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# RESPONSE

## The Constitution of Agency Statutory Interpretation

*Evan J. Criddle\**

### INTRODUCTION

Within the field of federal statutory interpretation, there is a zone where courts refuse to tread. As the Supreme Court famously explained in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>1</sup> courts will not second-guess a federal administrative agency's reasonable interpretation of a statute it administers when it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law."<sup>2</sup> *Chevron* deference thus carves out a "space"<sup>3</sup> within which agencies may interpret statutes as they think best—even changing their interpretations over time—without fear of judicial interference as long as they provide a reasoned justification and comply with applicable procedural requirements.<sup>4</sup>

Some legal scholars have argued that *Chevron* deference charts the boundary between law and policy.<sup>5</sup> Their argument can be

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1. 467 U.S. 837 (1984).

2. United States v. Mead Corp., 533 U.S. 218, 229 (2001) (internal quotation marks and citation omitted).

3. Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them *Chevron* "Space" and *Skidmore* "Weight," 112 COLUM. L. REV. 1143 (2012).

4. See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

5. See, e.g., Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN L.J. AM. U. 187 (1992); Richard J. Pierce, Jr., *How Agencies*

summarized roughly as follows: when a statute's text is amenable to multiple readings (*Chevron* step one) and each of those readings is objectively "reasonable" (*Chevron* step two), a court has effectively exhausted the resources of legal analysis. From that point forward, the choice between reasonable statutory interpretations turns on extra-legal policy considerations that fall outside the heartland of judicial expertise. Rather than answer such questions through independent judgment, courts wisely defer to the agency that administers the statute, recognizing that the executive branch is usually in a better position to decide controversial questions of regulatory policy for a host of reasons such as expertise, political accountability, and congressional expectations.<sup>6</sup> According to this view, *Chevron* deference empowers a federal agency to exploit statutory ambiguities and gaps in order to promote its own independent policy preferences and the incumbent administration's political agenda.<sup>7</sup>

Not everyone accepts this reading of *Chevron*. In an article published recently in the *Vanderbilt Law Review*, Professor Aaron Saiger argues that *Chevron* does not, in fact, give agencies a blank check to adopt any "reasonable" statutory interpretation.<sup>8</sup> According to Professor Saiger, when a federal agency engages in statutory interpretation, its ethical "duties parallel those of the judge in a case where no deference is offered."<sup>9</sup> The agency therefore bears an ethical obligation to draw on "available interpretive tools to reach the best account it can of what a statute means"<sup>10</sup> rather than "chase any policy [it] can reasonably square with the statute."<sup>11</sup> This obligation to seek the best interpretation of a statute applies with full force, he argues,

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*Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197, 200 (2007); Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV. 273 (2011); Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822–24 (1990).

6. See, e.g., Seidenfeld, *supra* note 5, at 289 (arguing that *Chevron* deference is based on a "policy-interference avoidance principle" whereby courts refrain "from second guessing a decision by a political branch when doing so will require the court to rely heavily on policy" rather than law).

7. See *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) (asserting that when an agency chooses between reasonable statutory interpretations under *Chevron*, its task is "not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress"); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1131 (2009) (suggesting that the "open-ended" character of *Chevron* steps one and two "creates proven scope for various ideological influences in *Chevron's* application").

8. Aaron Saiger, *Agencies' Obligation to Interpret the Statute*, 69 VAND. L. REV. 1231 (2016).

9. *Id.* at 1234.

10. *Id.*

11. *Id.* at 1237.

even when *Chevron* prevents courts from testing the interpretation through judicial review.<sup>12</sup>

Professor Saiger deserves praise for challenging the conventional wisdom that federal agencies are free to pursue their own policy preferences when operating within *Chevron*'s zone of discretion. In this invited Response Essay, I endorse Professor Saiger's central thesis while proposing some friendly amendments that are intended to fortify his argument. Although I agree that federal agencies are subject to norms that constrain their choice of statutory interpretations within *Chevron*'s zone of discretion, I suggest that these norms should be characterized slightly differently, and I propose a more fully developed account of the legal basis for these obligations.<sup>13</sup> Professor Saiger claims that an agency's obligation to seek the "*best* interpretation"<sup>14</sup> of statutory provisions derives from (1) the idea that agencies are "pure creatures of their statutes" without independent policymaking authority and (2) the principle of "legislative supremacy," which subordinates agency policymaking to statutory directives.<sup>15</sup> In contrast, I argue that an agency's obligation to set aside its own independent policy preferences in favor of legislative policy judgments rests primarily on a different legal foundation: the constitutional requirement that Congress must supply an authoritative "intelligible principle" to guide agency discretion whenever it entrusts lawmaking authority to an agency.<sup>16</sup> Because the nondelegation doctrine prohibits Congress from empowering a federal agency to make law without supplying an intelligible principle to channel agency discretion, an

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12. See *id.* at 1245–46 (analogizing agency discretion to prosecutorial discretion, which is regulated by ethical norms).

