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INTRODUCTION

Adrian Vermeule has accurately observed that "[t]he administrative state is the central and unavoidable topic of modern constitutional theorizing."[1] So it is also with administrative law theorizing. The topic is inevitably *central* because "administrative state" describes the government under which we live. The topic is *unavoidable* for two reasons. First, the combination of regulatory and enforcement authority in the same hands challenges Americans' civics-book understanding of the separation of powers. Despite the constitutional vesting of legislative power in Congress, "the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating."[2] Second, in the face of Americans' oft-voiced aspiration for a government of laws, the bureaucracy appears to be awash in discretion. This discretion is arguably controlled only at the margins by a federal judiciary that sanctions the passing of policymaking authority to administrative agencies under a rarely enforced nondelegation doctrine.[3] For both reasons, the legitimacy of the administrative state is always a topic ripe for debate.

To those anxious about the administrative state's legitimacy, the U.S. Supreme Court's now-iconic *Chevron*[4] decision could well be troubling. Especially if read literally, its famous two-step framework for judicial review of agency legal interpretation affords administrative agencies considerable deference in imputing meaning to Congress's enactments. Federal courts are to defer to any "permissible" interpretation of the law in

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1. Adrian Vermeule, *The Administrative State: Law, Democracy, and Knowledge*, *in* OXFORD HANDBOOK OF THE UNITED STATES CONSTITUTION (Mark Tushnet et al. eds., forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2329818.

2. City of Arlington v. FCC, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).

3. LISA SCHULZ BRESSMAN, EDWARD L. RUBIN & KEVIN M. STACK, THE REGULATORY STATE 141–42 (2010) ("[T]he [Supreme] Court has suggested that no delegation is likely to fail muster on constitutional non-delegation grounds.").

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

question whenever a statute "is silent or ambiguous with respect to the specific issue" presented.[5] Chief Justice Roberts has recently voiced in dramatic terms the anxiety such deference provokes:

> When it applies, *Chevron* is a powerful weapon in an agency's regulatory arsenal. Congressional delegations to agencies are often ambiguous—expressing "a mood rather than a message."[6] By design or default, Congress often fails to speak to "the precise question" before an agency. In the absence of such an answer, an agency's interpretation has the full force and effect of law, unless it "exceeds the bounds of the permissible."[7]
>
> It would be a bit much to describe the result as "the very definition of tyranny," but the danger posed by the growing power of the administrative state cannot be dismissed.[8]

The Chief Justice appears to see little difference between *Chevron* deference and the wholesale abdication of legal construction entirely to a single branch of government.

I try, in this Essay, to evaluate this particular worry: Should *Chevron* deference be thought inconsistent with legitimacy in the administrative state?[9] In particular, I examine whether or under what conditions *Chevron* poses a threat to what is routinely taken to be an essential component of government legitimacy, namely, the rule of law. This inquiry requires me first to set out a conception of the rule of law that is plausible for the administrative state—a state in which discretion abounds. I argue that *Chevron* is consistent with the most normatively attractive such conception. I believe, however, that a proper conception of the rule of law also has implications for two important questions: (1) whether there is room for political considerations in judicial review of the permissibility of agency action and (2) whether presidential involvement in an agency's decision making should intensify its entitlement to *Chevron* deference. My answer to the first question is "no" and to the second, "almost always no."

I. THE RULE OF LAW IN THE ADMINISTRATIVE STATE

Discussions of concepts like "legitimacy" or "the rule of law" are typically muddy because so many plausible conceptions exist of those ideas. Jeremy Waldron has identified the rule of law as an "essentially contested" concept, meaning that its internal complexity gives rise to plausible rival versions of the concept that prioritize its various features

5. *Id.* at 843.

6. *City of Arlington*, 133 S. Ct. at 1879 (citing Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition Standards*, 75 HARV. L. REV. 1263, 1311 (1962)).

7. *Id.* (citing Barnhart v. Walton, 535 U.S. 212, 218 (2002)).

8. *Id.* (citing Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring); Sackett v. EPA, 132 S. Ct. 1367, 1374 (2012)).

9. This Essay is part of a larger symposium entitled Chevron *at 30: Looking Back and Looking Forward*. For an overview of the symposium, see Peter M. Shane & Christopher J. Walker, *Foreword:* Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475 (2014).

very differently.[10] Scholars writing about the administrative state sometimes use legitimacy to mean something like resemblance to the original constitutional design,[11] and sometimes—as I do— to mean worthy, in principle, of both respect and public acceptance.[12]

For the purposes of this discussion, I mean the rule of law to refer to government under a set of formal and informal processes that operate to promote the following normative propositions:

1. That government action should be bounded by rules promulgated by institutions legitimately authorized to make rules that both authorize and constrain government behavior;
2. That the governing rules and their implementation be respectful of human rights, including all individual rights entrenched in the law itself;
3. That government actors should obey the law, that is, they should perform conscientiously those duties that the law mandates and refrain from acts that the law prohibits;
4. That government actors, in exercising such discretion as the law may authorize, be able to justify their discretionary action according to reasons rooted in a sound interpretation of the relevant law; and
5. That meaningful recourse should be available to citizens should they be injured by government action in violation of these requirements.

My position is that a government so organized as to try to ensure these values provides its citizens the rule of law.

Two aspects of the foregoing propositions are possibly controversial. First, I build legitimacy into the first of these propositions in order to couple the rule of law with a set of criteria that render law itself worthy of respect. Allen Buchanan has usefully written that "an entity has political legitimacy if and only if it is morally justified in wielding political power."[13] A full-blown explication of his argument is unnecessary for this Essay, but I mean, at least, to endorse his notion that to morally "exercise a monopoly, within a jurisdiction, in the making, application, and enforcement of laws,"[14] the relatively small subset of a polity that gets to wield state power must take as their governing premise equal consideration for the interests of all persons subject to the jurisdiction's laws.[15] As Buchanan argues, it is difficult to see how a wholly undemocratic society could fulfill that premise.[16] Building a political legitimacy premise into a conception of the rule of law

10. Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137 (2002).

11. Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1675 n.92 (2004) ("By agency legitimacy, I mean consistency with the constitutional structure . . . .").

12. *Cf.* Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313 (2013).

13. Allen Buchanan, *Political Legitimacy and Democracy*, 112 ETHICS 689, 689 (2002).

14. *Id.*

15. *Id. passim*.

16. *Id.* at 717.

necessarily implies also that the rule of law, properly understood, requires some sort of democratic foundation.

