

CHEVRON AND THE PRESIDENT'S ROLE IN THE LEGISLATIVE PROCESS

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INTRODUCTION

So often, the question in cases of statutory interpretation is what “Congress meant,”¹ what “Congress intended,”² or what “Congress thought.”³ After all, the basic assumption of statutory interpretation is *legislative* supremacy.⁴

But these questions are incomplete, for they leave implicit an essential part of the legislative process: the President. Article I, Section 7 of the Constitution requires the President to sign a bill before it becomes a law unless two-thirds of each house override his veto.⁵ And the Constitution gives the President the power to recommend legislation to Congress.⁶ Typically, the President is as essential to the passage of legislation as Congress.

Yet the President’s role in the legislative process is often overlooked and subordinated for linguistic convenience. This Article considers how the President’s role in the legislative process affects whether courts should defer to agency interpretations of statutes. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court held that courts should defer to an agency’s reasonable interpretation of an ambiguous statute.⁷

1. See, e.g., *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 473 (1977).

2. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (discussing the presumption that Congress does not intend to preempt state law causes of action).

3. See, e.g., *Taylor v. United States*, 495 U.S. 575, 597 (1990).

4. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989) (explaining the common idea that courts are subordinate to legislatures except when they exercise the power of judicial review).

5. U.S. CONST. art. I, § 7.

6. U.S. CONST. art. II, § 3 (stating, “He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient”).

7. 467 U.S. 837, 843–44 (1984).

Ambiguity, the Court explained, represented an implicit delegation of interpretive authority from Congress to the agency.⁸ Moreover, agencies are more democratically accountable than courts, and they have greater technical expertise.⁹

The President's role in the legislative process offers another reason for deference. Legislative supremacy requires interpreters to construct legislative intent from statutory context. The President's involvement in the legislative process gives him unique knowledge of statutory context. And when agencies are subject to presidential control, their interpretations likely reflect this knowledge. The Executive Branch might then be a better expositor of statutory meaning than the courts. Unlike the traditional view of agency expertise, this view links agencies to the President and focuses on a specific sort of expertise in statutory meaning, one based on actual participation in the legislative process.¹⁰

But once revealed, this additional reason for deference is ultimately *Chevron's* undoing. Embedded in the constitutional structure is the principle that lawmaking should be separate from law-exposition.¹¹ *Chevron* combines presidential lawmaking with binding interpretive authority contrary to this principle. This combination incentivizes the President to use his legislative influence to insist on vague language upfront that he can then interpret authoritatively away from the constitutional requirements of bicameralism and presentment.

Concerns about *Chevron* from a separation-of-powers perspective are not new.¹² These more general concerns, however, have overlooked the President's role in the legislative process. Moreover, they can be countered with the general constitutional principle of democratic accountability to no necessary conclusion.

The more specific constitutional principle offered here proves more formidable. After all, *Chevron* bears a striking resemblance to institutional arrangements the Framers rejected as inconsistent with the design of the Constitution—specifically, the Council of Revision, which would have

8. *See id.* at 843–44 (explaining that if Congress leaves a term in a statute ambiguous the court asks “whether the agency’s answer is based on a permissible construction of the statute”).

9. *Id.* at 864–66.

10. *See infra* notes 22–25 and accompanying text.

11. *See infra* Part IV.A.

12. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 470 (1989) (noting that “*Chevron* offers no evidence to support its conclusion that silence or unclarity in a regulatory statute typically represents Congress’s deliberate delegation of meaning-elaboration power to the agency”).

involved the Judiciary in the exercise of the veto power.¹³ This institutional arrangement is strong evidence of *Chevron's* inconsistency with the constitutional design. A better interpretive rule, more consistent with constitutional structure, is to reject deference for independent judicial review—after all, the Judiciary plays *no* role in the legislative process.

The Article proceeds as follows: Part I sketches the traditional justifications for *Chevron*. Part II sets out the President's role in the legislative process, looking to the Constitution, history, and modern practice. Part III offers a distinct reason for deference based on the President's role in the legislative process. Part IV argues that *Chevron* combines lawmaking and binding interpretive authority in a way contrary to constitutional structure. And Part V argues for independent judicial review as an alternative. The Article then concludes.

I. TRADITIONAL JUSTIFICATIONS FOR *CHEVRON* DEFERENCE

In *Chevron*, the Supreme Court set out a two-step framework to determine if a court should defer to an agency's interpretation of a statute. First, a court was to use the traditional tools of statutory construction to determine “whether Congress has directly spoken to the precise question at issue.”¹⁴ If so, “that is the end of the matter.”¹⁵ If not, the court should defer to an agency's reasonable interpretation of the statute.¹⁶ Crucially, *Chevron* identified ambiguity as implicit legislative intent to delegate the power to resolve statutory ambiguity to agencies.

Chevron's presumption that, absent legislative intent to the contrary, agencies have the authority to interpret ambiguities in statutes has often been referred to as a fiction.¹⁷ For that reason, *Chevron* has also been justified as a constitutionally inspired default rule. When agencies resolve

13. See *infra* Part V.A.

14. *Chevron*, 467 U.S. at 842.

15. *Id.* (explaining that if the intent of Congress is clear, no further inquiry is necessary).

16. *Id.* at 843–44.

17. See, e.g., Stephen 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.”); Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 517 (“[A]ny rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.”); Cass R. Sunstein, *Beyond Marbury: The Executive's Power To Say What The Law Is*, 115 YALE L.J. 2580, 2589–90 (2006) (stating that *Chevron's* conclusion that delegations of rulemaking power implicitly include the power to interpret ambiguities is a legal fiction); cf. Farina, *supra* note 12, at 470 (pointing out that *Chevron's* conclusion that silence in a regulatory statute represents “Congress's deliberate delegation of meaning-elaboration power to the agency” is not supported by evidence).

questions of statutory ambiguity, they are really exercising policy discretion. And it is more consistent with our democratic system to vest policy discretion in the politically accountable branches.¹⁸ Although relying on the presumption of congressional intent, the Court also stressed this point:

[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: “Our Constitution vests such responsibilities in the political branches.”¹⁹

Chevron's default rule “serve[s] as a constitutional doctrine of second best, indirectly preserving structural norms that the Court will not enforce directly.”²⁰ *Chevron* thus “reconciles modern conceptions of delegation and interpretive lawmaking with a constitutional commitment to policymaking by more, rather than less, representative institutions.”²¹

In addition to being more democratic, agencies are also thought to be more expert than courts. For example, the Court further noted in *Chevron* that “[j]udges are not experts in the field.”²² And Justice Breyer has described “the traditional view that agencies are more ‘expert’ on policy matters than courts, and courts should ‘defer’ to their policy expertise.”²³ On this view, agencies “are more likely than the courts to reach the correct result.”²⁴ Expertise feeds into *Chevron*'s fiction: “It is virtually always proper for a court to assume Congress wanted the statute to work and, at least, did not intend a set of interpretations that would preclude its effective administration.”²⁵

None of these traditional reasons for deference, however, say anything about the President's role in the legislative process.

II. THE PRESIDENT'S ROLE IN THE LEGISLATIVE PROCESS

The Supreme Court has stated: “The Constitution limits [the President's] functions in the lawmaking process to the recommending of

18. See, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 626–27 (1996) [hereinafter Manning, *Constitutional Structure*]; Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 978 (1992); Scalia, *supra* note 17, at 515.

19. *Chevron*, 467 U.S. at 866 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)).

20. Manning, *Constitutional Structure*, *supra* note 18, at 633.

21. *Id.* at 634.

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

23. Breyer, *supra* note 17, at 390.

24. Scalia, *supra* note 17, at 514.

25. Breyer, *supra* note 17, at 368.

laws he thinks wise and the vetoing of laws he thinks bad.”²⁶ But it would be wrong to consider these functions so limited as the Court’s tone suggests.

A. *The Recommendation Clause*

Article II of the Constitution states that the President “shall . . . recommend to [the Congress’s] Consideration such Measures as he shall judge necessary and expedient.”²⁷ This provision was relatively uncontroversial at the Founding.²⁸ Two aspects of the Recommendation Clause’s drafting history hint at its original meaning. First, from James Madison’s notes on the Constitutional Convention for August 24, 1787: “On motion of Mr. Gov^r Morris, ‘he may’ was struck out, & ‘and’ inserted before ‘recommend’ in clause 2^d. sect 2^d art: X. in order to make it the *duty* of the President to recommend, & thence prevent umbrage or cavil at his doing it.”²⁹ The change of language from permissive to mandatory suggests that the President has a duty to recommend measures to Congress.³⁰ Creating a duty rather than a right prevented Congress from “argu[ing] that the President’s participation in lawmaking was part of a scheme to usurp Congress’ legislative power”—the sort of umbrage and cavil that seemed to concern Governor Morris.³¹

Second, where an early version of the Recommendation Clause spoke to “Matters,” the final version speaks to “Measures.”³² This change “reinforces the inference that the Framers intended the President’s recommendations to be more than precatory statements.”³³ Rather, the President was to recommend specific legislative bills.³⁴

Early practice, however, departs from this original meaning. George Washington’s first inaugural address initially contained detailed, specific

26. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

27. U.S. CONST. art. II, § 3.

28. THE FEDERALIST NO. 77, at 462 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[N]o objection has been made to this class of authorities . . .”).

29. James Madison, *Debates in the Federal Convention of 1787 as Reported by James Madison*, in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 109, 612 (Charles C. Tansill ed., 1927).

30. J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2081–82 (1989) (“James Madison’s notes on the Constitutional Convention for August 24, 1787, reveal that the Framers explicitly elevated the President’s recommendation of measures from a political prerogative to a constitutional duty . . .”).

31. *Id.* at 2082.

32. *Id.* at 2084.

