Testimony of Charles J. Cooper
Cooper & Kirk, PLLC

The Administrative State and Congressional Abrogation of the *Chevron* and *Seminole Rock* Doctrines

Hearing Before the
Homeland Security & Governmental Affairs Committee,
Subcommittee on Regulatory Affairs & Federal Management
United States Senate

March 17, 2016

Washington, DC

Chairman Lankford, Ranking Member Heitkamp, and members of the Committee: thank you for providing me this opportunity to discuss the sweeping and largely unaccountable governmental powers exercised by administrative agencies.[1] As Chief Justice Roberts has lamented, "[t]he Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities."[2] The modern Administrative State has become a sovereign unto itself, a one-branch government whose regulatory grasp reaches into virtually every human activity.

The focus of my remarks will be on the Supreme Court's policy of deferring to agency interpretations of ambiguous statutes, known as the *Chevron* doctrine, as well as its companion policy of deferring to agency interpretations of ambiguous regulations, known as the *Seminole Rock* doctrine. In my view, these doctrines are of doubtful validity under the Constitution's separation of powers, and they exacerbate other constitutional concerns created by the rise of the modern Administrative State. My purpose today is to outline these serious problems with *Chevron* and *Seminole Rock* and to offer a few preliminary thoughts on what Congress can do to abrogate these two doctrines.

I. The Rise of the Administrative State

As Justice Thomas observed in his concurring opinion in *Perez v. Mortgage Bankers Association* last year, the modern Administrative State "has its root[s] in . . . the Progressive Era."[3] And the seeds from which those roots sprang were planted primarily by Woodrow Wilson,

[1] Founding partner, Cooper & Kirk, PLLC. Mr. Cooper served as the Assistant Attorney General for the Office of Legal Counsel from 1985–1988 and in the Civil Rights Division of the Justice Department from 1981–1985. Much of his practice focuses on cases involving the separation of powers and the Administrative Procedure Act. As part of that practice, Mr. Cooper has litigated numerous important cases in the Supreme Court and in the lower federal courts.

[2] *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting).

[3] 135 S. Ct. 1199, 1223 n.6 (2015) (Thomas, J., concurring in the judgment).

the Publius of the Administrative State. In his 1887 essay, "The Study of Administration,"[4] Wilson argued for broad delegations of regulatory authority to "expert" administrative agencies. Wilson believed that the economic and social transformations of the late-nineteenth century required a national government that could act with "the utmost possible efficiency."[5] But he lamented that our constitutional structure, with its carefully crafted system of separated powers and checks and balances, was not designed to be efficient;[6] to the contrary, it was designed to safeguard the People's liberty by making the exercise of Federal governmental power difficult.[7] Wilson complained that, under our system, "advance must be made through compromise, by a compounding of differences, by a trimming of plans and a suppression of too straightforward principles."[8] These inefficiencies were, to Wilson's mind, made even worse by the need to justify governmental reforms to the People, whom he regarded as "selfish, ignorant, timid, stubborn, or foolish."[9]

Wilson preferred to place governmental powers in the hands of those who could claim to have expertise relating to the policy issues under consideration. It was crucial to "discover the simplest arrangements by which responsibility can be unmistakably fixed upon officials," providing them with "large powers and unhampered discretion."[10] In Wilson's analogy, "[t]he cook[s] must be trusted with a large discretion as to the management of the fires and the

---

[4] Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 198 (1887).
[5] *Id.* at 197.
[6] *INS v. Chadha*, 462 U.S. 919, 944 (1983) ("By the same token, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . .").
[7] *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2597 (2014) (Scalia, J., concurring in the judgment) (describing "the folly of interpreting constitutional provisions designed to establish a structure of government that would protect liberty on the narrow-minded assumption that their only purpose is to make the government run as efficiently as possible" (quotation marks and citation omitted)).
[8] Wilson, *supra* note 4, at 207.
[9] *Id.* at 208.
[10] *Id.* at 213.

ovens."[11] By conferring sweeping powers on the "experts," Wilson hoped to overcome the inefficiencies of our constitutional system—that is, its checks and balances—and permit agencies to make policy swiftly, insulated from the political pressures faced by the People's elected representatives.

This vision of expansive bureaucratic power took hold in the Supreme Court's jurisprudence in the early twentieth century, particularly during the New Deal. As Wilson made clear, the key to the Progressives' vision of the Administrative State was the concentration of broad authority in agencies, and that meant that its greatest obstacle was the Constitution's careful separation of power through exclusive, non-delegable grants to separate branches of government.

"[T]he Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government."[12] Article I vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States";[13] Article II vests "[t]he executive Power . . . in a President of the United States";[14] and Article III vests "[t]he judicial Power of the United States . . . in one supreme Court," and in congressionally established inferior courts.[15] "The declared purpose of separating and dividing the powers of government, of course, was to diffus[e] power the better to secure liberty."[16]

---

[11] *Id.* at 214.
[12] *Department of Transp. v. Association of American R.R.*, 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring in the judgment).
[13] U.S. CONST. art. I, § 1.
[14] *Id.* art. II, § 1.
[15] *Id.* art. III, § 1.
[16] *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (alteration in original) (quotation marks omitted); *see also Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1954 (2015) (Roberts, C.J., dissenting) ("'[I]f there is a principle in our Constitution . . . more sacred than another,' James Madison said on the floor of the First Congress, 'it is that which separates the Legislative, Executive, and Judicial powers.' . . . By diffusing federal powers among three different branches, and by protecting each branch against incursions from the others, the Framers devised a structure of government that promotes both liberty and accountability." (first omission in original) (citation omitted)); *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) ("Separation-of-powers principles are intended, in part, to protect each

The Supreme Court has recognized that "[t]hese grants are exclusive";[17] no branch can delegate its power to another branch. The constitutional text confirms this,[18] for its careful division of legislative, executive, and judicial powers would be senseless if those powers could be reallocated by the branches themselves.[19] Nor could the branches perform their task of checking and balancing each other if they delegated away their unique roles in the constitutional structure. As Madison said in *Federalist No. 51*: "[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist

---

branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well."); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."); *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment) ("the Constitution diffuses power the better to secure liberty").