13. Professor Saiger appears to embrace the idea that an agency's obligation to choose the "best" interpretation has a legal dimension, see *id.* at 1232 (characterizing the requirement "to select the *best* interpretation of its governing statute" as both "a legal and ethical duty"), but he frames his article primarily as an inquiry into the *ethics* of statutory interpretation, see *id.* at 1237 ("This Article is about [the] 'morals' [of statutory interpretation]."), 1240 ("This Article . . . is concerned with . . . government ethics—namely obligations that actors . . . have in connection with the execution of their public duties."). Agencies bear ethical obligations of faithful interpretation, he argues, because an agency's role-oriented authority is akin to that of an agency lawyer who, in the words of Geoffrey Miller, "acts unethically when she substitutes her individual moral judgment for that of a political process which is generally accepted as legitimate." *Id.* at 1244 (quoting Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1337 (1987)). Although I have some quibbles with the framing of his ethical argument, including his characterization of my own previous writings on the fiduciary character of administrative law as "ethical analysis," *id.* at 1244, for purposes of this brief Response Essay I will focus exclusively on explaining the possible legal basis for the obligations he proposes.

14. *Id.* at 1237.

15. *Id.* at 1274.

16. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); *Yakus v. United States*, 321 U.S. 414, 426 (1944).

agency bears a corresponding constitutional obligation to conduct statutory interpretation in a manner that focuses on “faithfully” following this legislative guidance rather than pursuing its own independent policy preferences.<sup>17</sup> This constitutional obligation of fidelity to an agency’s statutory mandate is a legal conduct rule that regulates agency statutory interpretation even when *Chevron*’s deferential decision rules limit judicial review.<sup>18</sup> Consequently, federal agencies lack authority under the Constitution to treat *Chevron* deference as a license to advance policy agendas that are unmoored from relevant legislative guidance and constitutional norms.

The remainder of this Essay is divided into two parts. Part I assesses the strengths and weaknesses of Professor Saiger’s critique and explains why further attention to the Constitution’s intelligible principle requirement is necessary to explain why agencies may not fill statutory “gaps” with their own independent policy preferences. Part II problematizes Professor Saiger’s effort to distinguish statutory interpretation from policymaking by calling attention to the important conceptual distinction between “statutory interpretation” (which seeks to recover semantic meaning) and “statutory construction” (which seeks to distill a statute’s legal meaning by applying relevant legal norms). I argue that statutory construction occupies a space between interpretation and policymaking, because it enlists agencies as collaborators with Congress in the dynamic authorship of a regulatory regime. Yet, regardless of whether an agency engages in interpretation or construction, it is never permitted to bypass constitutional and statutory norms in favor of its own independent policy preferences. Even when *Chevron* calls for judicial deference, the constitutional foundations of agency statutory interpretation dictate that federal agencies, as public fiduciaries,<sup>19</sup> are legally obligated to use their best judgment to fulfill their statutory mandates in good faith, not to pursue their own independent policy agendas or the political objectives of the incumbent administration.

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17. U.S. CONST. art. II, § 3.

18. See JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES AND MORALS OF LEGISLATION 430 (W. Harrison ed., 1948) (1789) (distinguishing conduct rules from decision rules); Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 628 (1983) (same).

19. See Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. 1271 (2010); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEXAS L. REV. 441 (2010) [hereinafter Criddle, *Fiduciary Administration*]; Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006).

## I

In recent years, legal scholars have devoted increasing attention to the law and practice of agency statutory interpretation.<sup>20</sup> Much of the resulting literature explores differences between the respective institutional roles of judges and federal agencies.<sup>21</sup> Professor Saiger's recent article, in contrast, emphasizes an important point of commonality between judicial and agency statutory interpretation: both judges and agency heads<sup>22</sup> are legally and ethically obligated to "obey the Constitution and conform to the laws."<sup>23</sup> An agency's duty to obey the law "cannot be less demanding" within *Chevron's* zone of reasonableness, Professor Saiger argues, just because it "knows that it will not face judicial review."<sup>24</sup> Rather, an agency must always "act within its best assessment of its legislatively granted powers."<sup>25</sup> Accordingly, when agencies confront statutory ambiguity, they should embrace the interpretation that they believe best captures a statute's meaning. Professor Saiger does not dispute that reasonable minds may disagree about the best interpretive methodology for discerning the meaning of ambiguous statutory directives (e.g., textualism, purposivism).<sup>26</sup> Nonetheless, he argues that debates over statutory interpretation methodology should not obscure the fundamental principle that an agency bears an ethical duty to "hew to the

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20. See, e.g., William N. Eskridge Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411; Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673 (2007); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005); Pierce, *supra* note 5; Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871 (2015); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI. KENT L. REV. 321 (1990); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015); Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. (forthcoming).