33. *Id.*

34. Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 48–49 (2002).

legislative proposals. But these were scrapped because Washington feared the perception that “concrete presidential proposals might unduly influence an autonomous branch of government.”³⁵ “So too, President Thomas Jefferson avoided specificity in his recommendations”³⁶ Among early Presidents, Andrew Jackson was the exception; his first State of the Union Message “contained more than ten specific recommendations.”³⁷

Any concerns about recommending specific legislation disappeared by the twentieth century. “Presidents Theodore Roosevelt, Woodrow Wilson, and Franklin D. Roosevelt seized the legislative initiative.”³⁸ President Eisenhower put forth an “elaborate paraphernalia of a comprehensive and specific inventory, contents settled and defined as regards substance no less than finance, *presented in detailed fashion and packaged form at the opening of each session of Congress*”³⁹

Public addresses, such as the State of the Union and the inaugural, have traditionally served as opportunities for the President to recommend legislation, and doing so is now normal. Take President Barack Obama’s most recent State of the Union address. Among other things, he called on Congress to pass tax reform for American manufacturing, to pass new immigration laws, to change energy policy, to pass legislation changing fraud penalties, to pass the Buffett Rule for taxes, to pass a law banning insider trading in Congress, and to pass legislation giving him authority to reorganize the bureaucracy.⁴⁰ Illustrating presidential ownership of legislation, President George W. Bush “urge[d]” Congress “to pass both *my* Faith-Based Initiative and the ‘Citizen Service Act’” in his 2003 State of the Union address.⁴¹ And in his first State of the Union address, Bill Clinton called on Congress to pass “the Brady Bill,” “a tough crime bill,” “a real campaign finance reform bill,” “the motor voter bill,” and “the lobbying registration bill,” among others.⁴²

More importantly, the Executive sends draft legislation to Congress. Executive communications have “become a prolific source of legislative proposals” and consist of a “draft of a proposed bill” that is sent “to the

35. David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789–91*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 189 (1995).

36. Kesavan & Sidak, *supra* note 34, at 52.

37. *Id.*

38. *Id.*

39. Richard E. Neustadt, *Presidency and Legislation: Planning the President’s Program*, 49 AM. POL. SCI. REV. 980, 981 (1955).

40. Barack Obama, State of the Union address (Jan. 24, 2012).

41. George W. Bush, State of the Union address (Jan. 28, 2003) (emphasis added).

42. William J. Clinton, State of the Union address (Feb. 17, 1993).

Speaker of the House of Representatives and the President of the Senate.”⁴³

Today, the White House has institutionalized the proposal of legislation. The Office of Management and Budget (OMB) reviews legislative proposals from agencies and ensures that agency views on legislative proposals are consistent with administration policy.⁴⁴ OMB helps the President develop a position on legislation, it publicizes the President’s views, and it coordinates agency views.⁴⁵ Agencies are required to submit their proposed legislative programs to OMB; they are also directed to “take into account the President’s known legislative, budgetary, and other relevant policies.”⁴⁶ Moreover, agencies “shall not submit to Congress any proposal that OMB has advised is in conflict with the program of the President.”⁴⁷

Executive drafting is common. In an example that perhaps belies the view that Congress should dominate legislative drafting, President Obama “acknowledged . . . that his hands-off approach to health care legislation had likely been a mistake and that he had ‘probably left too much ambiguity out there’ by allowing Congress to take the lead in drafting a bill.”⁴⁸ Illustrating the specificity of draft legislation, Treasury Secretary Timothy Geithner wrote in *The Wall Street Journal* that, in formulating financial regulation reform, the President “asked [the Department] to write draft legislation rather than propose broad principles.”⁴⁹ The Congressional Record tracks executive communications and the Executive Branch often submits new draft legislation through that channel.⁵⁰ The

43. *How Our Laws are Made*, THE LIBRARY OF CONGRESS: THOMAS, <http://thomas.loc.gov/home/lawmade.bysec/sourcesofleg.html> (last visited Nov. 30, 2012).

44. *The Mission and Structure of the Office of Management and Budget*, OFFICE OF MGMT. & BUDGET, http://www.whitehouse.gov/omb/organization_mission/ (last visited Nov. 30, 2012).

45. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-19, LEGISLATIVE COORDINATION AND CLEARANCE (1979), http://www.whitehouse.gov/omb/circulars_a019.

46. *Id.*

47. *Id.*

48. Sheryl Gay Stolberg, *Hands-Off Approach May Have Been a Mistake, Obama Says*, N.Y. TIMES PRESCRIPTIONS BLOG (Sept. 9, 2009), <http://prescriptions.blogs.nytimes.com/2009/09/09/hands-off-approach-may-have-been-a-mistake-obama-says/>.

49. Timothy Geithner, Op-Ed., *A Dodd-Frank Retreat Deserves a Veto*, WALL ST. J., July 20, 2011, at A19.

50. See, e.g., 158 CONG. REC. H1844 (daily ed. Apr. 16, 2012) (describing executive communication from the Chairman of the Nuclear Regulatory Commission containing draft legislation); 157 CONG. REC. H5659 (daily ed. July 27, 2011) (describing draft legislation submitted by the EPA, the Department of Veterans Affairs, and the Broadcasting Board of Governors).

Executive Branch also suggests amendments to existing laws.⁵¹

The power to recommend legislation is now commonplace. As political scientist Richard Neustadt explains:

Traditionally, there has been a tendency to distinguish “strong” Presidents from “weak” depending on the exercise of the initiative in legislation. . . . If these were once relevant criteria of domination, they are not so today. As things stand now they have become part of the regular routines of office, an accepted elaboration of the constitutional right to recommend⁵²

But the President provides Congress with more than a “drafting service.”⁵³ He also “choose[s] most *legislative* issues on which serious attention is to center at a session; the President becomes agenda-setter for the Congress, the chief continuing initiator of subject-matter to reach actionable stages in [the] committee and on the floor”⁵⁴

B. *The Veto Power*

Article I, Section 7 of the Constitution requires the President to sign a bill passed by the House of Representatives and the Senate before it becomes a law. If the President vetoes the bill, it is sent back to the house it originated in.⁵⁵ Congress can override the President’s veto with a two-thirds majority in each house.⁵⁶

Prior to the Revolution, colonial governors—appointed by the King—enjoyed an absolute veto over any legislative act.⁵⁷ And even if the colonial governor gave his assent, the King enjoyed a further absolute veto.⁵⁸ No surprise then that among the grievances in the Declaration of Independence was that the King “refused his Assent to Laws, the most wholesome and necessary for the public good.”⁵⁹ Against this backdrop, the Framers rejected an absolute veto.⁶⁰

But why have a veto power at all? As Alexander Hamilton explained in

51. See, e.g., 158 CONG. REC. H1366 (daily ed. Mar. 16, 2012) (referencing a letter from the Secretary of the Department of Energy suggesting amendments to the Atomic Energy Defense Act).

52. Neustadt, *supra* note 39, at 1014.

53. *Id.* at 1015.

54. *Id.*

55. U.S. CONST. art. I, § 7.

56. *Id.*

57. Carl McGowan, *The President's Veto Power: An Important Instrument of Conflict in Our Constitutional System*, 23 SAN DIEGO L. REV. 791, 793–94 (1986).

58. *Id.* at 794.

59. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

60. THE FEDERALIST NO. 69, at 416–17 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Federalist No. 73, the veto gave the President a means for defending himself against congressional encroachment on his power.⁶¹ But even further, the veto “furnishe[d] an additional security against the enactment of improper laws.”⁶² It provided this security by “establish[ing] a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.”⁶³

Put another way, the veto encouraged independent executive judgment about the substance of laws. This judgment could take different forms: the President could exercise independent constitutional judgment, or he could exercise independent policy judgment.

Early Presidents largely exercised constitutional judgment. Washington vetoed a bill passed by the First Congress on the grounds that it apportioned representatives in violation of the Constitution.⁶⁴ And while Adams and Jefferson used the power sparingly, Madison used it more frequently, objecting to laws because they violated the Establishment Clause, or because they were in excess of Congress’s enumerated powers.⁶⁵

In a famous exercise of the power, Andrew Jackson vetoed the bill renewing the Second Bank of the United States, insisting that it was unconstitutional⁶⁶—no matter that the Supreme Court upheld the First Bank of the United States in *McCulloch v. Maryland*.⁶⁷ According to Jackson, each branch of government has the authority to judge the constitutionality of laws.⁶⁸ Congress was not thrilled. It viewed Jackson’s veto as an affront to the Supreme Court’s power to interpret the Constitution.⁶⁹ In the end, however, Congress could not override the veto and Jackson prevailed.⁷⁰

Tension between the President and Congress, however, persisted. John Tyler’s veto of a tariff bill led to a movement to impeach him.⁷¹ The tension peaked in 1867, when, over President Andrew Johnson’s veto, Congress passed the Tenure of Office Act, which prevented the President

61. THE FEDERALIST NO. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

62. *Id.* at 443.

63. *Id.*

64. See McGowan, *supra* note 57, at 798–99.

65. *Id.* at 799–800.

66. *Id.* at 800.

67. 17 U.S. (4 Wheat.) 316, 316–17 (1819).

68. McGowan, *supra* note 57, at 800 (discussing Jackson’s veto of the Second Bank of the United States). Jackson was not alone in this view; others, such as Martin Van Buren and Thomas Jefferson, took a similar position. *Id.* at 800–01.

69. *Id.* at 801.

70. *Id.*

71. *Id.* at 802.

from removing certain officers without Senate consent.⁷² The Act was meant to antagonize Johnson, who stood in the way of the Reconstruction efforts of the Radical Republican Congress.⁷³ Johnson insisted that the law was unconstitutional. And he ultimately removed Secretary of War Edwin Stanton even though the Senate withheld its consent.⁷⁴ For this, Johnson was impeached.⁷⁵ In his trial, the prosecution argued that the President lacked the authority to judge the constitutionality of laws. Johnson, however, insisted that the law was unconstitutional and was ultimately acquitted.⁷⁶

Following the Civil War, statutes proliferated and the veto power became less about constitutional judgment and more about policy judgment.⁷⁷ Moreover, the use of the veto increased.⁷⁸ Until Andrew Johnson, no President had vetoed more than twelve bills. Johnson vetoed twenty-nine bills while Ulysses S. Grant vetoed ninety-three bills.⁷⁹ Grover Cleveland vetoed 414 bills in his first term alone.⁸⁰ Franklin Delano Roosevelt vetoed 635 bills—a number made possible in part by his exceptional time in office. Use of the veto has declined since Roosevelt: Ronald Reagan vetoed seventy-eight bills, George H. W. Bush vetoed forty-four bills, Bill Clinton vetoed thirty-seven bills, and George W. Bush vetoed twelve bills. Barack Obama, to date, has vetoed only two bills.⁸¹

Constitutional objections persist. For instance, President Obama threatened to veto the National Defense Authorization Act because it interfered with the President's constitutional authority.⁸²

But today, most vetoes and veto threats are policy-oriented. One of President Obama's two vetoes thus far was based on the "possible

72. *Id.*

73. *Id.* (Congress favored strict measures to ensure there would be no further uprisings in the South, while Johnson favored leniency).