Second, I am insisting that the rule of law has implications not only for the observance of legal duties and prohibitions, but also for the justifiability of acts that the law entitles administrators to take within their discretion—that is, within the zone of action that the relevant law neither mandates nor prohibits. That may seem odd given that the very point of having discretion might well be thought to be freedom to decide by whatever standards one chooses. Yet we would not have much of a rule of law in the administrative state if the reasons for even discretionary action did not have to be rooted in authorizing law. The considerations animating the rule of law ideal—especially the fear of arbitrary power and the equality of respect due the interests of all citizens—are no less important when administrators exercise their discretion than when they perform mandatory duties. To generalize from what Steve Burton has written about the exercise of discretion by judges, rule of law values "support a norm that requires [officials] at the least to justify their decisions in the rules, principles, and policies of the law."[17]

I am strengthened in my conviction as to the soundness of this conception of the rule of law because so much of our administrative law system is implicitly structured around its elements. They are all but codified in the Administrative Procedure Act's (APA) standards for judicial review of agency action,[18] especially as implemented through federal courts' embrace of the "hard look" doctrine.[19] That is, courts are directed to "compel agency action unlawfully withheld"[20] and to set aside agency action "contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction . . . without observance of procedure required by law."[21] These standards pretty much cover my first three normative premises. Courts are likewise to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

17. Steven J. Burton, *Particularism, Discretion and the Rule of Law*, *in* THE RULE OF LAW 178, 186 (Ian Shapiro ed., 1994).

18. 5 U.S.C. § 706 (2012).

19. Originally, the hard look doctrine required courts to ensure that the *agency* had taken a hard look at the regulatory issues. Over time, however, the D.C. Circuit morphed the hard look doctrine "into one that required a hard look not just by the agency, but by the court as well." As now—D.C. Circuit Judge Garland recognized, the D.C. Circuit developed three iterations of its hard look doctrine: procedural, quasi-procedural, and substantive hard look. Regardless of who was required to do the hard looking, in each of these three iterations, the D.C. Circuit's hard look doctrine gave courts much more authority to invalidate agency action than the rational basis review originally contemplated by the APA—and no variant of the hard look doctrine was linked to the doctrines for judicial review of congressional action.

Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 438–39 (2009) (citing Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980); see Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 525–34 (1985)).

20. 5 U.S.C. § 706(1).

21. *Id.* § 706(2)(B)–(D).

with law,"[22] a standard that—through the use of the word "otherwise"—directly links discretion with acting in "accordance with law."

Courts truly deferential to agencies might well render the "arbitrary and capricious" standard only a very loose control over agency behavior. As is well known, however, courts have done precisely the contrary. As summarized in recent years by an ABA section task force, agency decisions may be set aside as arbitrary and capricious or an abuse of discretion for a wide variety of reasons, including the absence of "a reasonable relationship to statutory purposes or requirements."[23] An agency defending its action must offer an explanation that links its initiative to statutory purposes based "upon reasoning that is [not] seriously flawed."[24] These prongs of the jurisprudence of judicial review link the arbitrary and capricious standard to rule of law values and explicitly tie the legality of discretionary action to its justification according to legally authorized reasons.

Thus conceived, the rule of law helps to bolster a series of values widely taken to be fundamental elements of political legitimacy. Most obviously, the rule of law protects against arbitrariness in two senses. From the perspective of society as a whole, the rule of law helps to ensure that those in power cannot do what they want just because they want to do it, or because they have force on their side. From the point of view of individual persons, the protection of individual rights coupled with the requirement of ordinary legality works to ensure that no one's liberty is constrained without plausible justification.

Because government officials may do only what the law permits, the rule of law also advances democratic legitimacy to the extent that the law is the product of democratic institutions. Democracy provides an important justification for the requirement of law-based reasoning even as to discretionary action. Not only does public reasoning facilitate judicial review of official action, it also enables Congress and the public generally to monitor legal compliance and legal efficacy, thus promoting further democratic deliberation over the exercise of government power. The values of nonarbitrariness, democratic legitimacy, and institutional accountability[25] together form the normative basis for the rule of law ideal in the administrative state.

II. *CHEVRON* AND THE RULE OF LAW

It is easy to see, from a rule of law perspective, why the *Chevron* decision, at least in its rhetoric, could provoke anxiety. In an essay ultimately approving of the decision, then-Judge Kenneth Starr wrote:

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22. *Id.* § 706(2)(A).

23. Ronald M. Levin et al., *A Blackletter Statement of Federal Administrative Law—Preface*, 54 ADMIN. L. REV. 1, 42 (2002).

24. *Id.*

25. For especially nuanced explorations of the idea of accountability and its relationship to democratic legitimacy, see generally Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073 (2005), and Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607 (2007).

> Affording deference to an agency's legal analysis . . . seems facially contrary to the fundamental principle, incorporated in Chief Justice John Marshall's broad dictum in *Marbury v. Madison*, that "it is emphatically the duty of the judicial department to say what the law is." Judicial deference to agencies' statutory interpretations . . . necessarily means that an agency of the executive branch, to a greater or lesser degree, is displacing the judiciary in its traditional and jealously guarded law-declaring function.[26]

Coupled with the appearance of judicial displacement, Judge Starr continued, *Chevron* appeared to mark a relaxation in agency accountability to courts: "[T]he Court's decision rendered untenable an assumption that seems to have undergirded many administrative law decisions in the past: that federal courts have a general duty to supervise agencies in much the same way that the Supreme Court supervises lower federal courts."[27]

Even in its first decade, however, commentators were hardly unanimous in joining Judge Starr's characterization of *Chevron* as "revolutionary." Russell Weaver, for example, thought *Chevron*'s institutional implications were easily overstated:

> [M]y sense is that *Chevron*'s importance has been exaggerated. *Chevron* did not profoundly alter either the Supreme Court's conduct, or that of the lower federal courts. The Supreme Court frequently invokes *Chevron*, but it rarely defers without carefully scrutinizing agency interpretations. Moreover, the Court has been quite willing to reject agency interpretations, and the Court is often reluctant to "defer" in the sense of accepting a reasonable agency interpretation when it prefers an alternative interpretation. Thus, although *Chevron*'s rhetoric differed from *Skidmore*'s, the scope of review remains essentially unchanged.[28]

As Professor Weaver recognized, the boldness of *Chevron* appears mostly in the rhetoric of its now-ubiquitous two-step framework, implying that agencies should be bound only where statutes are completely free of ambiguity on the "precise question presented," and requiring judicial acceptance whenever an agency proposes to resolve statutory ambiguity in a merely rational way.

Putting aside that rhetoric, however, the conceptual basis for *Chevron*'s general stance on judicial review would appear to flow ineluctably from the very structure of the nondelegation doctrine on which the administrative state is founded. That doctrine rests on the proposition that a permissible vesting of decision making authority in the executive demands that Congress, in its authorizing legislation, include a meaningful boundary line that enables courts to differentiate lawful from unlawful administrative

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26. Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 283 (1986) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

27. *Id.* at 284. For a more anxious contemporary assessment of the implications of *Chevron* by another distinguished appellate judge, see generally Abner J. Mikva, *How Should the Courts Treat Administrative Agencies?* 36 AM. U. L. REV. 1 (1986).

28. Russell L. Weaver, *Some Realism About* Chevron, 58 MO. L. REV. 129, 131–32 (1993).

acts.[29] The so-called "intelligible principle" rule[30] requires that every statute embody boundaries that are discernible by judges applying the traditional tools of statutory construction to measure the scope of Congress's delegation. Judges using those tools may disagree as to a statute's most legally plausible reading, but some agency-constraining content must at least be detectable.