[17] *Association of American R.R.*, 135 S. Ct. at 1240–41 (Thomas, J., concurring in the judgment). *See Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011) ("Under the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government adopted in the Constitution, the 'judicial Power of the United States' . . . can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." (alterations in original) (quotation marks omitted)); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 496–97 (2010) ("[T]he President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch." (quotation marks omitted)); *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) ("Article I, § 1 . . . permits no delegation of those powers . . . .").

[18] *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 336–53 (2002). Notably, the Founders knew how to authorize delegations where they thought it necessary. Article II, Section 2, Clause 2 vests the power to appoint Executive officers in the President with the advice and consent of the Senate, but it also provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." This makes the absence of a broader authority to delegate all the more illuminating.

[19] *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow."); *see also Free Enter. Fund.*, 561 U.S. at 497 ("But the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment." (citation omitted) (quotation marks omitted)); *Wellness Int'l Network*, 135 S. Ct. at 1960 (Roberts, C.J., dissenting) ("In a Federal Government of limited powers, one branch's loss is another branch's gain, so whether a branch aims to 'arrogate power to itself' or to 'impair another in the performance of its constitutional duties,' the Constitution forbids the transgression all the same." (citation omitted) (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996))).

encroachments of the others . . . ."[20] The Founders, accordingly, armed each branch with a variety of checking powers so that they could prevent encroachments and abuses by the other two. For these reasons, the Court once believed that the doctrine forbidding the delegation of Congress' legislative power to the Executive Branch "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."[21]

Despite the nondelegation doctrine's firm foundation in the structure of the Constitution and in Supreme Court precedent, the Court "has abandoned all pretense of enforcing a qualitative distinction between legislative and executive power."[22] The last time the Court invalidated statutes delegating legislative power to the Executive Branch[23] was in 1935. During the 80 years since then, numerous agencies have essentially been granted regulatory *carte blanche*—authorized to regulate, for example, "in the public interest"—and the Supreme Court has uniformly upheld such boundless delegations of legislative authority.[24] As a practical matter, the nondelegation doctrine was laid to rest in *Whitman v. American Trucking Associations*. In upholding the Clean Air Act's delegation to the EPA of power to set ambient air quality standards "requisite to protect the public health,"[25] the Court acknowledged that it had "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[26]

---

[20] THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961).
[21] *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).
[22] *Association of American R.R.*, 135 S. Ct. at 1250 (Thomas, J., concurring in the judgment).
[23] *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935).
[24] *American Trucking Ass'ns*, 531 U.S. at 474 (collecting cases).
[25] *Id.* at 472.
[26] *Id.* at 474–75.

The Court has also permitted the judicial power, although vested by Article III exclusively in the federal courts, to be delegated to the Administrative State. The leading case is *Crowell v. Benson*, which upheld a Federal workers' compensation statute that made agency findings of fact final and binding upon Article III courts.[27] The Court held that this agency exercise of judicial power is constitutionally permissible so long as an Article III reviewing court is able to decide all questions of law *de novo*.[28] Since *Crowell*, it has been an unquestioned principle of the Supreme Court's jurisprudence that administrative agencies can adjudicate private rights and issue findings of fact that bind even Article III courts.[29]

The inevitable result of these decisions was to unite all three governmental powers in the "expert" hands of the Administrative State, despite Madison's famous warning in *Federalist No. 47* that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[30] As the Supreme Court has recognized, "Under most regulatory schemes, rulemaking, enforcement, and adjudicative powers are combined in a single administrative authority."[31] But the Wilsonian vision of the modern Administrative State could not be fully realized unless the "experts" in the agencies were also liberated from the control of the President. In *Humphrey's Executor v. United States*, the Court held that Congress may restrict the President's removal of executive branch officers who are empowered to exercise, in the words of the Court, "quasi legislative and quasi judicial" power.[32] Because the power to remove an officer is essential to the ability to control the officer,[33] the

---

[27] 285 U.S. 22, 46 (1932).
[28] *Id.* at 54.
[29] *See, e.g.*, *CFTC v. Schor*, 478 U.S. 833, 853–57 (1986) (holding that an agency could adjudicate a private, state-law counterclaim).
[30] THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).
[31] *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991).
[32] 295 U.S. 602, 629 (1935).
[33] *Morrison v. Olson*, 487 U.S. 654, 726 (1988).

effect of *Humphrey's Executor* was to free many of the Federal Government's most powerful agencies from direct presidential control.

The short of it is this: the Administrative State is now a *de facto* one-branch government, and most of the "experts" who run it are politically accountable to no one. They are not elected, nor are they controlled by those who are.

II. *Chevron*, *Seminole Rock*, and Their Justifications

As it gradually dismantled the separation of powers, the Court reasoned that the Constitution's structural safeguards of liberty were unnecessary—the Court could be trusted to safeguard liberty. The Administrative State could be permitted to wield legislative power because the Court would insist that administrative rules comport with "intelligible principle[s]" set forth by Congress in the agencies' legislative mandates.[34] The Administrative State could be permitted to exercise judicial power because the courts would review any administrative conclusions of law.[35] And the Administrative State could be permitted to exercise executive power, independent of Presidential control, whenever the courts determined that independence from Presidential oversight would be beneficial.[36] What emerged from this period was an implicit bargain: the Court would permit the Administrative State to exercise legislative, executive, and judicial power, but it would review administrative exercises of such power to prevent lawlessness and abuse. Judicial review, then, was substituted for the Constitution's checks and balances as the safeguard against the Administrative State becoming despotic.