74. *Id.* at 802–03.

75. *Id.* at 803.

76. *Id.*

77. *Id.*

78. *Presidential Vetoes: Washington–Obama*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/data/vetoes.php> (last updated Nov. 7, 2012) (showing that the number of total vetoes per presidency increased after Abraham Lincoln's presidency).

79. *Id.*

80. *Id.*

81. *Id.*

82. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, S. 1867–NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2012, 1, 2–3 (2011), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf.

unintended impact” of the bill.⁸³ The other bill was vetoed because other legislation rendered the bill unnecessary.⁸⁴ Likewise, President George W. Bush vetoed the Stem Cell Research Enhancement Act of 2005 based solely on policy objections.⁸⁵ Other examples are common.⁸⁶

As Charles Black has observed, the veto power “could make the President, in the absence of energetic, principled and tactically imaginative resistance in Congress, the most important part of Congress.”⁸⁷ Consequently,

[M]ajorities, even quite large, in “Congress,” as that word is commonly understood—that is to say, the House and the Senate—are powerless to fix American policy on anything, foreign or domestic, so long as Congress sticks to the forthright expression of policy judgment in a single bill, and attempts neither circumvention of the veto by “rider,” nor reprisal.⁸⁸

The rise of the policy-oriented veto coupled with the decline of the actual use of the veto may mean that modern presidents have had success in the legislative process. Because Congress knows of the veto power, “the actual veto can be rather rare”—often, the mere threat of the veto will suffice.⁸⁹ Sometimes, the President will publically make veto threats.⁹⁰ But even in the absence of an express veto threat, the President is likely to make his views known, and Congress is likely to craft a bill with these views in mind.

83. Barack Obama, *Presidential Memorandum—H.R. 3808* (Oct. 8, 2010), <http://www.whitehouse.gov/the-press-office/2010/10/08/presidential-memorandum-hr-3808>.

84. BARACK OBAMA, VETO MESSAGE ON H.J. RES. 64, H.R. DOC. NO. 111-84, at 1 (2d Sess. Jan. 13, 2010), available at <http://www.gpo.gov/fdsys/pkg/CDOC-111hdoc84/pdf/CDOC-111hdoc84.pdf>.

85. GEORGE W. BUSH, VETO MESSAGE ON H.R. 810, H.R. DOC. NO. 109-127, at 1 (2d Sess. July 20, 2006), available at <http://www.gpo.gov/fdsys/pkg/CDOC-109hdoc127/pdf/CDOC-109hdoc127.pdf>.

86. See *Summary of Bills Vetoed 1789–present*, U.S. SENATE, <http://www.senate.gov/reference/Legislation/Vetoes/vetoCounts.htm> (last visited Nov. 30, 2012) (listing all bills vetoed along with the respective President’s reasons for doing so).

87. Charles L. Black, Jr., *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS., Spring 1976, at 87, 89.

88. *Id.* at 94.

89. *Id.* at 95; see also Steven A. Matthews, *Veto Threats: Rhetoric in a Bargaining Game*, 104 QJ. ECON. 347, 363–64 (1989) (characterizing the presidential veto as not only an indicator of the President’s preferences but also the means to influence Congress).

90. See, e.g., Charlie Savage, *Obama Drops Veto Threat over Military Authorization Bill After Revisions*, N.Y. TIMES, Dec. 14, 2011, <http://www.nytimes.com/2011/12/15/us/politics/obama-wont-veto-military-authorization-bill.html> (noting that due to the Obama Administration’s threats of vetoing the National Defense Authorization Act of 2012 Congress amended the Act’s provisions).

For instance, use of the Recommendation Clause—either by broad proposals or by draft legislation—provides Congress with important information about the President's views. And again, OMB plays an important role throughout the legislative process.⁹¹ It approves agency testimony and letters and prepares statements of administration policy on pending legislation.⁹² Some of these statements of administration policy contain express veto threats. For example, after expressing concern that a proposed bill would “unravel decades of work to forge consensus, solutions, and settlements” with respect to California water policy, one such statement concludes: “[W]ere the Congress to pass H.R. 1837, the President's senior advisors would recommend that he veto the bill.”⁹³ Other OMB statements point out specific differences between Congress's version and the President's proposals.⁹⁴ Others statements express support for pending legislation.⁹⁵ At bottom, the Executive Branch—backed by the veto power—is in a constant dialogue with Congress throughout the legislative process.

Just how much influence the veto exerts on the legislative process depends on both the nature of the President and the nature of the Congress. It seems likely that in many scenarios the veto power does move legislative outcomes closer to the President's preferences.⁹⁶ Unless the veto is overridden, a bill to some extent “will almost always reflect the [P]resident's preference” because “Congress must craft the bill in such a

91. See *supra* notes 44–47 and accompanying text.

92. *The Mission and Structure of the Office of Management and Budget*, OFFICE OF MGMT. & BUDGET, http://www.whitehouse.gov/omb/organization_mission/ (last visited Nov. 30, 2012).

93. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 1837—SACRAMENTO–SAN JOAQUIN VALLEY WATER RELIABILITY ACT, 1 (2012), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1837_20120228.pdf.

94. See, e.g., OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 1734—CIVILIAN PROPERTY REALIGNMENT ACT, 1 (2012), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1734h_20120206.pdf (“Unlike the President's proposal, H.R. 1734 provides broad categorical exemptions . . .”).

95. See, e.g., OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 3521—THE EXPEDITED LEGISLATIVE LINE-ITEM VETO AND RESCISSIONS ACT, 1 (2012), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr3521r_20120206.pdf (“The Administration strongly supports House passage of H.R. 3521.”).

96. See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 529–32 (1992) (discussing the legislative interplay between Congress and the President in terms of game theory).

way as to avoid the veto.”⁹⁷ Of course, the background threat of the veto cannot put into law all the President’s wishes. At times, he will compromise with Congress, conceding some points to enact others. But at the very least, the President’s signature connotes that on some level, the legislation comports with his preferences.

C. *The President as Legislator-in-Chief*

The modern president has been commonly described as the “Legislator-in-Chief.”⁹⁸ But the President’s role in the legislative process should not be overstated. The President does not initiate every bill that becomes a law. He does not always participate so vigorously throughout the process. Nor is his veto so threatening in every case.

In many cases, Congress drives the legislative process. Individual members are often responsible for initiating bills—so much so that their names are forever attached to them. Think McCain-Feingold,⁹⁹ Norris-LaGuardia¹⁰⁰ or McCarran-Ferguson.¹⁰¹ Moreover, each House has its own legislative counsel that provides drafting services.¹⁰²

Still, the President makes considerable use of the recommendation power. With the help of OMB, he is involved in every stage of the legislative process.¹⁰³ And ultimately, every bill passed by the House and Senate must be presented to him. To a large extent, the President’s political legacy is tied to his legislative success.¹⁰⁴

97. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 350 (2006).

98. See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1818–19 (1996) (“Wilson’s proactive approach, if not always a success, has since become the norm, so much so that the President has aptly been termed the ‘legislator-in-chief.’”); Kesavan & Sidak, *supra* note 34, at 48–49; Matt Vasilogambros, *Obama Campaign Releases New Long-Form Web Ad*, NAT’L J., Apr. 30, 2012, <http://www.nationaljournal.com/2012-presidential-campaign/obama-campaign-releases-new-long-form-web-ad-20120430> (“[T]he campaign’s new 7-minute ad . . . paints the president as a strong commander in chief—and legislator-in-chief . . .”).

99. 2 U.S.C. §§ 431, 434, 437(g), 441(b) (2006) (regulating the funding of political campaigns).

100. 29 U.S.C. § 107 (2006).

101. 15 U.S.C. §§ 1011–15 (2006).

102. *Office of the Legislative Counsel*, U.S. SENATE, <http://slc.senate.gov> (last visited Nov. 30, 2012); *Office of the Legislative Counsel*, U.S. HOUSE OF REPRESENTATIVES, <http://www.house.gov/legcoun> (last visited Nov. 30, 2012).

103. See *supra* notes 44–47 and accompanying text.

104. Cf. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 168 (1990) (describing how the legislative successes or failures of one presidency define the policy choices of later

Beyond his formal powers, the President exerts intangible force on the legislative process: “[W]hen the chips are down, there is no substituting for the President’s own footwork, his personal negotiation, his direct appeal, his voice and no other’s on the telephone.”¹⁰⁵ The mere office of the President lends itself to persuasion. But the President’s constitutional powers become all the more potent when placed in the hands of someone who knows how to use them. Bill Clinton has described Lyndon Johnson as the President “with more ability to move legislation through the House and Senate than just about any other president in history.”¹⁰⁶ What made Johnson different? “He knew just how to get to you, and he was relentless in doing it.”¹⁰⁷

However limited the Framers might have thought the President’s role in the legislative process, it appears, as Charles Black has said, that the President’s modern role truly “illustrates the power of text over expectation.”¹⁰⁸

III. AN ADDITIONAL REASON FOR DEFERENCE

The President’s role in the legislative process offers an additional reason for deference. Because the President is so involved in the legislative process that produced the statute, he likely has special knowledge of its statutory context. This knowledge is attributable to agencies accountable to him. This combined executive knowledge of statutory context may give the Executive Branch an advantage over courts when it comes to constructing a statute’s meaning from its context. If that is so, courts do more for legislative supremacy by deferring to interpretations by the Executive Branch.

A. *Pre-Chevron Doctrine*

A few commentators have entertained in passing the possibility that agency interpretations might better represent statutory meaning.¹⁰⁹ And

presidencies).

105. Neustadt, *supra* note 39, at 1016.

106. Bill Clinton, *Seat of Power*, N.Y. TIMES, May 6, 2012, at 12 (reviewing ROBERT CARO, *THE PASSAGE OF POWER: THE YEARS OF LYNDON JOHNSON* (2012)).