At the same time, authorizing legislation is just that—an authorization, within some bounded realm of government power, for an agency to follow its best judgment in implementing the statute Congress has enacted. The bifurcation of legally discernible constraint, on the one hand, and authorized discretion, on the other, does not itself dictate the intensity with which courts should review an agency's stance on either question. It does imply, however, that the inquiries are different—that the agency must have a sense of its boundaries that it interprets *correctly* and an understanding of its discretion that it advances *permissibly*.[31] Otherwise, there would be no difference between boundaries and discretion.

Merely tracing the *Chevron* two-step to its delegation doctrine roots, however, might still leave two rule of law anxieties unanswered: Can the rule of law be reconciled (1) with the nondelegation doctrine itself and (2) with "deferential" review of agency interpretations of law where statutes are legally ambiguous?

Two interrelated rule of law–based objections to the current state of nondelegation doctrine are common. The first is that the breadth of delegation which courts now permit violates a supposed requirement that Congress make all substantive policy choices of sufficient weight to be regarded as legislative in nature.[32] The second is that the so-called intelligible principles that courts attribute to statutes in order to sustain their constitutionality are utterly illusory.[33] That is, broad delegations violate the rule of law because the statutory constraints on administrative authority are simply too vaporous to count as actual rules.

So much ink has been spilled on the nondelegation doctrine that I will be brief in my own responses to these challenges. To the first, it must be observed that no one has truly succeeded in articulating a judicially manageable standard for differentiating permissible from impermissible

29. Yakus v. United States, 321 U.S. 414, 426 (1944) ("Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.").

30. J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("[So long as Congress] shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

31. *See generally* Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the* Chevron *and Nondelegation Doctrines*, 38 ARIZ. L.J. 921 (2006).

32. *See generally* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

33. 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6 (5th ed. 2013).

delegations that is sounder in theory or in any way more plausible than current doctrine.[34] The constitutional text itself provides no guidance. If anything, the textual scope of the Necessary and Proper Clause[35] implies that some version of the nondelegation doctrine more stringent than the "intelligible principle" requirement would run headlong into the Framers' intention that Congress have broad leeway in deciding how to implement its constitutional authorities through executive branch officers.[36]

That the founding generation might not have had in mind the particular breadth of discretion that the executive branch enjoys does not belie the legitimacy of broad delegation. As Jerry Mashaw has so thoroughly documented, the early decades of U.S. public administration were highly experimental and little constrained by any common understanding that the constitutionally prescribed separation of powers was procrustean in its rigidity.[37] So long as Congress provides agencies a mission that represents a rational means for implementing the constitutional powers of the legislative branch, and so long as those missions are constrained by enactments susceptible to interpretation through ordinary tools of statutory construction, no violation of the Constitution has occurred.

As to the "law-ishness" of legislative constraints as broad as, say, "the public interest, convenience, and necessity" standard for granting broadcast licenses,[38] the fact is that courts, in appropriate cases, appear capable of deploying ordinary interpretive tools to read operationally meaningful constraints on administrative action into even broad authorizing statutes. Administrators and their lawyers actually treat even broadly worded statutes as constraining them. In policing such laws, courts undoubtedly tolerate a degree of ambiguity that would be improper for a statute threatening individual liability for noncompliance. But that is not the right standard for judging whether the delegation to an agency counts as "law." Agency officials who misapprehend the boundaries Congress has set to the

34. The most intellectually ambitious attempt in this regard is the work of Professor Schoenbrod, who has proposed that courts distinguish between statutes that permissibly enact rules requiring only interpretation in their implementation and statutes that impermissibly enact only goals that require executive branch implementation through making law or rules on its own. SCHOENBROD, *supra* note 32, at 181–85. Even assuming this to be a manageable distinction—a heroic assumption—it is not clear that it maps persuasively onto either constitutional history or the normative purposes typically associated with the nondelegation doctrine. *See generally* Jerry L. Mashaw, *Pro Delegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

35. U.S. CONST. art. I, § 8.

36. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 493 (1987). For a narrower view of the clause, see generally Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

37. *See generally* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012). *See also* GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD (1997).

38. 47 U.S.C. § 307(a) (2012).

administrative programs for which they are responsible are not, on that account, held liable for civil or criminal wrong.[39] They are subject only to "do-overs."[40] Although various enactments might well be improved by being more or less specific, depending on the agency's assigned mission, statutory ambiguity does not defeat the operation of the rule of law as long as there is some "there" there.

Nor does the fact of judicial deference to an agency in interpreting its authorizing legislation threaten the rule of law. The consistency of the judicial function with some institutional deference in legal interpretation is a very old idea. Peter Strauss has cited *Edwards' Lessee v. Darby*[41] for the Supreme Court's early embrace of the proposition: "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."[42] In a sense, however, the idea has even more venerable Supreme Court roots. In his opinion for the Court eight years earlier in *McCulloch v. Maryland*,[43] Chief Justice Marshall—whose *Marbury* opinion remains the Supreme Court's iconic claim of the judiciary's entitlement to "say what the law is"[44]—had this to say about the appropriateness of institutional deference in *constitutional* cases:

> [A] doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the Government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.[45]

"[R]eceiv[ing] a considerable impression from . . . practice" is a good definition of deference. And compared to the deference to Congress that Chief Justice Marshall thought consistent with the appropriate judicial role in constitutional interpretation, deference to the executive branch in the "exposition" of statutes seems a very mild nod to interbranch comity. Chief

39. There is, of course, no law criminalizing the misinterpretation of statutes in the course of implementation. Moreover, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

40. Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 42 GEO. WASH. L. REV. (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2242869.

41. 25 U.S. (12 Wheat.) 206 (1827).

42. Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1154 & n.43 (2012) (citing *Edwards' Lessee*, 25 U.S. (12 Wheat.) at 210).

43. 17 U.S. (4 Wheat.) 316 (1819).

44. Marbury v. Madison, 5. U.S. (1 Cranch) 137, 177 (1802).

45. *McCulloch*, 17 U.S. (4 Wheat.) at 401.

Justice Marshall plainly saw no logical inconsistency between judicial claims of power to say what the law is and judicial practices of accounting for other branches' views in that process.

A rule of law challenge to *Chevron* would be stronger if the Step Two assessment of agency interpretations of law were toothless, but it is not. It is now commonplace that courts review the reasonableness of agency legal interpretation under Step Two with the rigor associated with judicial review of rulemaking generally.[46] To elicit deference, an agency must offer reasoned support for its interpretation, rooted in the purposes of the statute.[47] To take but one highly publicized example, the D.C. Circuit accepted the FCC's position that it was entitled to regulate broadband providers only after the panel majority was persuaded that the FCC had reasonably taken into account the language of the relevant statutory provision, its legislative history, the agency's prior interpretations of its authority, and the potential impact on its authority of other relevant legislation.[48] Although courts faced with statutory ambiguity are limited by *Chevron* to determining whether the agency has proffered a "permissible construction of the statute" in question, the inquiry into permissibility can be searching.