---

[34] *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).
[35] *Humphrey's Executor*, 295 U.S. at 631–32.
[36] *Morrison*, 487 U.S. at 689–93; *id.* at 693 ("We do not think that this limitation as it presently stands *sufficiently deprives* the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws." (emphasis added)).

The deal was a bad one on its own terms, but it got worse—much worse—when the Justices reneged on it in *Chevron v. NRDC*[37] and *Bowles v. Seminole Rock & Sand Co.*,[38] which freed the Administrative State from meaningful judicial review. Both doctrines require courts to defer to reasonable agency interpretations of ambiguous laws. In the case of *Chevron*, courts defer to reasonable agency interpretations of *statutes*; in the case of *Seminole Rock*, they defer to reasonable agency interpretations of the agency's own *regulations*. The justifications for the two doctrines are largely similar, and none of them is persuasive.

Chevron created a now-familiar two-step framework for federal courts to evaluate agency regulations and other decisions interpreting federal statutes. First, if the language of the statute is unambiguous, "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."[39] But if the statute is "silent or ambiguous with respect to the specific issue," the agency's interpretation will be upheld if it is "based on a permissible construction of the statute," even if it is not the construction that the court, using "traditional tools of statutory construction," would adopt.[40] Under *Chevron*, then, ambiguity in the text of a law is the source of the agency's interpretive authority—its jurisdiction—to resolve the ambiguity. And because statutory ambiguity is ubiquitous in the United States Code, *Chevron* grants administrative agencies interpretive discretion over virtually the entire sweep of federal statutory law.

Almost forty years before *Chevron*, *Seminole Rock* stated, with little explanation, that an agency interpretation of its own regulation must be given "controlling weight" by a court "unless

[37] 467 U.S. 837 (1984).
[38] 325 U.S. 410 (1945).
[39] 467 U.S. at 842–43 (footnote omitted).
[40] *Id.* at 843 & n.9.

it is plainly erroneous or inconsistent with the regulation."[41] Although the Court invoked the doctrine set forth in *Seminole Rock* several times over the next five decades, it was given new prominence by the 1997 decision in *Auer v. Robbins*[42]—so much so that the doctrine is now frequently referred to as *Auer* deference. Although the precise *Seminole Rock* formulation differs from the *Chevron* two-step approach, "[i]n practice, [*Seminole Rock*] deference is *Chevron* deference applied to regulations rather than statutes. The agency's interpretation will be accepted if, though not the fairest reading of the regulation, it is a plausible reading—within the scope of the ambiguity that the regulation contains."[43]

Once the notion of judicial deference to agency interpretations took hold, the Court extended it to the full reach of its logic. For example, the Court held, in the *Brand X* case, that an agency's interpretation of an ambiguous statute prevails over a federal court's prior contrary interpretation.[44] And in *City of Arlington v. FCC*, the Court extended *Chevron* to questions of agency *jurisdiction*, holding that, when a statute is ambiguous on whether the relevant agency has authority to interpret it, courts must defer to the agency's determination that it has such authority.[45] A similar, "steady march toward deference" can be seen in the context of *Seminole Rock* deference.[46] The bottom line is that *Chevron* and *Seminole Rock* have transformed the Administrative State into a kind of Super Court, vested with the last word, *binding even on the Supreme Court*, on the meaning of ambiguous statutes and regulations.

---

[41] 325 U.S. at 414.
[42] 519 U.S. 452, 461 (1997).
[43] *Decker v. Northwest Envt'l. Def. Ctr.*, 133 S. Ct. 1326, 1339–40 (2013) (Scalia, J., concurring in part and dissenting in part) (citations omitted).
[44] *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).
[45] 133 S. Ct. at 1868–71.
[46] *Perez*, 135 S. Ct. at 1214 (Thomas, J., concurring in the judgment) (collecting cases).

As Justice Scalia once observed, *Chevron* and *Seminole Rock* are "judge-made doctrines of deference."[47] They "did not purport to be based on statutory interpretation" of the Administrative Procedure Act.[48] Indeed they cannot be reconciled with the plain text and original design of that statute, as explained more fully below. Nor are these doctrines required by the Constitution.[49] To the contrary, as discussed below, the constitutionality of judicial deference to agency statutory and regulatory interpretations is highly doubtful.

The rationales for these judge-made rules of deference have proven elusive. *Chevron*'s most prominent justification is that Congress, by enacting an ambiguous provision, implicitly signals an intent to delegate power to resolve the ambiguity to the agency. A similar justification has been offered for *Seminole Rock*.[50] But the Court has been schizophrenic about the *kind of power*—legislative or judicial—that Congress has supposedly delegated to the agency. *Chevron* itself offers both answers. The rule of deference is at times framed in terms of judicial power: the Court speaks of "an agency's construction of the statute which it administers,"[51] and the agency is described as offering an "interpretation" of an ambiguous statute's "meaning."[52] Yet elsewhere