107. *Id.*

108. Black, *supra* note 87, at 89.

109. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 209–10 (2006) (“As far as information is concerned, specialized agencies are closer to the statute, its legislative history, and its original purposes and compromises than are generalist judges.”); Breyer, *supra* note 17, at 368 (“In the context of administrative law, this jurisprudential answer may rest upon a particularly important,

cases prior to *Chevron* hint at such an account.

As early as 1877 the Court explained that “[t]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration” in part because “[n]ot unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.”¹¹⁰

This noted relevance of agency participation in the legislative process persisted as a factor under the regime that preceded *Chevron*. Under that regime—exemplified by *Skidmore v. Swift & Co.*—deference was a case-by-case inquiry into the agency’s interpretation, focusing on the “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹¹¹

In *United States v. American Trucking Ass’ns*, the Court stated, “[T]he Commission’s interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions’ enactment to Congress.”¹¹² In *Zuber v. Allen*, the Court said the agency’s interpretation “carries the most weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings.”¹¹³ And as late as 1979 the Court said, “Administrative interpretations are especially persuasive where, as here, the agency participated in developing the provision.”¹¹⁴

Even when there was no evidence of actual participation in the legislative process, the contemporaneousness of an agency’s interpretation was a relevant factor under *Skidmore*. As the Court noted in *Norwegian Nitrogen Products Co. v. United States*, an agency interpretation “has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion.”¹¹⁵

All these cases focus on the agency’s participation in the legislative

highly relevant legal fact, namely, the likely intent of the Congress that enacted the statute. The agency that enforces the statute may have had a hand in drafting its provisions.”)

110. *United States v. Moore*, 95 U.S. 760, 763 (1877).

111. 323 U.S. 134, 140 (1944).

112. 310 U.S. 534, 549 (1940).

113. 396 U.S. 168, 192 (1969).

114. *Miller v. Youakim*, 440 U.S. 125, 144 (1979).

115. 288 U.S. 294, 315 (1933); *see also* *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (“The EEOC guideline in question does not fare well under these standards. It is not a contemporaneous interpretation of Title VII, since it was first promulgated eight years after the enactment of that Title.”); *Fawcus Mach. Co. v. United States*, 282 U.S. 375, 378 (1931) (“They constitute contemporaneous construction by those charged with administration of the act . . .”).

process, but they do not discuss the President's participation in the legislative process. Nor do they establish any link between agencies and the President. Perhaps they should have.

B. Agency Accountability to the President

Why should we link agencies to the President? "Because the power to remove is the power to control"¹¹⁶ As the Supreme Court most recently explained in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*:

Article II confers on the President "the general administrative control of those executing the laws." It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase. As we explained in *Myers*, the President therefore must have some "power of removing those for whom he cannot continue to be responsible."¹¹⁷

Ultimately, the President is responsible for the actions of executive agencies. The removal power ensures that agency officials act in accordance with the President's views.

Moreover, presidential control over administrative agencies has been institutionalized. OMB ensures that agency proposals and testimony are consistent with administration policy.¹¹⁸ And President Reagan instituted "a centralized mechanism for review of agency rulemakings unprecedented in its scale and ambition—and soon shown to be unprecedented in its efficacy as well."¹¹⁹ This mechanism set out substantive criteria for rulemaking and required executive agencies to submit proposed rules to the Office of Information and Regulatory Affairs (OIRA) for cost-benefit analysis.¹²⁰ Despite some differences, this basic structure of presidential control over agencies persists today.¹²¹

To be sure, some agencies are independent of the President. Independent agencies are marked by limits on the President's removal power—that is, the President may only remove an officer for good cause.¹²²

116. *In re Aiken County*, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

117. 130 S. Ct. 3138, 3152 (2010) (citation omitted).

118. See *The Mission and Structure of the Office of Management and Budget*, OFFICE OF MGMT. & BUDGET, http://www.whitehouse.gov/omb/organization_mission/ (last visited Nov. 30, 2012).

119. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277 (2001).

120. *Id.* at 2277–78.

121. See generally *id.*

122. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625 (1935) (explaining that

Moreover, independent agencies are not fully subject to OIRA oversight.¹²³

Presidents, of course, are not completely powerless to control independent agencies. Supreme Court Justice Elena Kagan, for instance, has argued that the President has some default authority to direct independent agencies in the exercise of their discretion.¹²⁴ And Presidents will often—though not always—appoint the officers who sit on independent agencies.¹²⁵

Still, Presidents have less control over independent agencies. Consider the facts of *Humphrey's Executor v. United States*, the case upholding the constitutionality of independent agencies. When Roosevelt wrote to Federal Trade Commissioner William Humphrey: “I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission”¹²⁶ This policy disagreement did not suffice as cause under the statute, and the Court found that Roosevelt could not remove Humphrey.¹²⁷

When an agency official can disagree with the President’s policy views without fear of reprisal, not much guarantees that the agency interpretation will accord with the President’s own view. Thus, the agency’s interpretation may not always reflect the President’s knowledge of statutory context based on his participation in the legislative process, though it may reflect the agency’s own knowledge of statutory context based on its participation in the legislative process.

But when agency officials are threatened with removal if they disagree with the President’s policy, their interpretations will likely be consistent with the President’s views. And if the President’s view represents any special knowledge of statutory context, then the agency’s view will too.

C. Constructing Statutory Meaning from Context

Statutory interpretation rests on the principle of legislative supremacy.¹²⁸ At bottom, legislative supremacy means that courts are the faithful agents of the legislative process and must follow its commands as best as possible.¹²⁹

independent agencies are created by Congress to be free from political control).

123. See Kagan, *supra* note 119, at 2277–88.

124. *Id.* at 2250–51.

125. See U.S. CONST. art. II, § 2.

126. *Humphrey's Ex'r*, 295 U.S. at 619.

127. *Id.* at 629.

128. See Farber, *supra* note 4, at 283.

129. See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63; (1994); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 9 (2001) (“[S]trong purposivism and textualism both seek to provide a superior way for federal judges to fulfill their presumed duty as Congress’s faithful

Any notion of legislative supremacy requires some notion of legislative intent as statutory meaning. As Joseph Raz has argued, “It makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make.”¹³⁰ Two theories of statutory interpretation dominate today: textualism and purposivism.

Neither theory purports to rely on *subjective* legislative intent—what the legislature and President actually thought. This view is typically associated with classical intentionalism, and has been forcefully attacked by Judge Easterbrook, among others.¹³¹ As he has explained, “Intent is elusive for a natural person, fictive for a collective body.”¹³² Even if such a collective intent existed, the complexity of the legislative process likely makes it impossible for courts to discern any actual yet unexpressed intent on a given issue.¹³³

Both purposivism and textualism avoid these difficulties by relying on *objective* legislative intent. Both theories look to a reasonable person, but they ask different questions of the reasonable person.

The classical statement of purposivism asks how “reasonable persons pursuing reasonable purposes reasonably” would have resolved a question of statutory interpretation.¹³⁴ Purposivism best furthers legislative supremacy because legislators vote for policies, not semantic details.¹³⁵ Of course, text still matters—in most cases, the text will be an accurate expression of the purposes of the statute. But at some point, courts should give precedence to policy context—“evidence that suggests the way a reasonable person would address the mischief being remedied”¹³⁶—rather than semantic context, because doing so more accurately describes legislative behavior.

Textualists, on the other hand, ask how “a reasonable user of language would understand a statutory phrase in the circumstances in which it is used.”¹³⁷ Focusing on semantic context best furthers legislative supremacy

agents.”)

130. Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 249, 258 (Robert P. George ed., 1996).

131. See Easterbrook, *supra* note 129, at 68.

132. *Id.*

133. See Max Radin, *Statutory Interpretation*, 43 *HARV. L. REV.* 863, 870–71 (1930).

134. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge & Philip P. Frickey eds., 1994).

135. See Max Radin, *A Short Way with Statutes*, 56 *HARV. L. REV.* 388, 400–08 (1942).

136. John F. Manning, *What Divides Textualists from Purposivists?*, 106 *COLUM. L. REV.* 70, 76 (2006) [hereinafter Manning, *Divides*].

137. *Id.* at 81.

given the nature of the legislative process. As Professor Manning has explained: “[T]he legislative process prescribed by Article I, Section 7 of the Constitution and the rules of procedure prescribed by each House place an obvious emphasis on giving political minorities the power to block legislation or, of direct relevance here, to insist upon compromise as the price of assent.”¹³⁸ Semantic context refers to “evidence that goes to the way a reasonable person would use language under the circumstances.”¹³⁹ Only by giving precedence to this do courts allow the legislative actors to “set the level of generality at which they wish to express their policies” and “strike compromises that go so far and no farther.”¹⁴⁰

The two theories are not always so different in practice. As noted above, purposivists will often view the text and accompanying semantic context as an accurate expression of purpose. And because textualists focus on the use of language in context—a key element of which is that “speakers use language purposively”¹⁴¹—they will often find it appropriate to resolve ambiguity in light of a statute’s purpose and accompanying policy context. Although textualists reject legislative history as evidence of purpose, they are “willing to make rough estimates of purpose from sources such as the overall tenor or structure of the statute, its title, or public knowledge of the problems that inspired its enactment.”¹⁴²

The difference, then, between purposivists and textualists is more about the precise point at which an interpreter resorts to policy context over semantic context than the relevance of either. Purposivists are more likely to resort to policy context before exhausting semantic context. Textualists are more likely to exhaust semantic context before resorting to policy context. But under either theory, both semantic context and policy context are relevant to statutory meaning.

The Supreme Court’s modern approach to statutory interpretation illustrates the relevance of both semantic and policy context. The Court’s inquiry “begins with the statutory text, and ends there as well if the text is unambiguous.”¹⁴³ But at some point the Court—even its most textualist members—resorts to policy context. For instance, Justice Scalia has referred to the “classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination.”¹⁴⁴ And as Judge

138. *Id.* at 99.

139. *Id.* at 76.

140. *Id.* at 99.

141. *Id.* at 84.

142. *Id.* at 84–85.

143. *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion).

144. *United States v. Fausto*, 484 U.S. 439, 453 (1988).