If this were not the case—if courts implementing Step Two were less rigorous—the risk to the rule of law would be evident in internal agency practice. And, no doubt, the Supreme Court's emphatic reminder of the deference owed agencies had some impact in elevating the authority of nonlawyer agency policy makers and reducing the de facto veto power of agency general counsels.[49] By itself, however, that sort of shift hardly betokens a descent into agency lawlessness. As recent work by Professors Emily Hammond and David Markell suggests, agencies engaged even in administrative activity all but practically immune to judicial review may nonetheless conduct that activity in a manner that displays fidelity to law, fairness, and neutrality in decision making, transparency, and rationality.[50] An agency's professionalism and institutional culture, its networks of important relationships with stakeholders, the empowerment of intended

46. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Ins., Co., 463 U.S. 29 (1983); Verizon v. FCC, 740 F.3d 623, 635 (D.C. Cir. 2014) ("The *Chevron* inquiry overlaps substantially with that required by the Administrative Procedure Act (APA), pursuant to which we must also determine whether the Commission's actions were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A); *see* National Ass'n of Regulatory Utility Commissioners v. Interstate Commerce Commission, 41 F.3d 721, 726–27 (D.C. Cir. 1994).").

47. Prior to ascending the bench and pretty much in the immediate wake of *Chevron*, Chief Judge Merrick B. Garland anticipated this approach. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 550 (1985).

48. *Verizon*, 740 F.3d at 637–40.

49. 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, 12 (2005) ("*Chevron* opened up and validated a policy making dialogue within agencies about what interpretation the agency *should* adopt for policy reasons, rather than what interpretation the agency *must* adopt for legal reasons . . . . *Chevron has increased the weight given to the views of* air pollution experts in the air program office relative to the lawyers in OGC.").

50. Hammond & Markell, *supra* note 12.

regulatory beneficiaries through the petition process, and norms internalized from programs that fit the more conventional pattern of accountability to judicial review may all help generate agency lawfulness from within.[51] If agency respect for law is notable with regard to programs where judicial review is all but precluded, it hardly seems that subjecting agency legal interpretation to the kind of deferential but careful review normally associated with rulemaking would act as a license for agency policymakers to ignore sound legal advice. If anything, a deference regime requires government lawyers to be careful and precise in advising their agency clients, distinguishing between the legal boundaries of agency discretion and the kinds of factors that would make discretionary action within those boundaries nonarbitrary.

Moreover, it bears emphasis that there is a deep way that deference to agency interpretation in the face of ambiguity positively advances the rule of law. In their pathbreaking study of the work of congressional drafters, Abbe Gluck and Lisa Bressman found that the overwhelming majority of those surveyed—over 80 percent—were aware of the *Chevron* doctrine,[52] and "91% reported that one reason for statutory ambiguity is a desire to delegate decision making to agencies."[53] Although the drafters surveyed indicated that statutory ambiguity often resulted from motivations other than a purposeful determination to leave the resolution of issues to the agency, they were aware that statutory ambiguity effectively made the resolution of ambiguity an agency task.[54] These findings suggest that the theory of congressional delegation on which *Chevron* largely rests—a theory frequently dismissed as a legal fiction[55]—actually mirrors legislative understanding and drafting practice faithfully. That is, in reminding courts to defer to agencies in the resolution of ambiguity, *Chevron* is carrying out a conscious congressional design. Whether enlarging agency authority is typically the motivating factor behind statutory ambiguity, it may well be so in particular cases, and, in any event, Congress is likely to be aware that enhanced delegated authority is the inevitable consequence of ambiguity. The delegation is thus intentional, even if not motivational.

Chevron detractors may object that what Congress understands it is delegating to an agency through ambiguous statutory authorization is not room for agency judgment as to what the statute means, but only room for agency judgment as to how the statute is best implemented. But the two issues are necessarily intertwined. To be sure, whether an agency has reasonably interpreted its statutory mandate is analytically a different question from whether its exercise of discretion pursuant to that discretion is arbitrary and capricious; maintaining this distinction is important to the

51. *Id.* at 316–17.

52. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 995 (2013).

53. *Id.* at 997.

54. *Id.* at 995–98.

55. Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2025–34 (2011) (reviewing the academic literature).

preservation of rule of law values, as discussed further below.[56] But every application of agency authority is simultaneously an assertion that its statute, properly interpreted, authorizes that application within the scope of the agency's delegated policymaking discretion. That reality is the foundation of the Court's recent opinion that there is no distinction between jurisdictional and nonjurisdictional agency assertions of statutory authority. As Justice Scalia wrote: "[T]here is *no difference*, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority . . . and its exceeding authorized application of authority that it unquestionably has."[57]

It is precisely because of this kinship that any distinctive difference in the stringency with which courts police agency interpretations of legally ambiguous statutory boundaries and agency applications of the implementation authority they claim would be anomalous. With regard to the very issue in *Chevron*—the permissibility of the EPA's "bubble" approach to the definition of "modified major stationary source"[58]—the arguments that the EPA would make for the permissibility of its reading of the Clean Air Act's ambiguities would be all but identical to its arguments in defense of its proposed rule as an implementation strategy. On both matters, the EPA would have to persuade a court that a definition of "modified major stationary source" that permitted "bubbling" amounts to a sufficiently appropriate means of accomplishing Congress's purposes to be both within its discretion and rational. As the casebook I coauthor notes: "Judicial deference at *Chevron*'s 'Step Two' appears to be deference to the same sorts of expert determinations and policy inferences to which courts are expected to defer under the 'arbitrary or capricious' standard" when applied to the rule as a form of implementation.[59] For this reason, judicial deference in the review of agency legal interpretation that is roughly equivalent to its deference in review of agency legal implementation is not only consistent with rule of law premises, but advances the value of judicial fidelity to honoring Congress's delegation of authority to the agency in the first place.

III. PRESIDENTIAL REGULATORY OVERSIGHT AND THE RULE OF LAW

Given the link now traced between rule of law values and the respect *Chevron* commands for Congress's choice of administrative decision maker, then-Professor Elena Kagan's much-cited 2001 article championing presidential involvement in administration makes a surprising claim—namely, that courts should intensify *Chevron* deference if presidential

56. *See infra* at p. 698.

57. City of Arlington v. FCC, 133 S. Ct. 1863, 1870 (2013).

58. 42 U.S.C. § 7503(a)(1)(B) (2012).