---

[47] *Id.* at 1211 (Scalia, J., concurring in the judgment).
[48] Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 785 (2010) (describing *Chevron* in these terms).
[49] *See* Daniel Lovejoy, *The Ambiguous Basis for* Chevron *Deference: Multiple-Agency Statutes*, 88 VA. L. REV. 879, 898 ("[a] constitutional explanation of *Chevron* proves far too much"); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2129–31 (2002); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514–16. Some scholars have argued, implausibly, that *Chevron* might be required by principles of judicial restraint and separation of powers, *see, e.g.*, Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 277–78, 283, 285 (1988); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 308–09, 312 (1986). It is worth noting that, if *Chevron* were constitutionally mandated, the Supreme Court's decision in *United States v. Mead Corp.* would have to be overruled, since it held that *Chevron* does not apply where Congress has not delegated to the agency the authority to resolve statutory ambiguities with the force of law. 533 U.S. 218, 229–31 (2001). In other words, *Mead* recognized that Congress can decide whether *Chevron* applies to a particular statute, which Congress could not do if *Chevron* were constitutionally required. *See infra* Section V.
[50] *See Martin*, 499 U.S. at 151; *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment).
[51] *Chevron*, 467 U.S. at 842.
[52] *Id.* at 844–45.

the Court states that the rule of deference is based on a "legislative delegation" that "involve[s] reconciling conflicting policies" and adopting "wise policy"[53]—quintessential exercises of legislative power.

The same confusion is seen in the *Seminole Rock* caselaw. In *Martin v. Occupational Safety and Health Review Commission*, for instance, the Supreme Court reasoned that Congress had delegated to the agency "the power authoritatively to interpret its own regulations" (a judicial power) as "a component of the agency's delegated *lawmaking* powers" (a legislative power).[54]

This conflation of "legislative" and "interpretive" power has persisted in *Chevron* and *Seminole Rock* precedents alike. Most recently, for example, in *City of Arlington v. FCC*, the Court described "archetypal *Chevron* questions" as involving agency "*interpretive decisions* . . . about how best to *construe* an ambiguous term in light of competing *policy interests*."[55] The Court here seems to be describing the offspring of an illicit affair between the legislative and judicial branches—an agency whose job description is to reconcile competing policy interests (a legislative act) through binding interpretations of ambiguous statutory terms (a judicial act). Similarly, in the context of *Seminole Rock* deference, the Court has proffered the oxymoronic explanation that agencies exercise " 'interpretive' lawmaking power."[56]

The dissent in *City of Arlington* likewise blurred the constitutionally critical line between lawmaking and binding interpretation. Chief Justice Roberts described *Chevron* as requiring courts to "defer to an agency's *interpretation of law* when and because Congress has conferred

---

[53] *Id.* at 865.
[54] 499 U.S. at 151 (emphasis added).
[55] 133 S. Ct. at 1868 (emphases added).
[56] *Martin*, 499 U.S. at 151; *see also id.* at 154 (describing "lawmaking by regulatory interpretation" and the use of "*adjudicatory* power to play a *policymaking* role" (emphases added)).

on the agency interpretive authority over the question at issue."[57] But elsewhere the Chief Justice said, "[B]efore a court may grant such deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency *lawmaking power* over the ambiguity at issue."[58] Finally, the Chief Justice melded into a single sentence delegations of both judicial and legislative powers: "An agency's *interpretive authority*, entitling the agency to judicial deference, acquires its legitimacy from a delegation of *lawmaking power* from Congress to the Executive."[59]

The delegation rationale for *Chevron* and *Seminole Rock*, then, is completely indifferent to whether the agency action at issue is *making* law or *interpreting* law—or both. Either way, however, *Chevron* and *Seminole Rock* raise serious constitutional questions, for it was precisely to keep these fundamentally different government powers *separate*, and also to separate them from the executive power, that the Framers vested them in *separate* branches. And the constitutional problem is not ameliorated by describing the powers delegated to the Administrative State as "*quasi*-legislative" or "*quasi*-judicial."

In keeping with the Wilsonian emphasis on the rule of experts, the Court has also stated that "practical agency expertise is one of the principal justifications behind *Chevron* deference,"[60] and agency expertise is "[p]robably the most oft-recited justification for *Seminole Rock*."[61] The Court explained the expertise rationale in *Chevron*:

---

[57] 133 S. Ct. at 1877 (Roberts, C.J., dissenting) (emphasis added).
[58] *Id.* at 1880 (emphasis added).
[59] *Id.* at 1886 (emphases added).
[60] *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990).
[61] *Perez*, 135 S. Ct. at 1222 (Thomas, J., concurring in the judgment); *see also Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part). *See, e.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("This broad deference is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." (quotation marks omitted));

> Judges are not experts in the field, and are not part of either political branch of the Government . . . . 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.[62]

Relatedly, by requiring deference to agency expertise, it follows that *Chevron* and *Seminole Rock* require courts to accept changes in agency interpretations reflecting new facts or changes in administration policy. It is true, of course, that allowing agencies to continuously revise their interpretations of statutes or regulations avoids the "ossification of large portions of our . . . law" that would occur if courts provided definitive interpretations of statutes and regulations.[63] But a fundamental precept of the rule of law is (or at least once was) that the meaning of a statute enacted by Congress does not change unless *Congress* changes it. Nor does the meaning of a duly promulgated regulation change absent formal amendment. In all events, this rationale makes no pretense of providing a statutory or constitutional justification for *Chevron* and *Seminole Rock*, and it does not answer the serious constitutional objections to the validity of the doctrines.[64]

Another justification for *Chevron* and *Seminole Rock* rests on the idea of political accountability. As the Court put it in *Chevron*,

> [w]hile 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.[65]

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 629–30 (1996).

[62] 467 U.S. at 865.

[63] *Mead*, 533 U.S. at 247–48 (Scalia, J., dissenting); *see also United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1852 (2012) (Kennedy, J., dissenting) ("Agencies with the responsibility and expertise necessary to administer ongoing regulatory schemes should have the latitude and discretion to implement their interpretation of provisions reenacted in a new statutory framework.").