Easterbrook has explained, “Knowing the purpose behind a rule may help a court decode an ambiguous text, but first there must be some ambiguity.”¹⁴⁵

D. *The Executive Branch's Knowledge of Statutory Context*

The nature of the Executive Branch's participation in the legislative process gives it unique knowledge of the factors relevant to statutory meaning under any theory of interpretation: semantic context, policy context, and the lines of compromise embedded in a statute.

1. *Semantic Context*

The Executive likely has some knowledge of a statute's semantic context. After all, the President often submits draft bills to Congress, which often serve as templates for future legislation. To the extent that a statute contains competing semantic canons of construction,¹⁴⁶ for instance, the Executive may have insight into which canon should prevail based on his potential involvement in the drafting of the bill. Similarly, the Executive might know about whether a word should be given its technical or ordinary meaning.¹⁴⁷

Executive knowledge of semantic context is perhaps weaker than policy context. Executive drafts, after all, are just that—drafts. Even if they provide a template for Congress, there are numerous opportunities for revision and amendment of bills throughout the legislative process.¹⁴⁸ And the House and Senate tend to take drafting seriously—both have Offices of Legislative Counsel that provide drafting services to their members.¹⁴⁹

That is not to say that executive knowledge in this area is nonexistent. Even if Congress revises executive drafts, individual agencies and OMB participate throughout the process and may be aware of significant revisions. Statements of administration policy sometimes refer to quite

145. *Nat'l Tax Credit Partners v. Havlik*, 20 F.3d 705, 707 (7th Cir. 1994) (citations omitted).

146. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401–06 (1949).

147. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995).

148. See JOHN V. SULLIVAN, *HOW OUR LAWS ARE MADE*, H.R. Doc. No. 110-49, at 6 (2007), THE LIBRARY OF CONGRESS: THOMAS, available at <http://www.gpo.gov/fdsys/pkg/CDOC-110hdoc49/pdf/CDOC-110hdoc49.pdf>.

149. *Office of the Legislative Counsel*, U.S. SENATE, <http://slc.senate.gov/> (last visited Nov. 30, 2012); *Office of the Legislative Counsel*, U.S. HOUSE OF REPRESENTATIVES, <http://www.house.gov/legcoun/> (last visited Nov. 30, 2012).

specific revisions.¹⁵⁰ Similarly, in the event that Congress takes the lead in drafting, the Executive Branch is likely to be aware of major language and its evolution throughout the process. To be sure, textual nuances may sometimes escape the Executive Branch's oversight, but its familiarity with the general text and structure of the statute is of value.

2. *Policy Context*

The Executive's use of the recommendation power and the veto power gives it considerable knowledge of a statute's policy context, the most important aspect of which is purpose. Courts often look to purpose to shed light on ambiguity.¹⁵¹ And evidence of purpose can be found in "the overall tenor or structure of the statute, its title, or public knowledge of the problems that inspired its enactment."¹⁵²

Executive insight into purpose stems first from the Recommendation Clause. The President often initiates the legislative process. He proposes legislation during the State of the Union address, he submits drafts to Congress, agencies accountable to him submit legislative proposals, and he uses his influence with Congress to set the legislative agenda.¹⁵³ Because Congress's time is limited, and the President's agenda-setting power strong,¹⁵⁴ executive proposals may stand a greater chance of becoming law. In that case, the Executive assuredly knows the law's purpose. After all, when the President initiates the legislative process, he does so with some substantive purpose in mind.

Even for laws not initiated by the Executive, the veto power ensures some executive knowledge of purpose. The Executive Branch converses

150. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 1249—AMERICA INVENTS ACT, 1 (2011), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1249r_20110621.pdf ("[T]he Administration is concerned that Section 22 of the Manager's Amendment to H.R. 1249 does not by itself ensure such access.").

151. See, e.g., *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) ("We hold that the term 'employees,' as used in § 704(a) of Title VII, is ambiguous as to whether it includes former employees. It being more consistent with the broader context of Title VII and the primary purpose of § 704(a), we hold that former employees are included within § 704(a)'s coverage.").

152. Manning, *Divides*, *supra* note 136, at 85; see also *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) ("Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue."); *Robinson*, 519 U.S. at 346 ("Those arguments carry persuasive force given their coherence and their consistency with a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms.").

153. See *supra* Part II.A.

154. See Neustadt, *supra* note 39, at 1014–15.

with Congress throughout the legislative process and the threat of the veto allows the President to influence the process. The President's ultimate approval of a bill signifies that he and Congress agree on purpose at some level of generality. And, therefore, he knows the law's purpose, at some level of generality.

3. *Legislative Compromise*

The legislative process often begs for compromise. As Professor Manning has explained:

[B]y dividing the constitutional structure into three distinct institutions answering to different constituencies, the bicameralism and presentment requirements of Article I, Section 7 effectively create a supermajority requirement. The legislative process thus affords political minorities extraordinary power to stop the enactment of legislation and, therefore, to insist upon compromise as the price of assent.¹⁵⁵

Although "semantic meaning is the currency of legislative compromise,"¹⁵⁶ when semantic meaning is indeterminate, the lines of compromise embodied in a statute are hazier.

Through the Recommendation Clause, the Executive Branch often sets the initial lines of compromise by making proposals of his own. And its engagement in the legislative process means that it is likely aware of any drawing or redrawing of the lines of compromise as the legislative process unfolds—regardless of which branch initiated the legislation. Statements of the administration's policy, express veto threats, and informal negotiations all illustrate this awareness of line redrawing.

Not only is the Executive aware of the lines of compromise, he shapes those lines. After all, presidential involvement at any stage of the legislative process is backed by the veto power. The recommendation of legislation signals what will survive the veto.¹⁵⁷ Communications with Congress provide information about what legislation risks the veto. The President's ultimate approval means that the resultant compromise is at least minimally acceptable to the President.¹⁵⁸

E. The Executive Branch as a Superior Expositor of Statutory Meaning

All this knowledge gives the Executive an advantage over the courts in interpreting ambiguous statutes. The unique knowledge of statutory

155. Manning, *Divides*, *supra* note 136, at 103 (footnote omitted).

156. *Id.* at 99.

157. See Neustadt, *supra* note 39, at 1014–15.

158. See Bradley & Posner, *supra* note 97, at 350.

context makes for a better construction of legislative intent. For that reason, courts generally fulfill their roles as faithful agents better when they defer to agency interpretations of ambiguous statutes.

Chevron instructs courts to use the “traditional tools of statutory construction” to determine if Congress “spoke[] to the precise question at issue.”¹⁵⁹ If the statute speaks to the question, the case is resolved.¹⁶⁰ If not, courts should defer to an agency’s reasonable interpretation.¹⁶¹ It is not entirely clear what constitutes the “traditional tools of statutory construction.” It seems that some level of textual analysis is appropriate at step one. Yet the Court has gone beyond textual analysis in some cases, looking at general administrative structure¹⁶² and legislative history at step one.¹⁶³

Whatever the precise contours of step one, it requires some minimal level of statutory ambiguity. And the more ambiguous the statute, the more difficult it is to construct statutory meaning from context. Indeed, some have even argued that a statute may be so ambiguous that any construction is unwarranted.¹⁶⁴ Judge Easterbrook has described the task this way:

The construction of an ambiguous document is a work of judicial creation or re-creation. Using the available hints and tools—the words and structure of the statute, the subject matter and general policy of the enactment, the legislative history, the lobbying positions of interest groups, and the temper of the times—judges try to determine how the Congress that enacted the statute either actually resolved or would have resolved a particular issue if it had faced and settled it explicitly at the time. Judges have substantial leeway in construction. Inferences almost always conflict, and the enacting Congress is unlikely to come back to life and “prove” the court’s construction wrong. The older the statute the more the inferences will be in conflict, and the greater the judges’ freedom.¹⁶⁵

This outlook on judicial competence to interpret ambiguous statutes is pretty grim. Take the presence of conflicting inferences: is the judicial choice of one over the other much more than an arbitrary exercise of discretion?

159. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 843 n.9 (1984).

160. *See id.* at 842.

161. *See id.* at 866.

162. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

163. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704–05 (1995).

164. *See* Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544 (1983).

165. *Id.* at 533–34 (footnote omitted).

Not so with the Executive's choice: embedded in that choice is the Executive's superior knowledge of statutory context, which means that this branch is far more likely to embody the inference that is more faithful to legislative intent.

F. *Doctrinal Implications*

This additional reason for deference is in some sense more limited than the traditional reasons. It would extend only to contemporaneous interpretations by agencies accountable to the President. And, of course, it would not apply to statutes passed over the President's veto.

But in another sense it would support broader deference. The President's participation in the legislative process, after all, is not limited to agency-administered statutes. Thus, a contemporaneous interpretation attributable to the President will be helpful in resolving statutory ambiguity outside the agency context. On this view, courts should pay attention to presidential signing statements.¹⁶⁶

A clear rule of contemporaneousness could be based on whether the interpretation occurred under the President who approved the law. And a clear rule of accountability could be based on whether the agency officials are subject to removal at-will by the President. In these respects, the contours of the doctrine are relatively clear.

In *United States v. Mead Corp.*,¹⁶⁷ the Court limited *Chevron* to cases where Congress expected the agency to speak with the force of law.¹⁶⁸ It noted that a "very good indicator" of such an expectation is congressional authorization to engage in rulemaking or adjudication.¹⁶⁹ Because the justification for deference offered here has nothing to do with congressional delegation, the Court's foray into *Chevron* step zero is irrelevant. What matters is not congressional expectation about interpretive authority, but whether an interpretation can be attributed to the President.

This justification for deference diverges from current doctrine in another respect. The Court has said, "Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."¹⁷⁰ If deference is based on executive knowledge of statutory context, inconsistency—particularly an inconsistent interpretation well after enactment—is problematic. In most cases, the prior interpretation will be a

166. See Bradley & Posner, *supra* note 97, at 350–55.

167. 533 U.S. 218 (2001).

168. *Id.* at 229–30.

169. *Id.*

170. Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

better representation of statutory meaning given its contemporaneousness.

G. *The Threat of Strategic Interpretation*

Crucially, however, agency interpretations of statutes are post-enactment. With respect to presidential signing statements, some have argued that “the potential for unchecked opportunistic behavior by the President is great.”¹⁷¹ The same issue arises here. Statutes, after all, are compromises, and the President may be willing to concede some points to win others. If courts defer to subsequent administrative interpretations, there may be an incentive for the President to shape those interpretations in a way that undermines rather than furthers the legislative compromise—an incentive to achieve what the President forfeited in the name of compromise during the legislative process.