21. See, e.g., Eskridge, *supra* note 20; Foote, *supra* note 20.

22. Professor Saiger uses the terms "agency" and "agency head" interchangeably, in recognition of the fact that the officials who lead an agency are ultimately responsible for directing agency statutory interpretation. See Saiger, *supra* note 8, at 1238–39.

23. *Id.* at 1247; see also 5 U.S.C. § 3331 (2012) (requiring agency officials to swear an oath to "support and defend the Constitution of the United States . . . ; bear true faith and allegiance to the same; . . . and . . . well and faithfully discharge the duties of [their] office"); 28 U.S.C. § 453 (2012) (requiring federal judges to swear an oath to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States").

24. Saiger, *supra* note 8, at 1247.

25. *Id.*

26. See *id.* at 1255 ("Agencies can interpret statutes in good faith using a variety of methodologies.").

interpretation that the agency itself determines, in good faith, to be the best *interpretation*,” rather than simply selecting any of several readings that the statutory text can plausibly bear.<sup>27</sup>

This effort to rein in agency statutory interpretation is motivated by important practical, conceptual, and normative concerns. Practically speaking, Professor Saiger worries that *Chevron* deference has emboldened the executive branch to test the limits of judicial tolerance, common sense, and the rule of law by endorsing “adventurous” statutory interpretations that reflect the incumbent administration’s views on optimal policy rather than the agency’s best understanding of the statute’s actual meaning.<sup>28</sup> Notably, Professor Saiger’s article arrives at a moment when political conservatives have accused the Obama Administration of launching sweeping policy initiatives without plausible congressional approval, including purportedly “unilateral” executive action on gun control and deferred immigration enforcement.<sup>29</sup> Professor Saiger appears to share critics’ concerns that these measures reflect shoddy statutory interpretation. In particular, he laments that the Obama Administration reportedly formulated its controversial gun control and immigration policies first and only later “scour[ed]” existing legislation “to find some implausible but not crazy legal hook for [its] actions.”<sup>30</sup> He suggests that this approach to statutory interpretation is unethical, because it does not reflect a good faith effort to treat statutory interpretation as an *interpretive* activity that respects the principle of legislative supremacy.<sup>31</sup>

Although Professor Saiger focuses on initiatives that have rankled political conservatives, his critique of the Obama Administration’s approach to statutory interpretation transcends partisan ideology. Liberals have raised similar concerns about the Administration’s aggressive interpretation of Congress’s post-9/11 Authorization for the Use of Military Force (“AUMF”).<sup>32</sup> Although the

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27. *Id.*

28. *Id.* at 1267 (quoting E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 3 (2005)).

29. *See id.* at 1267–68 (citing, inter alia, Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013); David Bernstein, *Obama: “Scrub Existing Legal Authorities” to Take Executive Action on Guns?*, VOLOKH CONSPIRACY (Jan. 1, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/01/obama-scrub-existing-legal-authorities-to-take-executive-action-on-guns/> [<https://perma.cc/RD7P-KLFF>]).

30. *Id.* at 1268 (quoting Bernstein, *supra* note 29).

31. *Id.* at 1268–1270.

32. Publ. L. No. 107-40, 115 Stat. 224 (2001).

AUMF speaks only of military action against “nations, organizations, or persons” who “planned, authorized, committed, or aided the [9/11] terrorist attacks . . . or harbored such organizations or persons,” the White House has interpreted the text as a virtual blank check to conduct counter-terrorism operations against groups and individuals who pose a threat to the United States, irrespective of whether these targets played a role in the 9/11 attacks.<sup>33</sup> Liberal dissatisfaction with aggressive agency statutory interpretation will undoubtedly increase in the future as the incoming Trump Administration abandons established agency statutory interpretations dealing with topics such as climate change, immigration, and health care. Indeed, President-Elect Trump has already attracted criticism for his clumsy effort to find an “implausible but not crazy” statutory basis to compel Mexico to pay for the construction of a wall on the U.S.-Mexico Border.<sup>34</sup> As Professor Saiger astutely observes, *Chevron* deference—and the culture of executive branch activism that it has inspired—may be partly to blame for such measures, because it has emboldened agencies to pursue result-oriented interpretations that do not actually reflect their best judgments about the meaning of a statutory text.<sup>35</sup>

At a more conceptual level, Professor Saiger’s article challenges the conventional wisdom that statutory ambiguities reflect an express or implicit delegation of policymaking authority to agencies. Here, Professor Saiger wages an uphill battle: not only does his thesis