[64] *See infra* Section III.

[65] *Chevron*, 467 U.S. at 865–66. The Court has applied this rationale to the *Seminole Rock* context as well. *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–99 (1991); Manning, *supra* note 61, at 629.

The political accountability rationale has several problems. First, it fails to grapple with the constitutional objections to *Chevron* and *Seminole Rock* discussed below.[66] In fact, this rationale is in the teeth of the Framer's purpose in vesting "all the legislative power" exclusively in Congress: to make the People's locally elected representatives in Congress politically accountable for any policy choices that would govern them *as law.* Second, the notion that agencies are overseen and controlled by a democratically elected President is highly dubious in the case of many agencies and clearly wrong in the case of independent agencies. As noted earlier, the Court in *Humphrey's Executor* largely freed independent agencies from presidential oversight, and "with hundreds of federal agencies poking into every nook and cranny of daily life, th[e] citizen might . . . understandably question whether Presidential oversight—a critical part of the Constitutional plan—is always an effective safeguard against agency overreaching."[67] Third, recent experience—especially after *Chevron*—has shown that the evil of unelected bureaucrats abusing their interpretive power is even worse than unelected judges abusing theirs.

One additional justification has been offered for *Seminole Rock* deference: that "the agency, as the drafter of the rule, will have some special insight into its intent when enacting it."[68] Indeed, based on this rationale, the Court has even gone so far as to suggest that *Seminole Rock* deference is "even more clearly in order" than *Chevron* deference.[69] This argument was

---

[66] *See infra* Section III.
[67] *City of Arlington*, 133 S. Ct. at 1879 (Roberts, C.J., dissenting).
[68] *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part); *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment); *Martin*, 499 U.S. at 152 ("Because the Secretary promulgates these standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question."); Manning, *supra* note 61, at 630.
[69] *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."); *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980) ("An agency's construction of its own regulations has been regarded as especially due that respect.").

answered by Justice Scalia: "Whether governing rules are made by the national legislature or an administrative agency, we are bound *by what they say*, not by the unexpressed intention of those who made them."[70] And all should agree with this proposition when the unexpressed intentions in question are not those of the legislators or regulators who actually adopted the law in question, but are only the *post hoc* views of subsequent legislators or regulators. Thus, "[f]or the same reasons that we should not accord controlling weight to postenactment expressions of intent by individual Members of Congress, we should not accord controlling weight to expressions of intent by administrators of agencies."[71]

In sum, *Chevron* and *Seminole Rock* do not purport to establish a rule required by the Constitution or by statute. They are judge-made legal fictions.[72] But the central problem with *Chevron* and *Seminole Rock* is not just that they have no basis in written law; the problem is that they are at war with the basic structural principles of our Constitution.

III. Judicial Deference and the Constitution

A. Article III. To the extent that *Chevron* and *Seminole Rock* rest on an implicit delegation of *judicial* power to administrative agencies, they are at war with Article III. It is indisputable that Congress does not have the power "to issue a *judicially binding* interpretation of the Constitution or its laws."[73] Nowhere does the Constitution assign that power to Congress.

---

[70] *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part) (emphasis in original).
[71] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment) (citation omitted).
[72] *See, e.g.*, Thomas W. Merrill, *Step Zero After* City of Arlington, 83 FORDHAM L. REV. 753, 759 (2014) ("Even *Chevron*'s most enthusiastic champions admit that the idea of an 'implied delegation' is a fiction."); Cass R. Sunstein, *Beyond* Marbury: *The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2590 (2006) (stating that "*Chevron* rests on a fiction" that is "not at all easy to defend"); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 192 (1998) ("*Chevron* is actually an aggressive fashioning of judge-made law by the Court."); Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("For the most part courts have used 'legislative intent to delegate the law-interpreting function' as a kind of legal fiction.").
[73] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment) (emphasis added). Of course, the Executive has the power to interpret duly enacted laws, since that is an inevitable part of executing them. But that is quite different

Rather, it is inherent in the judicial power to "say what the law is."[74] As Alexander Hamilton wrote in *Federalist No. 78*, "[t]he interpretation of the laws is the proper and peculiar province of the courts."[75] "Lacking the power itself, [Congress] cannot delegate that power to an agency."[76] Therefore, the notion that Congress can make an agency the "authoritative interpreter"[77] of federal law not only is contrary to the text and structure of the Constitution; it is incoherent. Congress surely cannot delegate a power that it does not possess.

There is also a strong argument that *Chevron* and *Seminole Rock* violate Article III even apart from nondelegation concerns. This view was first articulated by Professor Philip Hamburger[78] and has been embraced recently by Justice Thomas. "Those who ratified the Constitution knew that legal texts would often contain ambiguities," and "[t]he judicial power was understood to include the power to resolve these ambiguities over time."[79] But along with the judicial power came a duty to exercise independent judgment, "to decide cases in accordance with the law of the land, not in accordance with pressures placed upon them . . . from the political branches, the public, or other interested parties."[80] And to preserve judges' independent and impartial judgment, the Constitution gives the federal judiciary life tenure and salary protection, as Hamilton noted in *Federalist No. 79*.[81]

---

from the power to interpret laws *with binding force upon the judiciary*, a power the Constitution assigns to the Supreme Court alone.

[74] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

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

[76] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment).

[77] *Brand X*, 545 U.S. at 983.

[78] *See* Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. (forthcoming).

[79] *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment).

[80] *Id.* at 1218.

[81] *Id.* ("Because 'power over a man's subsistence amounts to a power over his will,' [Hamilton] argued that Article III's structural protections would help ensure that judges fulfilled their constitutional role.").