59. JERRY L. MASHAW, RICHARD A. MERRILL, PETER M. SHANE, M. ELIZABETH MAGILL, MARIANO-FIORENTINO CUÉLLAR & NICHOLAS R. PARRILLO, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 1009 (7th ed. 2014).

influence is apparent in the legal interpretation under review.[60] This is surprising because of the seeming decoupling of Congress's explicit choice of administrative decision maker from the obligation of courts to defer. The proposition is yet more unexpected in light of two other conclusions now-Justice Kagan has proffered. First, she is cautionary about the rule of law implications when Congress delegates administrative authority directly to the President,[61] which might otherwise have seemed intuitively the most appealing circumstance for according *Chevron* deference to presidentially driven policymaking. Further, she has argued that an agency should be thought to have waived its entitlement to *Chevron* deference if the congressionally named administrator, typically the agency head, sub-delegates the relevant decision making authority to another official within his or her agency—a proposition that seems to emphasize the rule of law value in respecting Congress's initial assignment of decision making responsibility.[62]

To be fair to Kagan's argument, it is not primarily a project to square *Chevron* with a theory of the rule of law. The basis for a rule of law argument in support of intensifying—or at least preserving—*Chevron* deference if presidential influence is apparent in the legal interpretation under review would come from a "unitary executive" interpretation of the Constitution, which Kagan does not embrace. Under "unitary executive" theory, the President is constitutionally entitled to direct the exercise of all discretion that Congress delegates to any administrative agency. Deference to the President would thus be consistent with the rule of law because the Constitution itself would have effectively vested in the President all forms of policy discretion exercised by the executive branch. Taken seriously, unitary executive theory means that Congress's assignment of decision making responsibilities is ultimately only hortatory. Presidents could not

60. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376 (2001) ("*Chevron*'s primary rationale suggests [an] approach, which would link deference in some way to presidential involvement."). Jack Beermann not only insists that the questions are separate, but is deeply critical of the Roberts Court for not giving clearer guidance as to when to apply arbitrary and capricious review and when to apply what is properly *Chevron* Step Two review. Jack M. Beermann, Chevron *at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 743–48 (2014). But, as I argue, an agency's arguments for the permissibility of its interpretation are likely to track what would be its arguments for the reasonableness of its statutory implementation strategy. The relevance of one or the other standard is likely to turn chiefly on the way in which a plaintiff frames the legal challenge to the agency action at issue. Shane & Walker, *supra* note 9, at 483 n.53 ("Whether a court uses one or the other rubric for its decision is most likely to turn on whether the challenge to agency reasonableness is based on an alleged lack of principled connection between agency action and the purposes and boundaries set in the relevant statute—which makes the dispute look interpretive—or whether the agency is assertedly lacking in its demonstration that the connections it posits actually exist on the record, which sounds more like an arbitrary and capricious challenge.").

61. Kagan, *supra* note 60, at 2368–69.

62. David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 204 ("If the congressional delegatee of the relevant statutory grant of authority takes personal responsibility for the decision, then the agency should command obeisance, within the broad bounds of reasonableness, in resolving statutory ambiguity; if she does not, then the judiciary should render the ultimate interpretive decision.").

only themselves direct how statutorily designated decision makers are to exercise discretion, they could presumably require statutorily designated decision makers to implement decisions essentially made by other administrators.[63]

Unitary executive theory, however, is largely indefensible as constitutional interpretation despite its earnest defenders' repeated claims on its behalf.[64] It is indefensible as a historical reading because the founding generation regarded the discretion constitutionally vested in the President as pertaining to management, not policy.[65] The debates in the first Congress regarding the structure of our first administrative departments indicate the contemporary view that the President need have policy control over only those administrators who assist in implementing the specific constitutional powers vested in the executive, not responsibilities assigned to the executive entirely by Congress.[66] Unitary executive theory is also implicitly refuted by the constitutional text, which explicitly makes the President commander-in-chief of the military[67] and authorizes him to seek written opinions on official matters from all heads of departments.[68] If Article II's vesting of executive power had by itself created the unitary executive, both of these subsequent constitutional assignments would be superfluous.[69] Indeed, the latter would seem bizarre.

It also must be said that Congress does not embrace this theory. Over sixty years ago, Congress enacted explicit authority for the President to delegate to any official appointed with Senate advice and consent "any function which is vested in the President by law, or any function which such officer is required or authorized by law to perform only with or subject

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63. *Cf.* Jason Marisam, *The President's Agency Selection Powers*, 65 ADMIN. L. REV. 821, 853–54 (2013).

64. *See* PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 32–42 (2009).

65. *See* JOHN A. ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE 1–3 (1986).

66. *See* Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 615–17 & nn.73–78 (1989).

67. U.S. CONST. art. II, § 2, para. 1.

68. *Id.*

69. A 2002 Office of Legal Counsel opinion, since withdrawn on other grounds, actually opined that the President of the United States enjoyed and would enjoy plenary control over decision making regarding the disposition of prisoners of war whether or not the Constitution included the commander-in-chief clause: "[Our] constitutional structure requires that any ambiguity in the allocation of a power that is executive in nature must be resolved in favor of the executive branch . . . . Even if the Constitution's entrustment of the Commander-in-Chief power to the President did not bestow upon him the authority to make unilateral determinations regarding the disposition of captured enemies, the President would nevertheless enjoy such a power by virtue of the broad sweep of the Vesting Clause." Memorandum from Jay S. Bybee, Assistant Att'y Gen., for William J. Haynes, II Gen. Counsel, Dep't of Defense Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations 4 (March 13, 2002), *withdrawn by* Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Memorandum for the Files Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, at 2 (Jan. 15, 2009).

to the approval, ratification, or other action of the President."[70] Under unitary executive theory, this statute, too, would be utterly superfluous.

Kagan's project, however, is not rooted in unitary executive constitutional interpretation. It is intended instead to deploy *Chevron* to incentivize White House involvement in administrative decision making, which her article champions chiefly on grounds of administrative effectiveness and democratic accountability.[71] She notes that the *Chevron* opinion justifies Step Two deference in part because the courts lack the democratic accountability of the elected branches, and then ascribes administrative agencies' democratic accountability substantially to their hierarchical relationship to the President:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[72]

Following the logic of the Court's observations, Kagan notes, the strongest cases for *Chevron* deference would seem to be those in which "presidential involvement [in agency legal interpretation] rises to a certain level of substantiality, as manifested in executive orders and directives, rulemaking records, and other objective indicia of decision making processes."[73]

Kagan properly notes that *Chevron*'s other explicit justifications—congruence with congressional intent, agency expertise, and the rigors of agency deliberative process[74]—all cut against treating presidential involvement as a lever for intensifying judicial deference.[75] Each, that is, recognizes the specific legitimacy of deferring to the particular administrator to whom Congress has assigned an administrative task. And as it happens, these justifications, rather than the agencies' link to the President, have come to dominate judicial understanding of the rationale for *Chevron* deference. What Kagan accurately observed as of 2001 is yet more emphatically true in 2014: "[T]he deference rule has become

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70. 3 U.S.C. § 301 (2012).

71. Kagan, *supra* note 60, at 2331 ("All models of administration must address two core issues: how to make administration accountable to the public and how to make administration efficient or otherwise effective.").

72. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

73. Kagan, *supra* note 60, at 2377.

74. *Chevron*, 467 U.S. at 865.