33. See, e.g., Rebecca Ingber, *Co-Belligerency*, 42 YALE J. INT’L L. (forthcoming 2017) (“[A]s things stand today, the public can only discover that we are at war with a particular group not because Congress declares it, not because the Executive declares it, not even because the group attacks us, but rather because we attack them.”); Greg Miller & Karen DeYoung, *In Syria, Obama Stretches Legal and Policy Constraints He Created for Counterterrorism*, WASH. POST (Sept. 23, 2014), [http://www.washingtonpost.com/world/national-security/in-syria-obama-stretches-legal-and-policy-constraints-he-created-for-counterterrorism/2014/09/23/79fdaf44-4339-11e4-9a15-137aa0153527\\_story.html](http://www.washingtonpost.com/world/national-security/in-syria-obama-stretches-legal-and-policy-constraints-he-created-for-counterterrorism/2014/09/23/79fdaf44-4339-11e4-9a15-137aa0153527_story.html) [https://perma.cc/9YK-TMNW] (noting Senator Tim Kaine’s concern that allowing the White House to use the AUMF as a legal basis for military action against the Islamic State in Syria would set “a horrible precedent”).

34. See *Memo Explains How Donald Trump Plans To Pay for Border Wall*, WASH. POST., <https://www.washingtonpost.com/apps/g/page/politics/memo-explains-how-donald-trump-plans-to-pay-for-border-wall/2017/04/07/> [https://perma.cc/6YDP-CNG8]. Trump has proposed, inter alia, that the executive branch reinterpret the USA Patriot Act to prevent undocumented workers from sending money remittances to Mexico until the Mexican government relents and agrees to pay for a border wall. For a critique of this proposal’s legal coherence, see Stephen Heifetz & Kaitlin Cassel, *Trump’s Mexico Remittance Proposal Goes Inexplicably Awry*, STEPTOE INT’L COMPLIANCE BLOG (Apr. 15, 2016), <http://www.steptoelinternationalcomplianceblog.com/2016/04/trumps-mexico-remittance-proposal-goes-inexplicably-awry/> [https://perma.cc/NQD3-7GGF].

35. Saiger, *supra* note 8, at 1255, 1266–69. Professor Saiger argues that jurists may disagree about what statutory interpretation methodology is actually best from a legal point of view, while still accepting that agencies bear an ethical obligation to adopt the interpretation that they believe is “best” according to their own favored methodology. *Id.* at 1255.



challenge the views of many prominent legal scholars,<sup>36</sup> but it also flies in the face of the Supreme Court's own formal justification for *Chevron* deference. According to the Court, *Chevron* is premised on the idea "that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion."<sup>37</sup> When Congress commits an ambiguous federal statute to an agency's administration, it expressly or implicitly authorizes the agency to fill in the missing details according to the agency's own view of wise policy. Judicial deference to agency statutory interpretation is appropriate, the Court has explained, because filling "gaps" in statutes "involves difficult policy choices that agencies are better equipped to make than courts."<sup>38</sup>

This justification for *Chevron* is vulnerable to the criticism that it improperly characterizes all uncertainties in statutory interpretation as "gaps." To better appreciate the inadequacy of this "gap" metaphor, consider the following scenario, as described by the Tenth Circuit:

Buried deep in our immigration laws lie . . . two provisions: 8 U.S.C. §§ 1255(i)(2)(A) and 1182(a)(9)(C)(i)(I). Enacted first, 8 U.S.C. § 1255(i) grants the Attorney General discretion to "adjust the status" of those who have entered the country illegally and afford them lawful residency. But growing concerns about illegal immigration eventually induced Congress to enact § 1182(a), which appears to take away at least part of the discretion § 1255(i) gives. Among other things, [it] provides that certain persons who have entered the country illegally more than once are categorically prohibited from winning lawful residency here—that is, unless they first serve a ten-year waiting period outside our borders.<sup>39</sup>

Recognizing that the relationship between these facially contradictory provisions was unclear, the Tenth Circuit concluded in *De Niz Robles v. Lynch* that the agency was free to choose either of two "reasonable" interpretations: it could hold that § 1182(a) eliminated the Attorney General's discretionary power to adjust status for covered individuals, or it could conclude that § 1182(a) preserved the Attorney General's status-adjustment power.<sup>40</sup> The court justified deference to

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36. See, e.g., *Pierce*, *supra* note 5 (asserting that within *Chevron*'s zone of reasonableness, agencies are free to engage in "a policy-making process").

37. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); see also *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (2012) ("*Chevron* and later cases find in unambiguous language a clear sign that Congress did not delegate gap-filling authority to an agency; and they find in ambiguous language at least a presumptive indication that Congress did delegate that gap-filling authority."); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (characterizing *Chevron* as "an implicit delegation from Congress to the agency to fill in the statutory gaps"); *Pierce*, *supra* note 5, at 982 ("*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps.>").