Under this view of Article III, the deference doctrines are an impermissible abdication of judicial duty.[82] When a judge defers to an agency's interpretation of an ambiguous statute or regulation, the judge relinquishes his independent judgment and subordinates his views to those of the agency, which does not have the protections required by Article III—life tenure and salary protection—for the exercise of judicial power. As Justice Thomas has concluded, "[b]ecause the agency is thus not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns."[83]

B. Article I. To the extent that *Chevron* and *Seminole Rock* are based on a supposed implicit congressional delegation of legislative power to agencies, their validity must be assessed under Article I's exclusive grant to Congress of *all* legislative power. To be sure, the nondelegation doctrine has lain dormant since the 1930s and, as discussed above, the Supreme Court's repeated approval of broad delegations of legislative power to administrative agencies has been one of the principal contributing factors to the rise of the modern Administrative State and the sweeping power it wields today. The Supreme Court, however, has never formally overruled the nondelegation doctrine. Indeed, at least some Justices have expressed the desire to breathe new life into the nondelegation doctrine,[84] and I would welcome this development. But regardless of whether the *Supreme Court* chooses to enforce the Constitution's distinction between executive and legislative power, *Congress*, of course, retains the power—and, I believe, the obligation—to recognize the constitutional problem posed by agencies wielding legislative

[82] *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Perez*, 135 S.Ct. at 1217–20 (Thomas, J., concurring in the judgment).
[83] *Perez*, 135 S.Ct. at 1220 (Thomas, J., concurring in the judgment).
[84] *See, e.g.*, *Association of American R.R.*, 135 S. Ct. at 1237 (Alito, J., concurring); *id.* at 1251–52 (Thomas, J., concurring in the judgment); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672–688 (1980) (Rehnquist, J., concurring in the judgment)

power and to itself maintain the constitutional boundaries between legislative and executive power.[85]

C. Due Process. At the core of the Fifth Amendment's guarantee of due process is the bedrock principle that the Government cannot deprive a person of life, liberty, or property unless (1) Congress has authorized such deprivation pursuant to a law that preexisted the deprivation and (2) an independent judiciary has accorded the person all rights guaranteed to him under law.[86] *Chevron* and *Seminole Rock* flout this traditional view of due process by permitting the agency to serve as lawmaker, prosecutor, and judge.

Although this due process problem inheres in both the *Chevron* and the *Seminole Rock* doctrines,[87] it is especially pronounced in the *Seminole Rock* context. *Seminole Rock* permits an agency to issue a regulation (lawmaking power), authoritatively interpret the regulation (judicial power), and enforce the regulation (executive power). Further, *Seminole Rock* allows the agency to circumvent the limitations placed on it by the APA's rulemaking procedures. Since an agency's interpretation of its own regulations is not subject to the APA's notice-and-comment procedures, the agency can effectively write a new regulation while bypassing the APA's limitations on its power.[88] *Seminole Rock* thus gives the agency a powerful incentive first to "speak vaguely and broadly" in its written regulation, then to "interpret" its regulation (without

[85] *See Michigan*, 135 S. Ct. at 2713–14 (Thomas, J., concurring).
[86] Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 YALE L.J. 1672, 1677–80, 1681–1726 (2012); Matthew J. Franck, *What Happened to the Due Process Clause in the* Dred Scott *Case? The Continuing Confusion over "Substance" versus "Process,"* AM. POL. THOUGHT at 120–30 (Winter 2015).
[87] *See* Hamburger, *supra* note 78.
[88] *Id.*; *see also Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) ("Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment."); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1464 (2011); Manning, *supra* note 61, at 655–60.

notice-and-comment), and finally to apply its interpretation retroactively,[89] a danger that the Supreme Court has recognized.[90] Such a scheme is ripe for abuse,[91] since the agency—as both lawmaker and interpreter—will get to decide what conduct is permitted or prohibited on an ongoing basis. Imagine, for instance, that Congress had the power both to ambiguously define a crime in the first instance and then to authoritatively determine, *post hoc*, whether particular conduct constitutes the crime: such sweeping power would be perilous indeed for any political opponent of a current congressional majority. It was to avoid precisely such abuses that our Constitution separated the executive, legislative, and judicial powers.

IV. Judicial Deference and the APA

Not only are *Chevron* and *Seminole Rock* contrary to the Constitution; they irreoncilablewith the original design of the APA. Section 706 of the APA provides, "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[92] As Justice Scalia observed last year, "[Section 706] thus contemplates that courts, not agencies, will authoritatively resolve ambiguities in

[89] *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part).

[90] *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) ("Our practice of deferring to an agency's interpretation of its own ambiguous regulations . . . creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit . . . ."); *see also Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) ("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").

[91] *Seminole Rock* is especially susceptible to abuse because, unlike *Chevron*, the Court has generally not imposed limitations on the *kinds* of agency interpretations that qualify for deference. In *Mead*, the Court held that *Chevron* deference only applies to a certain class of formal agency interpretations, such as adjudications or notice-and-comment rulemaking, but not to more *ad hoc* statements, such as U.S. Customs Service tariff classification letters. 533 U.S. at 229–34. The Court has imposed no such limitation on *Seminole Rock* deference, leading to the extraordinary result—demonstrated by *Auer* itself—that the Court has deferred even to an agency's litigating positions, such as interpretations taken in an *amicus* brief. *See Auer*, 519 U.S. at 461–63; *see also Perez*, 135 S. Ct. at 1214 (Thomas, J., concurring in the judgment).