But the opportunity to interpret strategically only arises to the extent that the President loses in the legislative process. If the President is influential, the legislative compromise is likely to reflect his policy preferences and there is no need to act strategically to undermine it. Moreover, the Executive is bound by *Chevron*.¹⁷² At *Chevron* step one, courts, after all, will not defer when a statute speaks clearly to an issue.¹⁷³ At the very least, the text—and perhaps more—constrains the Executive’s ability to act strategically.

And more so than other actors in the legislative process, the President pays for strategic interpretations with his credibility: “[T]he president is a more significant and visible figure, and he is more of a repeat player; thus, he has more to lose if he loses credibility.”¹⁷⁴ A loss of credibility for the President makes it more costly to deal with Congress in the future: an Executive whose interpretation “violates legislative bargains will have more trouble obtaining Congress’s cooperation later on.”¹⁷⁵

The President’s pre-enactment involvement in the legislative process reinforces this point. Throughout the process, the President has an incentive to provide accurate information about his preferences to shape the legislative compromise to his benefit.¹⁷⁶ These prior statements will

171. McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 727 (1992).

172. See Bradley & Posner, *supra* note 97, at 355 (explaining that “[c]ourts can decide to give more or less weight to the president’s views relative to Congress’s when deciding how to interpret a statute”).

173. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

174. Bradley & Posner, *supra* note 97, at 352.

175. *Id.*

176. See *supra* notes 87–88 and accompanying text.

constrain the President's future interpretations, or else he will look disingenuous.

Although the threat of strategic interpretation is real, executive interpretations are likely more persuasive evidence of statutory meaning, than, say, a single legislator's views post-enactment.¹⁷⁷ And executive interpretations are likely more faithful to legislative intent than a court's seemingly arbitrary choice among competing inferences.¹⁷⁸

But there is a deeper problem with deference rooted less in the probative value of executive interpretations and more in principle.

IV. CONSTITUTIONAL STRUCTURE AND THE PRESIDENT'S ROLE IN THE LEGISLATIVE PROCESS

One principle rooted in the Constitution's structure is an aversion to combining legislative power with binding interpretive authority. Consistent with this principle is the conventional and simplified view that Congress makes the law, the President executes the law, and the Judiciary interprets the law. But in reality, this view is not so simple.

A. *The Principle Separating Lawmaking and Interpretive Authority*

Although the Constitution divides power among the Executive, the Legislature, and the Judiciary, this does not mean that the departments are "totally separate and distinct from each other."¹⁷⁹ Rather, "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."¹⁸⁰ In this regard, the greatest threat to the separation of powers came from the legislature—in Hamilton's words: "The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments . . ."¹⁸¹

To this end, Professor Manning has argued: "[A] core objective of the constitutional structure [is] to ensure meaningful separation of lawmaking from the exposition of a law's meaning in particular fact situations."¹⁸²

177. See *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) ("In my opinion, the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed.").

178. See *supra* Part III.D.2.

179. THE FEDERALIST NO. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961).

180. *Id.* at 302–03.

181. THE FEDERALIST NO. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

182. Manning, *Constitutional Structure*, *supra* note 18, at 644 (discussing the concern that the body that is capable and sometimes willing to pass "bad law" may exercise the same

This principle, he argues, manifests itself in constitutional provisions that take “special pains to limit Congress’s direct control over the instrumentalities that implement its laws.”¹⁸³ The Constitution limits congressional control over the President by giving the states the power to choose presidential electors.¹⁸⁴ The Constitution also prevents Congress from changing the President’s compensation while in office.¹⁸⁵ Similarly, the Constitution limits congressional control over the Judiciary by providing judges with life tenure during good behavior,¹⁸⁶ and preventing Congress from not diminishing the salaries of judges while in office.¹⁸⁷

Moreover, the Framers rejected certain structures that would combine lawmaking and law-exposition.¹⁸⁸ They rejected the Council of Revision, which would have provided for the Judiciary and the President to exercise the veto together.¹⁸⁹ And they rejected using the upper house of the legislature as a court of last resort¹⁹⁰—as was true of the House of Lords in Britain.¹⁹¹ In Hamilton’s words:

From a body which had had even a partial agency in passing bad laws we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them would be too apt to operate in interpreting them¹⁹²

The principle finds further roots in the intellectual precursors to the Constitution: the writings of Locke, Montesquieu, and Blackstone all warned of the danger of combining lawmaking and law-exposition.¹⁹³

The danger was arbitrary government and its threat to liberty. The separation between lawmaking and interpretation controls arbitrary government and protects liberty in two ways. First, it makes it “more difficult for lawmakers to write bad laws and then spare themselves from the effects of those laws through their control over the laws’ application.”¹⁹⁴ Second, it gives legislators “an incentive to enact rules that impose clear

poor judgment when interpreting it).

183. *Id.* at 641.

184. U.S. CONST. art. II, § 1, cls. 2–3.

185. U.S. CONST. art. II, § 1, cl. 7.

186. U.S. CONST. art. III, § 1.

187. *Id.*

188. Manning, *Constitutional Structure*, *supra* note 18, at 643–44 (listing several significant proposals that were consistently rejected by the Constitution’s drafters).

189. See JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 336–47 (W. W. Norton & Co., 1987).

190. *Cf.* Manning, *Constitutional Structure*, *supra* note 18, at 643.

191. THE FEDERALIST NO. 81, at 482 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

192. *Id.* at 483.

193. Manning, *Constitutional Structure*, *supra* note 18, at 646.

194. *Id.*

and definite limits upon governmental authority, rather than adopting vague and discretionary grants of power.”¹⁹⁵

1. *Statutory Delegation to Agents of Congress*

Perhaps with this principle in mind, the Supreme Court has rigidly prohibited statutory delegation of power to implement laws to agents or subsets of Congress.

First, in *INS v. Chadha*,¹⁹⁶ the Court struck down the one-house legislative veto, which allowed a single house of Congress to invalidate a decision by the Executive Branch to allow a deportable alien to stay in the United States.¹⁹⁷ The invalidation of the Executive Branch's decision was an exercise of legislative power that violated the requirements of bicameralism and presentment.¹⁹⁸

Then in *Bowsher v. Synar*,¹⁹⁹ the Court held that an agent subject to the control of Congress could not participate in the execution of laws: “The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.”²⁰⁰ In *Bowsher*, Congress retained removal power over the Comptroller General, who had the authority to exercise executive power by specifying budget cuts.²⁰¹

Finally, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*,²⁰² members of Congress served on a review board that could veto decisions made by the Metropolitan Washington Airports Authority's (MWAA's) Board of Directors.²⁰³ Writing for the Court, Justice Stevens found labels irrelevant for separation of powers purposes: “If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of [Article I, Section 7].”²⁰⁴

Common to all three cases is the purpose of protecting bicameralism and presentment. Allowing Congress to delegate power to agents under its

195. *Id.* at 647.

196. 462 U.S. 919 (1983).

197. *Id.* at 956.

198. *Id.* at 956–57.

199. 478 U.S. 714 (1986).

200. *Id.* at 726.

201. *Id.* at 732–34.

202. 501 U.S. 252 (1991).

203. *Id.* at 255.

204. *Id.* at 276.

control creates an attractive alternative to the rigors of Article I, Section 7. As the Court explained in *MWAA*, it did not matter that the institutional arrangement at issue was a “practical accommodation” that furthered a “workable government,” because it “provide[d] a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role.”²⁰⁵ Congressional involvement in the execution of the laws “raises the very danger the Framers sought to avoid—the exercise of unchecked power.”²⁰⁶

2. *Statutory Delegation to the Executive Branch and the Judicial Branch*

By contrast, the Court has sustained broad delegations of authority to the Executive Branch,²⁰⁷ which has the authority to create binding policy outside of bicameralism and presentment.²⁰⁸ So long as a law “lay[s] down . . . an intelligible principle to which the [executive official] . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power.”²⁰⁹

In practice, there is no meaningful limit on delegation to the Executive Branch. Despite the nominal ban on delegation of legislative authority, the Court has only twice struck down statutes on nondelegation grounds.²¹⁰ And the Court has found an intelligible principle in statutes that direct the Executive Branch not to “unfairly and inequitably distribute[] voting power among security holders,”²¹¹ and to regulate in the “public interest.”²¹²

The Court has declined to enforce a meaningful nondelegation doctrine because it lacks a judicially manageable standard for doing so:

[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of

205. *Id.* at 276–77.

206. *INS v. Chadha*, 462 U.S. 919, 966 (1983).

207. *See, e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001).

208. Manning, *Constitutional Structure*, *supra* note 18, at 653.

209. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

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

211. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 96, 104–06 (1946).

212. *NBC v. United States*, 319 U.S. 190, 225–26 (1943).

degree.²¹³

So too, the Court has sustained broad delegations of power to the Judiciary. In *Mistretta v. United States*, the Court sustained the delegation of power to promulgate binding sentencing guidelines to the United States Sentencing Commission, a body placed in the Judicial Branch.²¹⁴

More commonly, delegation takes the form of broad statutory language that requires judicial policymaking: “The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law.”²¹⁵ For such statutes, courts must craft rules of decision that cannot be grounded in the text.

Why has the Court adopted such a different approach when legislation delegates power to the Executive Branch or the Judiciary? Because these delegations are:

[A] less substantial threat to bicameralism and presentment. . . .

. . . Specifically, when Congress uses imprecision or vagueness to avoid the costs of investigating and agreeing on the precise policies it wishes to adopt, it does so only at the expense of ceding control over the particulars of its program to another branch of government.²¹⁶

On this view, Congress makes the law. If Congress makes the law, it has an incentive to evade bicameralism and presentment by delegating to itself. It does not have a similar incentive to delegate to institutions beyond its control.