75. Kagan, *supra* note 60, at 2373–74.

disconnected from considerations relating to presidential involvement . . . . [C]ourts . . . have ignored the President's role in administration action in defining the scope of the *Chevron* doctrine."[76] *United States v. Mead Corp.*,[77] the Court's most comprehensive subsequent statement delimiting the scope of *Chevron* deference, centers the inquiry entirely on the nature of congressional delegation. The Court wrote that "a reviewing court has no business rejecting [on policy grounds] an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity" when it is "apparent . . . that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law."[78]

What *Chevron*'s history thus suggests is that the Court frames its significance more in the rule of law terms I have discussed than in light of the virtues Kagan associates with "presidential administration." In other words, courts defer to specific agencies because Congress has chosen specific agencies to be the locus of policymaking. This is, I believe, a good thing because I think Kagan rather overstates the virtues of "presidential administration." First, there is reason to doubt both the claims usually made for the presidency's democratic character, namely, that it represents national, as opposed to parochial interests, and that incentives pull presidents toward the policy preferences of the median voter.[79] Indeed, assuming democracy is advanced when government aligns its policies with those of the median voter, Matthew Stephenson has provided strong theoretical support for the proposition that such an alignment is more likely to be accomplished by an administrative agency with some degree of independence from direct presidential control than by the President himself.[80]

Moreover, institutional accountability is more likely to be achieved through the interaction of checking and balancing institutions than by imputing to the President a comprehensive discretion-directing power. Key elements of accountability in our public law system include the following: (1) requirements of notice and public input prior to administrative rulemaking; (2) requirements of public statements of basis and purpose for agency rules that lay out an agency's legal authority and the policy rationales upon which it acts; (3) judicial review; and (4) public scrutiny of

76. *Id.* at 2373–75; *see also* Emily Hammond, Chevron's *Generality Principles*, 83 FORDHAM L. REV. 655, 677 (2014) ("*Chevron* . . . is grounded in presidential accountability. . . . But it is interesting that the factor plays little to no role in the second-order *Chevron* decisions. As a descriptive matter, this omission invites rethinking about the place of presidential control in administrative law doctrine.").

77. 533 U.S. 218 (2001).

78. *Id.* at 229.

79. *See generally* B. DAN WOOD, THE MYTH OF PRESIDENTIAL REPRESENTATION (2009).

80. Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) ("Forcing the politically responsive president to share power with a partially insulated, politically unresponsive bureaucracy tends to reduce the variance in policy outcomes, because bureaucratic insulation creates a kind of compensatory inertia that mutes the significance of variation in the president's policy preferences.").

agency performance as facilitated by the Freedom of Information Act[81] and a vigorous press.

In light of these mechanisms, it remains truly uncertain what White House oversight contributes to regulatory effectiveness[82] except in one class of cases: The White House is uniquely positioned atop the executive branch to spot coordination problems among agencies. I thus propose below that *Chevron* deference might sometimes be deployed with a welcoming eye to presidential involvement, but only when problems of coordination arise.[83]

Kagan, in her academic role, was not oblivious to these concerns. Indeed, the precise reason she advocated (1) increased *Chevron* deference based on presidential influence over a subordinate's decision making rather than (2) increased *Chevron* deference to the President when Congress delegates administrative authority specifically to the President personally is that the President, unlike a subordinate member of the executive branch, is not subject to judicial review under the APA.[84] Likewise, aware of the importance of transparency in legitimating administrative policymaking, she argues:

> [I]f presidential policy is to count as an affirmative reason to sustain administrative action . . . then the relevant actors should have to disclose publicly and in advance the contribution of this policy to the action—in the same way and for the same reasons that they must disclose the other bases for an administrative decision to receive judicial credit.[85]

This limitation on *Chevron* deference would avoid one of the apparent difficulties that might flow from deferring to enhanced presidential involvement in administrative policymaking: the availability of executive privilege to shield the President's input from public (or judicial) view.

In truth, however, aside from the coordination problem I am bracketing for the moment, there is nothing the White House is likely to contribute to agency legal interpretation that would make that interpretation more deference-worthy from a rule of law point of view. To see this most clearly, it is helpful to focus a bit on both the nature of deference and on the limited range of cases in which White House involvement in administrative action could even conceivably make a difference in *Chevron*'s application. *Chevron* deference is critical, by definition, only in those cases where (a) a statute is legally ambiguous and (b) a court is persuaded of the policy wisdom of resolving that ambiguity in a manner different from the agency's proffered interpretation.[86] That is, an agency does not need deference to

81. 5 U.S.C. § 552 (2012).

82. SHANE, *supra* note 64, at 158–67.

83. *Cf.* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006).

84. Kagan, *supra* note 60, at 2368–69.

85. *Id.* at 2382.

86. Peter M. Shane, *Ambiguity and Policy Making: A Cognitive Approach to Synthesizing* Chevron *and* Mead, 16 VILL. ENVTL. L.J. 19, 24 (2005).

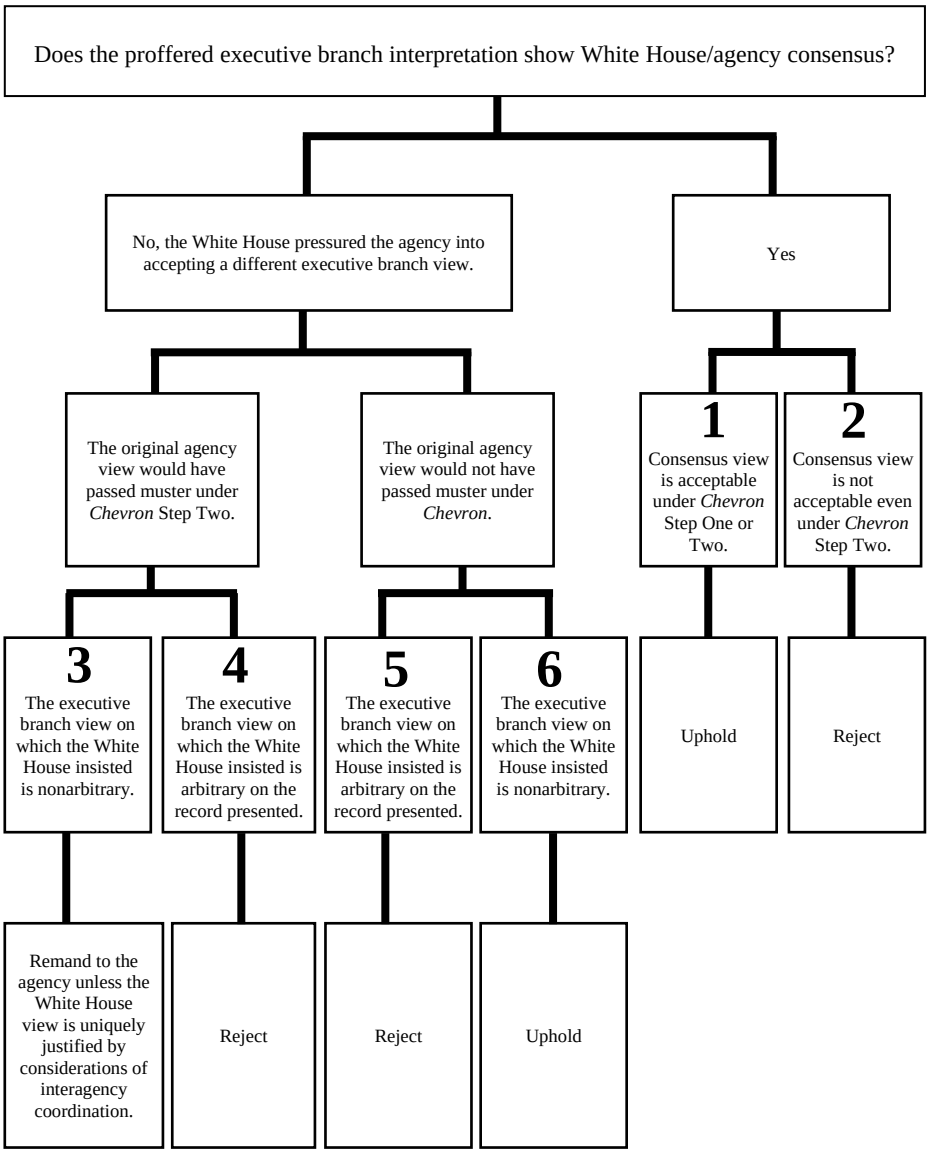
prevail in any case in which its legal interpretation, all told, strikes a court as the best interpretation possible.