38. *Brand X*, 545 U.S. at 980.

39. *De Niz Robles v. Lynch*, 803 F.3d 1165, 1167 (10th Cir. 2015).

40. See *id.* at 1167–68 (discussing *Padilla-Caldera v. Holder*, 637 F.3d 1140, 1153 (10th Cir. 2011)).

the agency based on the idea that the facial conflict between § 1255(i) and § 1182(a) reflected a “gap” that the agency could “exploit” to further its independent policy preferences:

[T]o reach *Chevron* step two the agency must first establish that traditional tools of statutory interpretation fail to reveal “what the law has always meant.” At that point the agency—avowedly and self-consciously—exploits the law’s ambiguity and exercises its “delegated” “policy-making” authority to write a new rule of general applicability according to its vision of the law as it should be. . . . [C]ourts defer to the agency’s new view because the agency has been authorized to fill gaps in statutory law with its own policy judgments.<sup>41</sup>

This gap-filling rationale for *Chevron* deference does not ring true as applied to the question presented in *De Niz Robles*. To be sure, Congress may have expected the agency (not the courts) to take the leading role in clarifying the ambiguous relationship between § 1255(i) and § 1182(a).<sup>42</sup> But the apparent conflict between these provisions is not the type of statutory silence that one would ordinarily characterize as a “gap.” Nor does it seem likely that Congress would have expected “the agency—avowedly and self-consciously”—to “exploit” the facial conflict between these provisions in order to advance its “own policy judgments” or “vision of the law as it should be.”<sup>43</sup> After all, the entire purpose of § 1182(a) was to *reduce* the Attorney General’s discretionary power; the only uncertainty was how much power Congress had actually withdrawn. Granted, even in this context Congress likely would have expected the agency to take the lead in resolving the facial contradiction between the two provisions. But it defies common sense to suggest, as the Tenth Circuit does, that Congress would have given the agency carte blanche to resolve the issue based on policy considerations that were alien to the legislative priorities embodied in the relevant statutory provisions.

Professor Saiger would likely argue that the Tenth Circuit’s error runs deeper than simply mischaracterizing the agency’s statutory interpretation as “gap-filing” or misconstruing Congress’s expectations. In his view, the heart of the case against unfettered agency statutory interpretation is normative and structural: because agencies are, formally speaking, “pure creatures of their statutes” without inherent

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41. *Id.* at 1173.

42. Recent empirical studies offer some support for the idea that Congress consciously legislates against the backdrop of *Chevron* deference. See, e.g., Abbe L. Gluck & Lisa Schultz Bressman, *Agency Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Lisa Schultz Bressman & Abbe L. Gluck, *Agency Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part II*, 66 STAN. L. REV. 725 (2014).

43. *De Niz Robles*, 803 F.3d at 1173.

constitutional authority,<sup>44</sup> they must be able to trace every exercise of administrative authority to a statutory source.<sup>45</sup> Accordingly, Professor Saiger concludes that when an agency does not seek to discern and apply a statute's "best interpretation" in good faith, its interpretations—however reasonable on their face—are "ultra vires."<sup>46</sup> Agencies must therefore resist the seductive idea that statutory "ambiguity authorizes agencies to chase any policy agenda they can reasonably square with the statute."<sup>47</sup>

There are at least two potential weaknesses in this line of argument. The first is that the conclusion does not follow from the premises. Even if it were true that an agency's authority is constituted exclusively by statute, it is possible that an agency still might not bear a legal or ethical obligation to pursue the "best interpretation" of a statute rather than pursue the interpretation that best accords with their own views of wise policy. After all, *Chevron* embraces the idea that statutory gaps and ambiguities reflect delegations of discretionary power to agencies, and these delegations could very well include authorization to fill gaps with extraneous policy considerations. If at least some statutes do contain "gaps" that cannot be erased in a mechanical fashion using traditional tools of statutory interpretation, it is unclear under Professor Saiger's theory why the task of filling these gaps should be conceptualized as an exercise in "interpretation" rather than "policymaking."

To establish that agencies bear an "obligation to interpret the statute" when they operate within *Chevron*'s zone of agency discretion, Professor Saiger must first demonstrate that the Supreme Court has it wrong: there is no such thing as a statutory "gap," because all questions of statutory interpretation can be resolved through legal interpretation. Professor Saiger doesn't explain, however, why we should believe that statutory "gaps" are chimerical.

A second weakness in Professor Saiger's argument is that it does not fully account for the President's independent constitutional authority.<sup>48</sup> Recall that the Supreme Court in *Chevron* opined that

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44. Saiger, *supra* note 8, at 1274.