[92] 5 U.S.C. § 706.

statutes and regulations."[93] After all, the statute says that the reviewing court "*shall* decide *all relevant questions of law*." The language is imperative, commanding that courts are not to permit *anyone else* to decide questions of law. The interpretation of a statute or regulation is indisputably a question of law.[94] To make this point even more explicit, the statute specifically requires courts to "interpret constitutional and statutory provisions" and "determine the meaning . . . of the terms of an agency action," such as a regulation.

This statutory mandate cannot be squared with *Chevron* and *Seminole Rock*. When a court defers to an agency's interpretation of an ambiguous statute or regulation, the agency, not the court, is deciding the relevant "question[ ] of law," "interpret[ing]" the "statutory provision[ ]," or "determin[ing] the meaning" of a regulation. "So long as the agency does not stray beyond the ambiguity in the text being interpreted, deference *compels* the reviewing court to 'decide' that the text means what the agency says."[95] Indeed, the Supreme Court has expressly stated that when a court defers under *Chevron*, it is *not* deciding the meaning of the statute; rather, it is acknowledging the *agency's* role as the "authoritative interpreter" of the statute.[96] And in the context of interpreting regulations, the same is true of *Seminole Rock* as well. Both *Chevron* and *Seminole Rock* are thus "[h]eedless of the original design of the APA."[97]

---

[93] *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment).
[94] *See, e.g.*, *Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995) ("Because statutory terms are at issue, their interpretation is a question of law and it is the court's duty to define the appropriate standard.").
[95] *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) (emphasis in original).
[96] *Brand X*, 545 U.S. at 983 ("Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.").
[97] *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment). Some scholars have pointed out that judicial deference to agencies conflicts with Section 706 only if the agency is understood to be exercising *interpretive* authority. If the agency is instead understood to be exercising delegated *legislative* power to "fill any gap left" in the statute or regulation, then the agency's regulation or interpretive rule—within the boundaries of reasonableness—is the equivalent of lawmaking. Under that view, the agency is not deciding any questions of law: it is *legislating*, and the courts, by sustaining the agency's action, are simply acknowledging that the agency had authority to legislate as

V. Abrogating *Chevron* and *Seminole Rock*

Judicial deference to the Administrative State has always been controversial. Even before *Chevron*, Congress debated proposals that would have directed courts to review agency statutory interpretations without deference.[98] Among scholars and jurists alike, there has been sustained criticism of the legitimacy of both *Chevron*[99] and *Seminole Rock*,[100] and that criticism has now reached the point where even proponents of these two doctrines have begun to acknowledge their questionable underpinnings.[101] Indeed, with regard to *Seminole Rock*, at least, the criticism spans the jurisprudential spectrum, from Justice Thomas to Justice Ginsburg.[102] The time is ripe for congressional action to enforce the original design of the APA and, more important still, to restore the structural constitutional boundary between courts and administrative agencies.

---

it did, not "deferring" to an agency's interpretation. This response is too clever by half, not only because it "runs headlong into the teeth of Article I's [Vesting Clause]," *Michigan*, 135 S. Ct. at 2713 (Thomas, J., concurring), but also because, even if the deference doctrines do not *expressly contradict* the APA, they certainly flout the *original design* of the APA, as evidenced by the APA's clear textual command that courts "decide all questions of law." It is implausible to say that Section 706 contemplated the esoteric distinction that scholars have put forward in defense of *Chevron* and *Seminole Rock*.

[98] *See* discussion of Bumpers amendment, *infra*.

[99] *See, e.g.*, *Michigan*, 135 S. Ct. at 2712–14 (Thomas, J., concurring); *Perez*, 135 S. Ct. at 1211–13 (Scalia, J., concurring in the judgment); *see generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

[100] *See, e.g.*, *Perez*, 135 S. Ct. at 1210–11 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1212–13 (Scalia, J., concurring in the judgment); *id.* at 1225 (Thomas, J., concurring in the judgment); *Decker*, 133 S. Ct. at 1338–39 (Roberts, C.J., concurring); *id.* at 1342 (Scalia, J., concurring in part and dissenting in part); *Christopher*, 132 S. Ct. at 2168 (criticizing *Seminole Rock* for incentivizing the issuance of ambiguous regulations to empower agencies); *Talk America, Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring); *Gonzales v. Oregon*, 546 U.S. 243, 256–59 (2006) (Kennedy, J.) (refusing to defer under *Seminole Rock* where a regulation did "little more than restate the terms of the statute itself"); Stephenson & Pogoriler, *supra* note 88, at 1459–66; William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1184 (2008); Manning, *supra* note 61, at 631–96.

[101] *See, e.g.*, *Michigan*, 135 S. Ct. at 2712–14 (Thomas, J., concurring); *Perez*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment).

[102] Justice Ginsburg joined Justice Thomas's dissent in *Thomas Jefferson University v. Shalala*, which noted that *Seminole Rock* incentivizes the issuance of vague regulations that maximize agency power and deprive parties of adequate notice regarding the state of the law. *See* 512 U.S. at 525 (Thomas, J., dissenting).

As noted earlier, *Chevron* and *Seminole Rock* are "judge-made doctrines of deference."[103] And regardless of one's views about their validity under the APA or the Constitution, they are certainly not *required* by any statute or constitutional provision.[104] Congress can, therefore, abrogate or otherwise modify *Chevron* and *Seminole Rock* by statute.

Chevron and *Seminole Rock* are sometimes characterized as standards of judicial review,[105] and, if that is so, Congress has power to prescribe a different standard of review as a necessary and proper means of carrying into execution both its own statutes and the judicial power.[106] In fact, Section 706 of the APA is *itself* a standard of review for agency action,[107] and just as Congress had the power to enact Section 706 in the first place, it has the power to restore that statute's original design by abrogating the deference doctrines.

