO) for the legitimacy of such provisions.[42] And as might be expected, the Court in that case did not entirely rely on the liberal construction provision. Instead, it rested its "less restrictive reading" on its "prior cases and the general principles surrounding this statute," on "Congress' self-consciously expansive language and overall approach," and only third on Congress's "express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.' "[43] This is hardly strong support for a broad claim that Congress can instruct judges on interpretation

Stepping back from Siegel's arguments, it is worth noting that the question of whether Congress can instruct the courts on interpretation is much disputed. The conventional answer is that a congressional power to dictate interpretation would interfere with the judicial power and independence of the courts, and with the duty of

39. U.S. CONST. art. III.

40. HAMBURGER, *supra* note 2, at 331–32 (explaining the eighteenth-century view that a constitution should establish the separation of powers as a default rule, from which it then could carve out exceptions).

41. Siegel, *supra* note 3, at 977.

42. Sedima v. Imrex Co., 473 U.S. 479, 497–98 (1985); Siegel, *supra* note 3, at 976 (citing Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1502 n.228 (2000)).

43. Sedima, 473 U.S. at 497–98.

judges to exercise independent judgment. Another view, however, has developed to the effect that Congress can at least dictate to the courts how they should interpret statutes—this being the position adopted by Siegel. But "the duty of the judicial department to say what the law is" cannot be sliced and diced to separate statutes from the Constitution; in other words, it cannot be narrowed to apply only when judges interpret the Constitution.[44] Such an approach would deprive the courts of their independence in expounding the law, except in constitutional matters. Were Congress thereby to become the interpreter of its own statutes, the consequences for the courts and for the people of the United States would be sobering. Siegel's essay, however, discusses none of this.

Congress's role in interpretation need not be pursued here. Suffice it to say that, although Congress can clarify what it intends or means, it does not necessarily follow that Congress can instruct courts on how to interpret statutes, and Siegel's reliance on the one point to prove the other suggests just how far he is stretching to defend *Chevron*.[45]

V. THE COST OF A VOLTE-FACE

Thus far, I have simply recited Siegel's four arguments and questioned their intellectual force; it therefore remains necessary to consider their political costs. Siegel's vision of how to prop up *Chevron* would require the Supreme Court to overturn a vast body of case law—both on delegation and on interpretation. And this is no small matter. Leaving aside that this volte-face would require a profound intellectual disjuncture, it would come with risks for the Court and the country.

A. Nondelegation Doctrine

Siegel's policymaking vision of *Chevron* would require a reversal of the "nondelegation doctrine." As Cass Sunstein has observed, the Supreme Court has consistently held that Congress may not delegate

44. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

45. Incidentally, Siegel also claims that "courts have a duty, where possible, to construe statutes in a way that saves their constitutionality, even deeming the statutes to be rewritten in different language where necessary." Siegel, *supra* note 3, at 980. But this grossly misstates the doctrine of equitable interpretation, for it does not adequately recognize the precondition for the doctrine in an ambiguity, its goal of discerning legislative intent, or the risks of taking it further. (For this doctrine, see HAMBURGER, *supra* note 36, at 54–57, 339–40, 344–57). Moreover, even if there were such a duty, it does not mean (as Siegel assumes) that the courts would have to save ambiguous statutes by pretending that they contained clauses authorizing rulemaking. On the contrary, it would be much easier to save their constitutionality by just recognizing that they do not authorize rulemaking.

legislative power.[46] Of course, it has simultaneously allowed the reality of delegation, but it has done so with a remarkable adherence to the theory that legislative power cannot be delegated. So, in defense of *Chevron,* should the Court candidly accept that Congress can give legislative power to agencies?[47]

Siegel sidesteps this issue by speaking of agency "policy choices" rather than agency lawmaking. Yet he recognizes that when he speaks of "policy choices," he is really talking about lawmaking.[48] Whatever the label, if *Chevron* is to be justified on the ground that Congress has allocated policymaking rather than interpretation to agencies, this would openly accept the delegation of legislative power to agencies—something the Supreme Court has long said is unconstitutional.

B. Precedents

Siegel's suggestion that *Chevron* does not concern interpretation would also overturn a long line of cases. For more than three decades, Supreme Court decisions have treated *Chevron* as involving judicial deference to agency interpretation. For example, *United States v. Mead Corp.* held that *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[49]

Accordingly, if judges were to follow Siegel's reimagination of *Chevron*, they would have to reverse their longstanding understanding of the case. I wrote in "Chevron *Bias*":

> The excuse that administrative interpretation is merely lawmaking . . . conflates what the Supreme Court has persistently differentiated. If the Justices have been mistaken in recognizing agency interpretation as interpretation, why have none of them corrected themselves—why have none of them clarified that that it is not interpretation? And if, after so many decades, they conclude it is not interpretation, not even partly interpretation, let them explain why, so late in the day, they are changing their minds. In the meantime, the insistence of a handful of academics that it is merely lawmaking looks utterly unrealistic.[50]

Perhaps the greater good of saving *Chevron* justifies the pretense that it means the opposite of what it clearly says and has long been understood to mean; but this has yet to be shown.

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46. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000).

47. Of course, the "nondelegation doctrine" is a misnomer, as this label suggests that what is at stake is merely a judicial doctrine rather than the Constitution itself.