45. See *id.* at 1272–73 (arguing that because "legal grants of power, and legal restrictions upon that power, must be understood as prior to the exercise of the power they delineate," agency statutory interpretation likewise "should be intellectually prior" to extrinsic policy considerations).

46. *Id.* at 1274.

47. *Id.* at 1237.

48. See, e.g., Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282 (2006) (arguing that the executive branch has inherent power "to prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of any congressional authorization to compete that theme").

judicial deference to agency statutory interpretation was appropriate, in part, because “an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”<sup>49</sup> When an agency bases its statutory interpretations on the President’s considered policy preferences, the interpretations arguably draw their authority not only from the statutory text itself, but also from the President’s independent Article II power.<sup>50</sup> Some legal scholars believe that this link to the President is sufficient to justify agencies basing their statutory interpretations on policy considerations that lack a clear basis in the statute itself.<sup>51</sup>

Professor Saiger appears to take the position that an agency may not rely upon the President’s independent constitutional authority as a basis for grafting executive policy preferences onto statutes, because this is foreclosed by the principle of “legislative supremacy”<sup>52</sup>: both the President and federal agencies are bound by the terms of validly enacted statutes. Once again, however, Professor Saiger’s argument is missing a crucial step. Federal statutes trump executive policymaking only if they expressly or implicitly address the question at hand. If a statute does not actually resolve the relevant issue, but instead merely delegates the issue’s resolution to an administering agency (as the Supreme Court traditionally presumes under *Chevron*), there is no true conflict between the principle of legislative supremacy and the idea that an agency may pursue the President’s views of wise policy. Consequently, neither the statutory basis of agency authority nor the principle of legislative supremacy are sufficient to ground a general obligation for agencies to seek the “best interpretation” of an ambiguous statute.

What Professor Saiger needs to complete his argument is a robust justification for the idea that statutes impose legal obligations that channel and constrain agency interpretation even when *Chevron* deference applies, because the specific provisions under review are capable of sustaining more than one reasonable interpretation.

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49. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865 (1984).

50. *See id.* at 865–66 (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).

51. *See Goldsmith & Manning, supra* note 48, at 2298–2301 (arguing that the executive branch’s inherent “completion power” can explain the *Chevron* doctrine).

52. Saiger, *supra* note 8, at 1247.

Fortunately, Professor Kevin Stack has supplied the missing link in an illuminating article on agency statutory interpretation.<sup>53</sup> Professor Stack argues that the modern nondelegation doctrine has important implications for statutory interpretation in the administrative state. By requiring Congress to supply a statutory “intelligible principle” whenever it delegates authority to agencies, the nondelegation doctrine guarantees that federal agencies are never consigned to craft regulatory policy in a policy vacuum; instead, they always have statutory principles or policy considerations that govern their exercise of discretionary authority.<sup>54</sup> As a result, even when a statutory provision can sustain multiple reasonable interpretations, the nondelegation doctrine ensures that statutes provide at least general guidance to inform an agency’s choice between these alternatives.<sup>55</sup>

Professor Stack uses these observations to buttress the popular idea that agencies should employ a purposive approach to statutory interpretation.<sup>56</sup> Professor Saiger resists this conclusion, arguing that Professor Stack “falls short of justifying purposivist interpretation as the ‘best’ sort of interpretation,” because agencies could conceivably adopt a textualist interpretive methodology without acting illegally or unethically.<sup>57</sup> Although I am personally persuaded by Professor Stack’s argument, we need not choose sides in this debate to embrace Professor Stack’s deeper insight that the intelligible principle requirement formally precludes Congress from conferring “unconfined and vagrant” discretion on agencies.<sup>58</sup> To the extent that the Constitution requires Congress to embed intelligible principles in regulatory statutes, both textualists and purposivists should be able to accept that the principle of legislative supremacy requires agencies to respect these principles as authoritative guidance when addressing statutory ambiguities, silences, contradictions, and other puzzles. For this reason alone, the idea that agencies may turn to “the incumbent administration’s views of wise policy” rather than seeking in good faith to apply a statute’s

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53. Stack, *supra* note 20.

54. *Id.* at 893–94 (citing, *inter alia*, *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457 (2001)).

55. Significantly, Stack’s insight that the intelligible principle requirement constrains statutory delegations applies equally to statutes that delegate authority directly to the President, *see, e.g.*, *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935), so the fact that an agency may follow White House policy direction when interpreting statutes cannot cure an otherwise standardless delegation, *cf. American Trucking*, 531 U.S. at 472–73 (holding that an agency may not cure a standardless delegation by designing its own intelligible principle).