Alternatively, some have argued that *Chevron* and *Seminole Rock* can be viewed as rules of statutory interpretation.[108] But because these doctrines, by their own terms, purport to be "rooted in a background presumption of congressional intent,"[109] Congress has the power to rebut any presumed, implicit delegation of interpretive discretion by declaring its contrary intent

---

[103] *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment).
[104] *See supra* note 49.
[105] *See, e.g.*, *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 58 (2011) (describing *Chevron* as a standard of review).
[106] Michael Stokes Paulsen, *Abrogating* Stare Decisis *by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1590–91 (2000) ("At a minimum, the Necessary and Proper Clause permits Congress to proscribe any procedure or practice of courts that impairs the faithful exercise of '[t]he judicial Power' and to prescribe rules and procedures conducive to the faithful exercise of that power." (alteration in original)).
[107] *United States v. Bean*, 537 U.S. 71, 77 (2002); *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 375 (1989); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985).
[108] Rosenkranz, *supra* note 49, at 2129–31; *Perez*, 135 S. Ct. at 1214 n.1.
[109] *City of Arlington*, 133 S. Ct. at 1868 (*Chevron*); *Martin*, 499 U.S. at 151 (*Seminole Rock*); *see also Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.").

by statute.[110] The Supreme Court recognized this authority in *United States v. Mead Corp.*, which held that *Chevron* deference applies only where the statutory text indicates 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."[111] There can be little dispute, then, that "[i]f Congress wanted to repudiate *Chevron*, it could do precisely that,"[112] and the same is no less true of *Seminole Rock*.[113]

Indeed, the Senate has previously passed legislation attempting to abrogate these deference doctrines. Even before *Chevron*, courts frequently deferred to agency interpretations of statutes,[114] and *Seminole Rock* had been applied by the Court in decisions prior to that time as well.[115] In response to the emergence of judicial deference to agencies, Democratic Senator Dale Bumpers of Arkansas—who passed away earlier this year—introduced a bill in 1975 that would have amended Section 706 of the APA to, among other things, make clear that "the reviewing

---

[110] Lovejoy, *supra* note 49, at 900 ("No judicial rule of good decisionmaking can prevail over a clear command of Congress, so . . . any presumption of congressional intent should be rebuttable by a clear congressional statement to the contrary."); Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 872–73 (2001) ("[I]f *Chevron* depends upon a presumption about congressional intent, then Congress has the power to turn off the *Chevron* doctrine when it wants. A presumption of congressional intent is obviously just that—a presumption— and must give way to evidence that Congress harbored a different intent.").

[111] *Mead*, 533 U.S. at 229.

[112] Sunstein, *supra* note 72, at 2589; *see also Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) (describing the conflict between Section 706 and *Chevron* and stating that "[t]he problem is bad enough, and perhaps insoluble if *Chevron* is not to be uprooted"); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 884 (7th Cir. 2002) (Easterbrook, J., concurring in part and concurring in the judgment) ("Congress can choose to delegate, or not, statute-by-statute or through framework laws such as the APA; it could undo *Chevron* across the board if the doctrine functioned as kryptonite to its enactments."); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1031 (1992) ("As previously indicated, I think that Congress has the constitutional power to direct courts to abandon the *Chevron* approach."); Laurence H. Silberman, Chevron—*the Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 824 (1990) ("Congress could reverse *Chevron*'s presumption generically by amending the Administrative Procedure Act (APA).").

[113] It is also worth noting that the Court itself has made exceptions to *Chevron* that would be difficult to reconcile with the notion that *Chevron* or *Seminole Rock* are constitutionally required. *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (declining to apply *Chevron* to "a question of deep 'economic and political significance' that is central to [a] statutory scheme" (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 2000)).

[114] *Chevron*, 467 U.S. at 844 & nn.13–14 (collecting cases).

[115] *See, e.g.*, *Udall*, 380 U.S. at 16–17.

court shall decide ***de novo*** all relevant questions of law."[116] Senator Bumpers explained that the amendment was necessary because "much of the power customarily exercised by these three original branches has been taken over by what in truth amounts to a fourth branch of government, the administrative branch, a branch that is not elected by anyone and, unlike the judiciary, is not insulated from political influence."[117] The amendment was also introduced in the House by then-Congressman Chuck Grassley (R-IA), who later became a Senate co-sponsor. The House Judiciary Committee favorably reported the amendment in 1980, and the Senate passed a version of the amendment in 1981 as part of the Regulatory Reform Act.[118] Although the amendment never became law, this previous legislative initiative demonstrates the Senate's bipartisan recognition of the dangers posed by judicial deference to the Administrative State. And those dangers have only grown more pressing with the passage of time.

It should come as no surprise that I strongly believe that Congress should pass legislation to abrogate *Chevron* and *Seminole Rock*. Congress could do so simply by amending Section 706 to make explicit (or rather, even more explicit) that courts must determine the meaning of regulations and statutes *de novo*, without deference to any administrative agency. Such an amendment would reaffirm the original design of the APA in language too plain to be ignored or evaded by the courts, and it would correct the ongoing violations of the Constitution sanctioned by the *Chevron* and *Seminole Rock* doctrines.

[116] 123 Cong. Rec. S639 (daily ed. Jan. 10, 1977) (statement of Sen. Bumpers) (amendment in bold).
[117] 121 Cong. Rec. S29,956 (daily ed. Sept. 24, 1975) (statement of Sen. Bumpers).
[118] *See* Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 5–9 & n.10 (1985).

CONCLUSION

The *Chevron* and *Seminole Rock* doctrines of judicial deference are at war with the structure of our Constitution and with the text and original design of the APA. Congress should exercise its constitutional authority to abrogate them.