How could presidential involvement in agency interpretation affect this conventional understanding of *Chevron*? This is easiest to analyze through a thought experiment—or series of thought experiments—captured in the figure on the next page. Each scenario assumes that some form of agency/White House consultation resulted—with regard to a legally ambiguous statutory provision—in the formulation of an executive branch statutory interpretation which a reviewing court must now assess. We can imagine then that a court's review of the relevant record could show either that the White House and the agency agreed on an executive branch interpretation or that White House involvement pressured the agency into abandoning a preferred legal interpretation. In the latter case, the record might also reveal whether the agency's abandoned interpretation would itself have had sufficient support in the record to be upheld under *Chevron* Step Two. For each of these scenarios, we can consider (1) how the court should respond if it finds the executive branch interpretation permissible under *Chevron* Step Two and (2) whether the simple fact of White House involvement ought to make any difference to the court's view.

Two possibilities seem uncontroversial. Should the White House and an agency agree on an interpretation that would be permissible even without taking account of White House involvement (Box 1 in the figure on the next page), of course, the court should defer. There is no reason why a legal interpretation that is nonarbitrary based on legally relevant reasons should be subject to second-guessing because the agency-preferred interpretation matches that of the White House. Likewise, if the executive branch interpretation is reasonable under *Chevron* Step Two, there would be no reason to abandon deference if it were disclosed that the agency had earlier revealed a preferred interpretation that, had it been offered, would have been deemed arbitrary on the record presented (Box 6). It would not be the fact of White House involvement that merits deference, but rather that the agency exercised its own discretion in abandoning a weaker view for a stronger one.

That really leaves two overall categories of cases in which a plausible question is raised about the relevance of White House involvement. What should happen if it appears to the court that the executive branch interpretation lacks sufficient support under conventional Step Two analysis to warrant deference? In other words, should the existence of a White House policy preference be sufficient to make an interpretation of law that otherwise would appear arbitrary deference-worthy (Boxes 2, 4, and 5)? Finally, perhaps most puzzling, what should happen if the executive branch interpretation would pass muster under *Chevron* Step Two, but the record reveals that the White House nudged the agency into abandoning another interpretation that would also have passed muster under *Chevron* Step Two (Box 3)?

Figure 1. How presidential involvement in agency interpretation affects the conventional understanding of Chevron.



The premise of the scenarios captured in Boxes 2, 4, and 5 is that deference, if given, could not be justified based on reasons rooted in the statute at issue. Deference based on White House involvement, if any, would have to be justified by the presumptive alignment between the proffered executive branch legal interpretation and the President's policy agenda. But there is no reason rooted in law to give the President's policy preferences such deference. Even if legal support for the "unitary

presidency" were stronger, a presidential imprimatur for agency legal interpretation would ordinarily add no legal weight to an otherwise weak legal interpretation just because the President endorses it. Although a number of scholars have recently offered sophisticated frameworks for accommodating some degree of political influence over administrative action within "arbitrary and capricious" review, none has purported to apply the framework to *Chevron* Step Two deference.[87] Presumably, that is because there is no rule of law value to be served by according that sort of treatment to the President's policy preferences, standing alone, as a basis for legal interpretation, as opposed (possibly) to implementation.

Recall why an agency may earn *Chevron* deference. As explained earlier, the *Chevron* framework and the nondelegation doctrine on which it is founded posit a distinction between discernible boundaries to permissible agency action and the justifiability of action taken within those boundaries. That is frequently not an easy line to draw. The kinds of factors an agency is likely to find persuasive with regard to its most effective implementation of a statute are likely to show up also in the agency's brief as reasons corroborating that its challenged action falls within a proper interpretation of its statutory boundaries. A court mindful of not overstepping its authority by second-guessing an agency's choice of implementation strategy will likely be respectful also of the agency's interpretation of an ambiguous legal boundary. In claiming authoritativeness with regard to legal interpretation, the agency touts its expertise, the rigors of its deliberative processes, and, of course, Congress's explicit selection of the agency as its chosen instrument of administration.

If, however, despite these factors, the agency's proffered legal interpretation still appears to a court to be arbitrary, the President's involvement in advancing what appears to be an unreasonable reading of the statute does not make it more reasonable. Arbitrary is arbitrary. Deferring to the President in order to uphold what appears to be an arbitrary statutory reading runs counter to the goal of agency institutional accountability—agencies will learn that they can dodge legal accountability by signing on to (or perhaps inviting) White House–preferred views that will be given deference even if not persuasively reasoned. Using presidential agreement (or inducement) as a proxy for democratic accountability will not work either. A statutory interpretation that cannot

87. *See, e.g.*, Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 n.15 (2009) ("This Article focuses on arbitrary and capricious review and thus does not directly propose changes to other judicial review doctrines, such as Step Two of *Chevron*. In this sense, this Article proceeds under the understanding that arbitrary and capricious review and Step Two of *Chevron* deference are distinct in what they require—meaning that *Chevron* 'reasonableness,' which is used to test the fit of an agency's interpretation with a statute, does not equate to *State Farm* 'reason giving,' which is used to assess the rationality of an agency's reasoning process."); *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1001 n.4 (2005) (differentiating between *Chevron* Step Two and arbitrary and capricious analysis in noting that inconsistency in an agency's position "bears on whether the Commission has given a reasoned explanation for its current position, not on whether its interpretation is consistent with the statute" under *Chevron*).

be adequately explained by justifications rooted in the statute may or may not coincide with the contemporaneous preferences of a majority of voters or even the preferences of a majority of the President's electoral supporters. It presumably cannot be squared, however, with the supporters of the Congress that enacted the statute in question—the implication of finding that the executive branch's legal interpretation cannot be reconciled on the record presented with the law actually enacted. Ignoring the democratic process that generated a statute in favor of the merely presumed political preferences of a contemporary majority represents no overall gain in democratic legitimacy.

The hardest question that could face a court is this—what to do if an executive branch interpretation appears worthy of *Chevron* deference, but the record reveals that the agency is proffering the executive branch interpretation only because of White House pressure to abandon an agency-preferred interpretation that would actually itself have been worthy of *Chevron* deference. In this very unlikely imaginary situation—unlikely because it is improbable that the usual process of discovery in litigation would uncover such a scenario—I would argue that, subject to one exception, a court should defer to the proffered executive branch interpretation only if the court judges that interpretation actually superior to the agency's abandoned interpretation. For all the reasons given above why White House involvement should not be allowed to convert an otherwise arbitrary statutory interpretation into a deference-worthy interpretation, neither rule of law values, nor democratic values more generally, would support deferring to a White House–induced legal interpretation which, even if legally justifiable, is inferior to a sounder legal interpretation preferred by the administrative institution as Congress's preferred decision maker about the statute at issue. A legal regime that would allow a plausible White House legal interpretation to trump a superior agency interpretation would arguably incentivize substandard lawyering by both the agency and the White House. Agency lawyers would realize that having the best possible interpretive argument would not immunize them from White House pressure to change, and the White House would know that it would not need the best possible argument to take interpretive authority away from the agency.