48. *See, e.g.*, Siegel, *supra* note 3, at 960 (relying on Monaghan's account of the "delegation of law-making authority to an agency" as "[t]he core insight").

49. 533 U.S. 218, 226–27 (2001).

50. Hamburger, *supra* note 2, at 1222.

And if the Supreme Court were to defend *Chevron* by reversing itself on delegation and interpretation, its decision would come with more than trivial costs. Americans might reasonably wonder what would justify the Court in spinning around on a dime. Indeed, they might reasonably conclude that the Court cares more about *Chevron* than about the law.

C. Fictions

Siegel appears to be calling on the Supreme Court to defend *Chevron* with a legal fiction. He is no doubt sincere in seeking his "conceptual shift"—the shift by which the Court would stop saying that the case centers on interpretation and would say, instead, that it merely recognizes statutory delegations of agency "policy choices" or lawmaking. But if the justification for *Chevron* deference is that statutory ambiguities need to be interpreted, what is this conceptual shift to delegated lawmaking other than a legal fiction?

I am not the only one to express this concern. Thomas Merrill observes: "Even Chevron's most enthusiastic champions admit that the idea of an 'implied delegation' is a fiction."[51] And Adrian Vermeule explains that "the delegation theory is an erroneous and insufficient justification for *Chevron*, both because it is rankly fictional—there just is no general delegation of that sort to administrative agencies—and because the *Chevron* opinion itself is irreducibly ambiguous, or ambivalent, on the topic of delegation."[52] Siegel's approach, in other words, departs from the underlying statutory and judicial realities.

The sad truth is that administrative power is repeatedly justified with what could politely be called "fictions," but which more bluntly look like falsehoods. Administrative power is called "administrative law"; the delegation of lawmaking power is justified under a "nondelegation" doctrine; agencies are said to be constrained by statutory "intelligible principles"; administrative rulemaking with notice and comment is said to be "democratic"; administrative adjudicators who usurp the role of judges are called "judges"; private claims to the Seventh Amendment jury right are defeated by the government's "public right"; the administrative denial of the due process of law is justified as "all the process that is due"; even when one gets the paltry right to a "hearing," one does not necessarily have the

51. Thomas W. Merrill, *Step Zero After City of Arlington*, 83 FORDHAM L. REV. 753, 759 (2014).

52. Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1557–58 (2015) (reviewing HAMBURGER, *supra* note 2).

right to be heard; and so forth. Administrative power rests on one brazen falsehood after another.

Siegel's arguments are admirably candid. But it is therefore all the more regrettable that they ask the Justices to prop up administrative power with yet another fiction. Both *Chevron* and the logic on which it rests involve interpretation, and if the Supreme Court were to say otherwise, it would be as unpersuasive as it is when it eviscerates jury rights by speaking of "public rights."

The Supreme Court is right to be concerned about its reputation. But a strained attempt to support an unsupportable doctrine is not the remedy. On the contrary, that sort of tactic, even in only one prominent case, can stimulate lasting cynicism, which may take decades to overcome. The ideal of judging that justifies the elevated role of the courts is one of independent judgment in accord with the law of the land. And any departure from this ideal of office and duty is apt to undermine confidence in the Justices and the law they are meant to uphold.

The reality is that we have a vast administrative state, resting on a raft of judicial falsehoods. And as these fictions are increasingly recognized for what they are, it is not only the administrative state that is at risk. The Justices therefore cannot afford any more fictions, falsehoods, or whatever else one wants to call these odorous untruths. And among these costly fictions is the "conceptual shift" that *Chevron* is not about interpretation. Instead of creating more fictions, the Justices, in accord with their duty and their institutional interests, need to adhere to the Constitution.

CONCLUSION

Although Siegel's argument is the best that can be made for *Chevron* deference, it cannot successfully prop up this doctrine. First, his observation that *Chevron* allows judges to interpret questions of agency authority is simply unresponsive to the concern that *Chevron* precludes judges from interpreting the underlying substantive questions—thereby requiring judges to abandon independent judgment and embrace judicial bias. Second, his claim that *Chevron* can be reconceptualized away from interpretation runs counter to the case, its logic, and its context in many decades of Supreme Court jurisprudence. Third, he is wrong in suggesting there is no significant difference between statutes that say they are authorizing rulemaking and those that do not. Fourth, although Congress can clarify what it intends or means, it does not follow that Congress can instruct courts how to

interpret statutes, let alone bar courts from saying what the law is. Fifth, the Supreme Court cannot afford Siegel's proposed volte-face.

In attempting to rescue *Chevron* deference from its constitutional failings, Siegel offers arguments that are not merely unsound, but positively rickety. The impression is of a doctrine resting precariously on narrow stilts, which cannot stand on their own but that have been propped together to support the insupportable.

Not just a technical detail of the administrative state, *Chevron* is an assault on the fundamentals of our judicial system. Recall, parties have a right to have judges decide what the law is, and they have a right to have judges decide this without bias toward the other party. *Chevron* is therefore an abomination, by which the Justices have turned the judiciary into an instrument of injustice.

Accordingly, rather than support *Chevron* on stilts, the Justices need to return to fundamentals. They need to remember that they hold an office of independent judgment in accord with the law of the land. This is their duty, not the defense of an oppressive and unconstitutional administrative state.