3. *Implications of the Principle So Conceived*

From the principle of separation expressed thus far, Professor Manning has argued for two propositions. First, he argues against giving authoritative weight to legislative history: “[I]t is the very fact of *congressional* involvement in the creation of legislative history that justifies textualists’ rejection of such materials. . . . This practice effectively assigns legislative agents the law elaboration function”²¹⁷

Second, Professor Manning has argued against binding deference to agency interpretations of their own regulations: “Given the reality that agencies engage in ‘lawmaking’ when they exercise rulemaking authority, *Seminole Rock* contradicts the constitutional premise that lawmaking and law-

213. *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

214. *Id.* at 371–79, 385 (majority opinion).

215. Easterbrook, *supra* note 164, at 544.

216. Manning, *Constitutional Structure*, *supra* note 18, at 653 (footnote omitted).

217. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 706 (1997).

exposition must be distinct.”²¹⁸

Both of these interpretive rules, he points out, are more consistent with our “original structural commitments”²¹⁹ in the Constitution—here, the structural commitment to separating lawmaking and interpretation.

But the principle so conceived is incomplete. In *Bowsher v. Synar*, for instance, the Court stated, “Congress cannot grant to an officer under its control what it does not possess.”²²⁰ And the canonical statement of the nondelegation doctrine states that, “Congress shall lay down by legislative act an intelligible principle.”²²¹ These statements ignore—or at the very least, leave implicit—the President’s role in the legislative process.

B. *The Effect of the President’s Participation in the Legislative Process*

What effect does the President’s role in the legislative process have on the principle separating lawmaking from interpretation? From one vantage point, perhaps we should be *less* concerned with legislative self-delegation corroding bicameralism and presentment. If Congress wants to avoid bicameralism and presentment by delegating interpretive authority to those under its control, the President can check that desire with the veto power. After all, Hamilton’s first justification for the veto was self-defense against legislative encroachment.²²²

But from another vantage point, perhaps we should be *more* concerned about executive delegations. The more influential the President is in the legislative process, the more he is able to initiate legislation and shape legislative compromises that delegate broad interpretive power to agents under his control—again, outside of Article I, Section 7.

As a purely functional matter, the unconstitutional combination of legislative and binding interpretive power in Congress is not all that different than the constitutional combination of legislative and interpretive authority in the Executive. Each house of Congress has the exclusive power to formally initiate and draft legislation and has an absolute veto power. The President has the power to recommend legislation to Congress and a qualified veto power.

The biggest difference between Congress and the President is Congress’s formal power to initiate and draft legislation. But in modern practice, these

218. Manning, *Constitutional Structure*, *supra* note 18, at 654 (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)).

219. Manning, *Constitutional Structure*, *supra* note 18, at 633.

220. 478 U.S. 714, 726 (1986) (emphasis added).

221. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 352 (1928) (emphasis added).

222. THE FEDERALIST NO. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

differences are smaller than they might seem. Although the President cannot force Congress to consider his recommendations, he is very influential in setting the legislative agenda.²²³ His drafts serve as templates and the threat of the veto gives him some influence on congressional drafting.²²⁴

Further, the President's qualified veto is not all that qualified—it is very difficult to muster two-thirds of each house to override it. It may still be that executive delegations are a less substantial threat to bicameralism and presentment—though the prevailing sentiment of the President as Legislator-in-Chief suggests otherwise—but functionally, executive delegations are still a significant threat.

But whatever the functional similarities, there is a massive difference in principle: the Constitution *requires* some combination of lawmaking and law-elaborating power in the President. The Constitution both vests the executive power in the President and gives him a role in the legislative process. As Paul Bator has explained: “Every time an official of the executive branch, in determining how faithfully to execute the laws, goes through the process of finding facts and determining the meaning and application of the relevant law, he is doing something which functionally is akin to the exercise of the judicial power.”²²⁵ The very nature of executive power requires the Executive to “determin[e] the meaning and applicability of provisions of law.”²²⁶

C. *The Effect of Binding Deference*

But just because some interpretation is incident to the executive power does not mean that courts should give authoritative weight to executive interpretations. Binding deference to executive interpretations of ambiguous statutes makes ambiguity more enticing for the Executive. And if the President has influence in the legislative process—as he surely does—he has a greater incentive to use that influence to insist on legislation with vague language. In essence, *Chevron* subsidizes ambiguity and delegation.

In a world without *Chevron*, ambiguity would not be as valuable to the Executive Branch. After all, the Executive Branch would face greater uncertainty that its interpretation of ambiguous language will be accepted by a court. By contrast, in a world with *Chevron*, the Executive Branch can be relatively certain that so long as its interpretation of ambiguous language

223. *See supra* Part II.A.

224. *See supra* Part II.B.

225. Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 264 (1990).

226. *Id.*

is not completely beyond the pale, a court will accept it.²²⁷

The President might then propose legislation containing ambiguous language. Or he might use his influence throughout the legislative process to push Congress to make statutory language even more ambiguous to get past step one of *Chevron*. The President might, for example, be artificially stubborn in insisting on a higher level of generality as the price for his assent. Delegation may be necessary—Congress and the President surely cannot specify every detail and contingency in the statutory text—but should the Court encourage ambiguity beyond what is necessary?

Of course, the President faces a tradeoff: statutes are more permanent than agency interpretations. After all, agencies are not penalized for inconsistent interpretations in the future.²²⁸ It is therefore possible that an agency's interpretation of ambiguous language might be undone by a future administration with different aims. This fact does counteract the incentive to insist on vagueness to the extent that presidents care about the permanence of their policy choices. But it is just as likely that presidents only care about putting their policies in place while in office to enjoy the political benefits derived from those policies.

In any event, statutory ambiguity proliferates today. For example, the U.S. Code is filled with statutes directing administrative agencies to regulate in the “public interest”²²⁹ or to regulate “for any other reason to promote equity and fairness,”²³⁰ or to prevent “unfair discrimination.”²³¹ Some statutes direct agencies to regulate with respect to certain “rights.”²³² But as the D.C. Circuit has pointed out, “The word ‘right,’ instead of answering a question, unhelpfully asks another one: To what is a person legally entitled?”²³³ Other statutes use the word “reasonable,”²³⁴ giving a reviewing court the meaningless task of determining whether an agency's interpretation of the word “reasonable” is reasonable. As Richard Epstein has argued, vague language in the recent Affordable Care Act and Wall Street Reform and Consumer Protection Act “delegates much blanket authority to government officials who will, effectively, make the rules up as

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

228. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (stating an initial interpretation is not an agency's final interpretation and that inconsistency is not a basis for declining *Chevron* deference).

229. *See, e.g.*, 47 U.S.C. § 157 (2006).

230. *Id.* § 312(g).

231. 15 U.S.C. § 78f(b)(5) (2006).

232. *See, e.g.*, 30 U.S.C. § 1272(e) (2006).

233. *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 708 (D.C. Cir. 2008).

234. *See, e.g.*, 42 U.S.C. § 1395y(a) (2006).

they go along.”²³⁵ Perhaps not surprisingly, presidential influence was significant in both of these pieces of legislation.²³⁶

Ultimately, creating a further incentive for statutory vagueness disservices the virtues of bicameralism and presentment. Less policy is made under Article I, Section 7 and more is made solely under the Executive Branch. Bicameralism and presentment protect liberty by making it more difficult for factions to capture government.²³⁷ And bicameralism and presentment promote wise laws by providing multiple rounds of deliberation by different institutions.²³⁸ The bottom line is that *Chevron* acts as a pro-delegation canon,²³⁹ but in a different—and more troubling—way than has traditionally been thought. Professor Farina has argued:

[T]he nondelegation doctrine came to incorporate a vision of the constitutional relationships between the legislature, agencies, and the judiciary fundamentally at odds with *Chevron*'s assumption that Congress may empower agencies to decide what regulatory statutes mean whenever they appear ambiguous.²⁴⁰

The permissibility of delegation “hinged” on “judicial policing of the terms of the statute.”²⁴¹ When agencies have the power to interpret the scope of their own authority, that judicial policing is gone and agency power is no longer “adequately checked.”²⁴²

But *Chevron*'s problem is not just that agencies have the power to interpret, and thereby expand, the scope of their own authority. *Chevron*'s further problem is that it incentivizes the Executive to use his influence in the legislative process to insist on broad and discretionary grants of power up front, so that he can then construe it authoritatively.

235. Richard A. Epstein, *Government by Waiver*, NAT'L AFFAIRS, Spring 2011, at 40.

236. See *supra* notes 40, 48, and accompanying text (stating the President influenced Congress through the State of the Union address by calling on Congress to pass legislation, but left Congress to take the lead in drafting the bill).

237. See THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) (“It is far less probable that culpable views of any kind should infect all the parts of the government at the same moment and in relation to the same object than that they should by turns govern and mislead every one of them.”).

238. See *id.* (“The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from the want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest.”).

239. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329 (2000) (“This is an emphatically prodelegation canon, indeed it is the quintessential prodelegation canon . . .”).

240. Farina, *supra* note 12, at 478.

241. *Id.* at 487.

242. *Id.* at 488.

From a separation of powers perspective, then, *Chevron's* problem is not just that it provides an inadequate check on agency power. Rather, it discards a specific type of check embedded into the constitutional structure—the separation of lawmaking and binding interpretive authority.

V. INDEPENDENT JUDICIAL REVIEW

Even if courts are unable to enforce the nondelegation doctrine for lack of a judicially manageable standard, they need not adopt an interpretive rule that exacerbates the separation-of-powers problem by combining legislative influence and binding interpretive authority. While the Constitution necessarily tolerates some combination of lawmaking power and interpretation, it does not tolerate the combination of lawmaking power and *binding* interpretive authority. After all, the nondelegation doctrine still exists in principle, if not in practice.

For this reason, courts should reject *Chevron* deference in favor of independent judicial review. Without deference, statutory ambiguity is worth less to the President and he is less likely to use his influence in the legislative process to get it. The upshot is greater statutory clarity upfront and more policy made under Article I, Section 7. Independent judicial review, then, operates “as a constitutional doctrine of second best, indirectly preserving structural norms that the Court will not enforce directly by invalidating acts of Congress.”²⁴³

A. *The Judiciary, the President, and the Council of Revision*

When it comes to binding interpretive authority, the complete absence of the Judiciary from the legislative process is critical. Recall Hamilton's warning about having the upper house act as a court of last resort: “From a body which had had *even a partial agency* in passing bad laws we could rarely expect a disposition to temper and moderate them in the application.”²⁴⁴ This structure was thought to be problematic for combining even partial agency in lawmaking with binding interpretive authority.