This view might be thought in tension with a well-known conclusion proffered by Judge Patricia Wald in her oft-cited and much discussed 1981 opinion in *Sierra Club v. Costle*.[88] Judge Wald's book-length opinion upheld against a series of both substantive and procedural challenges a set of regulations called "new source performance standards" (NSPS) governing emissions controls by coal-burning power plants.[89] The NSPS were challenged as both inadequate and too stringent by environmental and industry plaintiffs, respectively.[90] Among the environmental plaintiffs' complaints was the fact that the EPA had failed to docket a White House

88. 657 F.2d 298 (D.C. Cir. 1981).
89. 44 Fed. Reg. 33,580 (June 11, 1979).
90. *Sierra Club*, 657 F.2d at 312.

meeting occurring after the rulemaking comment period in which the White House might have encouraged the EPA to retain its existing 1.2 lbs/MBtu ceiling for total sulfur dioxide emissions, rather than lowering that ceiling, which the EPA had at least considered as an option.[91] The court concluded that the failure to docket the meeting was not improper because the 1.2 lbs/MBtu ceiling had adequate factual support in the administrative record, and the EPA had assured the court that the NSPS were not based on any information or data it received through the White House meeting.[92] Judge Wald took implicit note of the possibility that White House influence might have nudged the EPA to accept the 1.2 lbs/MBtu ceiling as opposed to some other option that might also have found adequate support in the record, but thought such an outcome unproblematic:

> Of course, it is always possible that undisclosed Presidential prodding may direct an outcome that *is* factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement. In such a case, it would be true that the political process did affect the outcome in a way the courts could not police. But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.[93]

Judge Wald's point, however, does not substantially undercut my analysis of the Box 3 problem. In indulging White House influence over the choice of one or another implementation strategy "factually based on the record," Judge Wald was not actually confronting a case of White House pressure regarding legal interpretation. The environmental plaintiffs did challenge the EPA's interpretations of the Clean Air Act with regard to a couple of matters, but none was relevant to the choice of the overall ceiling on sulfur dioxide emissions. When an agency is concededly acting within its statutory authority—that is, once the boundaries of permissible discretion have been identified—it may well advance democratic accountability to permit the White House to influence agency implementation strategy, so long as the resulting strategy is in fact defensible on the usual technocratic grounds. When it comes to defining the agency's jurisdiction, however, we face the conundrum of democratic accountability noted earlier. The White House has no greater democratic claim to define the scope of an agency's jurisdiction than did the Congress that originally enacted the law that the agency is now implementing. Should a court be cognizant that the agency had in mind a view of its authority that is different from the White House view, but also justifiable under *Chevron* Step Two, then democratic accountability would seem to call for special solicitousness toward the agency that a democratically-elected Congress picked to be the primary decision maker regarding the statute in question.

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91. *Id.* at 404.
92. *Id.* at 407–08.
93. *Id.* at 408.

There is arguably one exception to this analysis that courts should recognize. At least in a thought experiment, one can imagine a situation where the President is persuasive that, even if an agency's preferred view might have been superior or at least acceptable in isolation, the interpretation of the agency in question would make it difficult for another agency within the executive branch to fulfill its own mission under a sound interpretation of the second agency's authorizing legislation. For example, one could imagine a hypothetical situation in which, say, the soundest reading of a Department of Interior statute regarding wilderness conservation might make it difficult for the Department of Agriculture to give its forest management statutes their soundest reading—or vice versa. In that situation, because of the President's unique coordinating capacity, he might be able to argue that a suboptimal statutory reading by one or the other agency, if otherwise at least rational, ought to receive *Chevron* deference even if the agency under review would have preferred to maintain its own, sounder understanding of its mission. Deference to this rare sort of presidential preference could be more persuasively linked to a power of managerial coordination traceable to the vesting of executive power in the President and his constitutional responsibility to take care that *all* law be faithfully executed. Deferring to the President in this rare instance would be consistent with the rule of law.

CONCLUSION

At least since *Marbury v. Madison*, the "government of laws" ideal has served as a bright lodestar, guiding the development of American public law. It is frequently argued, however, that our legal system vests administrative decision makers with so much policymaking authority that the rule of law cannot now be taken seriously as a description of our governing ethos. This view is wrong. It is possible to articulate a set of normative premises that are commonly identified with the rule of law and which serve the values that lie at the heart of a government of laws: nonarbitrariness, democratic legitimacy, and institutional accountability. A government of laws is a government that embraces these premises through institutional practices reasonably calculated to realize the rule of law norms. Judging whether we do or do not experience the rule of law thus has to be determined as much by the nature of our legal practices as by the content of our legal rules.

From a rule of law perspective, the kind of deference *Chevron* counsels in the face of legally ambiguous statutes need not be problematic. Any system in which different branches enact legislation and execute the law will entail the vesting of discretion by the former in the latter. So long as the executing branch is required to justify its interpretations of legally ambiguous enactments with reasons rooted in the enacted law, the rule of law is respected.

In all but the rarest of cases, however, rule of law values imply that, under a sound reading of our Constitution, deference should or should not be accorded entirely on the basis of the legal interpretation proffered by the

administrative agency that is Congress's designated administrative decision maker, which is typically not the White House. White House involvement in persuading an agency to adopt a nonarbitrary interpretation that the agency embraces and can defend based on reasons rooted in law obviously should not count against that interpretation. But White House involvement should not be thought to earn deference for a proffered legal interpretation, whether originally preferred by an agency or not, that otherwise appears unjustified under hard look review. If the White House steers the agency away from an earlier preferred, but less sound interpretation of law, then the negotiated view, if non-arbitrary, should be given deference. In such a scenario, it would be the merit of the interpretation that warrants deference, not the fact of White House influence.

That leaves as the most theoretically interesting possibility, a scenario that may never surface in practice. We can imagine an administrative record revealing that the White House has steered an agency away from an earlier preferred interpretation that would have been deference-worthy and at least as sound (in the eyes of a court) as the White House view now being offered as the agency's own. In that extraordinary case, I argue that the court should ordinarily remand for further consideration by the agency. In a government of laws, the President should not be able to trump a superior legal interpretation with his own unless his preference is rooted in a well-grounded legal responsibility of the presidency. One such case exists. If the President's interpretation would enable other agencies to execute their legal missions more effectively, then *Chevron* deference linked to the presidential coordinating function could be linked persuasively to Article II's Vesting Clause and the founding generation's design of an executive that gave the President unique managerial responsibility. But the Constitution should otherwise not be interpreted to allow the President to dictate the ways Congress's designated administrative decision makers exercise their discretion, especially with regard to the interpretation of law.