More to the point, consider how close *Chevron* comes to the Council of Revision. Proposed as part of the Virginia Plan, the Council of Revision was to consist of “the Executive and a convenient number of the National Judiciary.”²⁴⁵ It would have had the authority to “examine every act of the

243. Manning, *Constitutional Structure*, *supra* note 18, at 633.

244. THE FEDERALIST NO. 81, at 483 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

245. Edmund Randolph, *Variant Texts of the Virginia Plan Presented by Edmund Randolph to the Federal Convention, May 29, 1787, Text A*, in DOCUMENTS ILLUSTRATIVE OF THE FORMATION

National Legislature before it shall operate . . . and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by of the members of each branch.”²⁴⁶

Madison supported the measure. He thought it would give the Judiciary an additional means to defend itself from the legislature.²⁴⁷ He also thought it would “preserv[e] a consistency, conciseness, perspicuity & technical propriety in the laws.”²⁴⁸ Finally, he thought it would serve “as an additional check against a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities.”²⁴⁹

Madison stressed that the Council secured, rather than undermined, the separation of powers:

Instead therefore of contenting ourselves with laying down the Theory in the Constitution that each department ought to be separate & distinct, it was proposed to add a defensive power to each which should maintain the Theory in practice. In so doing we did not blend the departments together. We erected effectual barriers for keeping them separate.²⁵⁰

In support, he pointed to the British Constitution, which “admit[ted] the Judges to a seat in the legislature, and in the Executive Councils.”²⁵¹ According to Madison, if the Council of Revision “was inconsistent with the Theory of a free Constitution, it was equally so to admit the Executive to any participation in the making of laws; and the revisionary plan ought to be discarded altogether.”²⁵²

But the Convention ultimately rejected the Council of Revision.²⁵³ Expressing his opposition, Elbridge Gerry stated: “It was making the Expositors of the Laws, the Legislators which ought never to be done.”²⁵⁴ So too, Governor Morris “objected that Expositors of laws ought to have *no hand* in making them.”²⁵⁵ Nathaniel Ghorum stressed that judges “ought to

OF THE UNION OF THE AMERICAN STATES 953, 954 (Charles C. Tansill ed., 1927).

246. *Id.*

247. See James Madison, *Debates in the Federal Convention of 1787 as Reported by James Madison*, in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 109, 423 (Charles C. Tansill ed., 1927).

248. *Id.*

249. *Id.*

250. *Id.* at 426–27.

251. *Id.* at 427.

252. *Id.*

253. *Id.* at 429.

254. *Id.* at 424.

255. *Id.* at 425 (emphasis added).

carry into the exposition of laws no prepossessions with regard to them.”²⁵⁶ According to Caleb Strong, “No maxim was better established” than “the power of making ought to be kept distinct from that of expounding, the laws.”²⁵⁷ And finally, Rufus King observed “that Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation.”²⁵⁸ While other members of the Convention offered different reasons for rejection of the Council of Revision, one persistent objection was the union of the veto power with binding interpretive authority.²⁵⁹

Yet *Chevron* creates a nearly identical structure: the Executive has both the veto power and the power to authoritatively construe ambiguous statutes—just as the Judiciary was to have both the veto power and the power to authoritatively construe statutes more generally. If anything, *Chevron* is more troubling because the President does not share the veto (as the Judiciary would have in the Council of Revision), and he has the additional legislative power of recommendation (which the Judiciary would have lacked under the Council of Revision).

The statements of Gerry, Morris, Ghorum, Strong, and King all suggest that *Chevron*’s institutional arrangements run counter to a constitutional principle separating lawmaking from law-exposition. But what then of Madison’s assertion that this principle would be equally violated by *any* executive role in the legislative process?

That the Convention ultimately gave the President such a role suggests that Madison was wrong. But the Convention did so on the assumption that the Judicial Branch would independently interpret the law. While the Executive Branch would necessarily engage in some interpretation incident to the executive power, it would not have binding interpretive authority. Naturally then, binding interpretive authority should rest in the Judicial Branch, which has not even partial agency in the making of laws.

B. *The Modern Presidency and Original Structural Commitments*

Whatever might have been true in 1787, the need for an independent judicial check is more pressing than ever. Where early presidents shied away from the legislative process, modern presidents embrace it.²⁶⁰ Both the veto and recommendation powers have evolved considerably since 1787. Presidential involvement in the legislative process today is extensive,

256. *Id.* at 428.

257. *Id.* at 424.

258. *Id.* at 147.

259. *See id.* at 422–28.

260. *See supra* Part II.A.

and presidential influence in the legislative process through the veto power great—"the power of text over expectation."²⁶¹

This influence heightens the President's ability to exploit *Chevron's* structural combination of lawmaking and binding interpretive authority for his own good. An independent judicial check "make[s] sense of original structural commitments" in light of the great legislative power the modern President exercises.²⁶² Here, that structural commitment is to bicameralism and presentment.

The Court has chosen default interpretive rules to further constitutional principles it is unwilling to enforce directly in light of modern reality. As the Court stated in *Mistretta*, "In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."²⁶³ Similarly, the Court has adopted clear-statement rules²⁶⁴ to protect federalism values that it is not willing to enforce directly.²⁶⁵

The Court should do the same here by setting a default rule of independent judicial interpretation of all statutes. The nondelegation doctrine must exist in principle, if not in practice, because rejecting the nondelegation doctrine in principle amounts to little more than a rejection of bicameralism and presentment. And if the nondelegation doctrine exists in principle, the Court should adopt an interpretive rule that furthers, rather than frustrates it.

C. *Chevron's Constitutional Counter*

Of course, *Chevron* might strike back with its own constitutionally-rooted rationale. When the traditional tools of statutory construction fail, "the resolution of that ambiguity necessarily involves policy judgment"—and under the Constitution, "policy judgments are not for the courts but for the political branches; Congress having left the policy question open, it must be answered by the Executive."²⁶⁶ After all, the Court in *Chevron* stressed that agencies are more democratically accountable.²⁶⁷

261. Black, *supra* note 87, at 89.

262. Manning, *Constitutional Structure*, *supra* note 18, at 633.

263. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989).

264. *See Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991).

265. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985).

266. Scalia, *supra* note 17, at 515.

267. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

But as Justice Scalia has argued, the constitutional principle may be illusory: “[T]he ‘traditional tools of statutory construction’ include not merely text and legislative history but also, quite specifically, the consideration of policy consequences.”²⁶⁸ Courts have long made policy judgments to resolve ambiguities, and never has their “constitutional competence” to do so been doubted.²⁶⁹

And if the Constitution places such a premium on democratic accountability for policymaking, why stop at the Executive Branch? Why not insist on congressional involvement in policymaking by insisting on bicameralism and presentment? That the nondelegation doctrine in its current form is not up to the task does not mean that the whole enterprise should be abandoned. If a default interpretive rule of independent judicial review channels more policy through Article I, Section 7 by making statutory vagueness less attractive to the Executive, then such a rule might ultimately be more faithful to democratic accountability than *Chevron*.

D. *The Proper Role of Executive Interpretations*

None of this is to say that courts should close their eyes to executive interpretations of statutes. They may well be persuasive evidence of statutory meaning, and when that is the case, courts should follow them.

But if *Chevron* has any force at all, it must be that courts defer in some cases where they would otherwise disagree with the agency’s interpretation. These cases are problematic and illustrate what the Executive has to gain from insisting on statutory ambiguity.

Accordingly, courts should give the same weight to executive interpretations as they would to any piece of persuasive evidence of statutory meaning. As Justice Jackson put it in *Skidmore v. Swift & Co.*:

The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.²⁷⁰

Justice Scalia has characterized “*Skidmore* deference” as an “empty truism and a trifling statement of the obvious.”²⁷¹ But that is precisely the point: courts should interpret agency-administered statutes as they would any other statute. If an agency interpretation is persuasive evidence of statutory meaning, then courts should consider it—as they would any other

268. Scalia, *supra* note 17, at 515.

269. *Id.*

270. 323 U.S. 134, 140 (1944).

271. *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J., dissenting).

persuasive evidence of statutory meaning.

Conversely, if a court disagrees with an agency's interpretation—even when that interpretation would pass *Chevron* step one—it should reject it. *Skidmore* deference reduces the ex ante incentive for the Executive to exact statutory vagueness as the price for his assent. After all, without *Chevron*, it is more uncertain that a court will accept an executive interpretation.

CONCLUSION

Rejecting *Chevron* would appear to be a drastic change, supplanting a clear and workable rule concerning deference to administrative agencies. But it may not be so. Professor Beermann has argued that *Chevron* “has proven to be a complete and total failure.”²⁷² Among other things, *Chevron*: “has no adequate theoretical foundation”; has “spawned three competing versions of Step One”; is “highly unpredictable”; has “not had the desired effect of significantly increasing deference to agencies”; has “created uncertainty about when it applies”; and is not even cited by the Supreme Court “in a high proportion of the cases in which it arguably applies.”²⁷³ At bottom, *Chevron*'s seductive image of simplicity is more illusory than real.

At the same time, the uncertainty of independent judicial review has been overstated.²⁷⁴ Justice Scalia, for instance, has described the “ineffable rule” that preceded *Chevron*.²⁷⁵ True enough that without *Chevron*, the persuasiveness of an administrative interpretation will vary based on the specifics of a case. But even under *Chevron*, courts must inquire into the specifics of the case—at least the statutory text, and perhaps more. Statutory interpretation necessarily proceeds case by case. Once that fact is admitted, scrutinizing, rather than rubber stamping, administrative interpretations does not seem all that much more burdensome.

And regardless, “The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.”²⁷⁶ As the rejection of the Council of Revision makes clear, the Convention made a choice to reject institutional arrangements combining legislative agency and binding interpretive authority. However clumsy, inefficient, or unworkable

272. Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should be Overruled*, 42 CONN. L. REV. 779, 782 (2010).

273. *Id.* at 783–84.

274. See Scalia, *supra* note 17, at 517.

275. *Id.*

276. *INS v. Chadha*, 462 U.S. 919, 959 (1983).

rejecting *Chevron* may be, it is ultimately more consistent with our original constitutional commitments.