56. Stack, *supra* note 20, at 893–95.

57. Saiger, *supra* note 8, at 1254–55.

58. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

intelligible principle is antithetical to bedrock constitutional principles.<sup>59</sup>

Ultimately, therefore, Professor Saiger is right to argue that agencies may not treat *Chevron* deference as a reservoir of unregulated discretion that they may “exploit” however they wish. Although *Chevron* prevents courts from challenging agencies’ reasonable interpretations of ambiguous statutes, this does not mean that statutory ambiguities present a blank slate on which agencies may inscribe their own independent policy preferences. The nondelegation doctrine prohibits Congress from delegating unfettered lawmaking authority through ambiguous or incomplete legislative drafting. To satisfy constitutional scrutiny, every legislative delegation must be accompanied by an intelligible principle capable of guiding an agency’s exercise of discretion at every phase of statutory interpretation. Agencies bear a concomitant obligation to exercise their interpretive authority in a manner that is conscientiously focused on “faithfully execut[ing]” their statutory mandates.<sup>60</sup> As a result, an agency’s obligation to interpret and discharge its mandate in good faith is not merely a question of administrative ethics or best practices; it is a constitutional requirement.

## II

Thus far, I have argued that constitutional principles require federal agencies to interpret ambiguous statutory provisions in accordance with Congress’s “intelligible principle” rather than resort to their own independent policy preferences or the incumbent administration’s political agenda. In this Part, I take up Professor Saiger’s invitation to consider more fully “what *ethical* self-understanding an agency should have when it selects an interpretation” within *Chevron*’s zone of discretion.<sup>61</sup> Professor Saiger argues that we should conceptualize federal agencies as “assignees”<sup>62</sup> of interpretive authority that “must give force to the meaning it understands the statute to have.”<sup>63</sup> A federal agency must therefore focus on

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59. If *Chevron* were based on the premise that agencies may “fill in gaps based on policy judgments made by the agency rather than Congress,” there would be merit to Justice Clarence Thomas’s concern that *Chevron* raises “serious” constitutional questions. See *Michigan v. EPA*, 135 S. Ct. 2699, 2712, 2713 (2015) (Thomas, J., concurring).

60. U.S. CONST. art. II, § 3.

61. Saiger, *supra* note 8, at 1236.

62. *Id.* at 1237.

63. *Id.* at 1274.

“interpretation” rather than “policymaking.”<sup>64</sup> In the discussion that follows, I seek to unsettle this understanding of an agency’s institutional role. I argue that when agencies administer ambiguous statutes, they are necessarily forced to make discretionary normative judgments that entail recourse to policy considerations. Nonetheless, the discretionary character of agency statutory construction does not exempt agencies from the legal requirement to discharge their purposive statutory mandates in good faith. This legal conduct rule remains in full force, displacing extraneous policy considerations, when agency statutory constructions qualify for *Chevron* deference.

Professor Saiger’s conception of agencies as assignees of interpretive power rests on the premise that statutory administration can be divided into two modes: “interpretation” and “policymaking.” Agency statutory interpretation is consistent with the principle of legislative supremacy, he argues, but independent agency policymaking is not.<sup>65</sup> Legal scholars have come to recognize, however, that there is a third mode of agency administration—statutory construction—that occupies an intermediate position between pure interpretation and pure policymaking. In contrast to statutory interpretation, which seeks to identify “the linguistic meaning of an authoritative legal text,” statutory construction draws on legal norms embedded in the statutory text and the broader legal system to discern the legal meaning of the text’s semantic content as applied to particular cases.<sup>66</sup> Statutory construction does not entail free-form policymaking, because it is subject to textual and normative constraints. Nonetheless, statutory construction is an inescapably juris-generative activity, because the decision maker exercises discretionary judgment to construct the statute’s legal meaning through a creative process that integrates the relevant textual and normative considerations into a coherent account of the statute’s legal import.

Professor Michael Herz has argued that this distinction between statutory interpretation and construction “maps tidily onto *Chevron*.”<sup>67</sup> In his view, statutory interpretation “corresponds to *Chevron*’s step

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64. *Id.* at 1237.

65. *See id.* at 1237 (“Legislative supremacy and fidelity to the statute, rather than good policy, should be the agency’s ‘moral’ lodestar.”).

66. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100, 103 (2010); *see generally* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 (2013); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65 (2011).

67. Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1895 (2015). As Professor Herz observes, however, courts tend to use the terms “interpretation” and “construction” interchangeably when applying *Chevron*. *Id.* at 1892.

one,” where courts employ traditional tools of statutory interpretation—“examining language, purpose, and legislative history”—to identify a statute’s linguistic meaning. Once a court determines at step one that a “statute is silent or ambiguous with respect to the specific issue,”<sup>68</sup> however, “[i]nterpretation . . . forsakes us” and the court withdraws to allow the agency to take the lead in statutory construction.<sup>69</sup> The role of courts at *Chevron* step two, therefore, is simply to ensure that an agency’s chosen construction is “reasonable” or “permissible”<sup>70</sup> (i.e., that it is not premised on interpretations that are inconsistent with a statute’s semantic meaning). Thus, Professor Herz suggests that *Chevron*’s two steps correspond neatly with statutory interpretation and construction.<sup>71</sup>

This argument is not convincing. To accept this account, we would have to conclude that courts exhaust the task of statutory interpretation at *Chevron* steps one and two, then pass the baton to agencies to conduct statutory construction. But this is plainly not how *Chevron* works. Step one does not entrust statutory interpretation solely to the courts: when courts encounter semantic ambiguities in a statute, *Chevron* counsels that they should defer to an agency’s reasonable efforts to clarify the statute’s linguistic meaning based, in part, on its expertise in the relevant field. Nor do courts limit their review under *Chevron* to the semantic meaning of a statute. Instead, they routinely consider substantive norms, such as constitutional concerns, at step one to determining whether agency statutory constructions are consistent with the text’s clear and unambiguous legal meaning.<sup>72</sup> Moreover, when normative considerations suggest that

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68. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984).

69. Herz, *supra* note 67, at 1895 (quoting FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS: PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS, WITH REMARKS ON PRECEDENTS AND AUTHORITIES* 111 (William G. Hammond ed., 3d ed. 1880)).

70. *Chevron*, 467 U.S. at 843.

71. Herz, *supra* note 67, at 1896 (quoting Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 469–72 (2013)); *see also* Jeffrey Pojanowski, *After Deference*, 81 *MO. L. REV.* (forthcoming 2017) (“If there is too large a linguistic leap from the ‘interpreted’ text to the rule itself, a reviewing court will find that the agency made law rather than interpreted it.”).

72. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”); Solum, *supra* note 66, at 113 (observing that “so-called ‘substantive canons’ are clear examples of canons of construction”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 *HARV. L. REV.* 405, 459 (1989) (“Interpretive principles are often a product of constitutional norms.”); Jonathan D. Urick, Note, *Chevron and Constitutional Doubt*, 99 *VAND. L. REV.* 375 (2013) (arguing that the constitutional avoidance doctrine is a mandatory—not merely prudential—limit on agency statutory interpretation).



an agency has adopted an unreasonable construction of the statute, courts do not hesitate to set aside the construction at *Chevron* step two—even if the construction is plausibly within the range of linguistic meanings that the statutory text can bear.<sup>73</sup> Thus, *Chevron*'s two steps clearly are not designed to separate statutory interpretation from statutory construction.

Nonetheless, understanding the interpretation/construction distinction helps to clarify how agencies should understand the nature of their own role in statutory administration. When agencies administer statutes, their task is not merely to discern the semantic meaning of statutory provisions through interpretation but also to translate that semantic meaning into legal meaning through statutory construction. When the issue before an agency is a choice between different understandings of a statute's semantic meaning, an agency bears a duty to choose the best interpretation. Other questions, however, call for statutory construction. For example, a statute's semantic content may be vague rather than ambiguous,<sup>74</sup> forcing the administering agency to draw distinctions that cannot be derived mechanically from the linguistic meaning of the statutory text. Or a statute may contain facially contradictory provisions that cannot be reconciled solely through textual analysis of the statute's semantic content (e.g., *De Niz Robles*). Statutory silences also call for construction, because they supply no text to interpret.<sup>75</sup> In each of these contexts, a statute's legal meaning must be constructed by synthesizing the text's linguistic meaning with legal norms that find expression in the Constitution, the statute, and other relevant sources of law. This is the task of statutory construction, not interpretation.

The distinction between statutory interpretation and statutory construction complicates the story Professor Saiger wants to tell (i.e., that agencies should pursue a statute's "meaning" without reliance on "policy, adherence to a political agenda, or considerations of the public good)."<sup>76</sup> As Professor Lawrence Solum has observed, statutory construction—unlike statutory interpretation—is a normative enterprise that necessarily draws on legal norms that are rarely made explicit in a statute's text:

The correctness of an interpretation does not depend on our normative theories about what the law should be. But construction is not like interpretation in this regard—the production of legal rules cannot be "value neutral" because we cannot tell whether a

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73. See, e.g., *Republican Nat'l Cmt. v. FEC*, 76 F.3d 400 (D.C. Cir. 1996).

74. *Id.* at 97–98 (discussing the distinction between vagueness and ambiguity).

75. See Solum, *supra* note 66, at 106–07 (discussing vagueness, contradictions, and silences as examples of contexts that call for construction).

76. Saiger, *supra* note 8, at 1274.

construction is correct or incorrect without resort to legal norms. And legal norms, themselves, can only be justified by some kind of normative argument.<sup>77</sup>

Consequently, statutory construction is not simply an effort to recover a textual meaning that exists as an objective fact that is “intellectually prior” to the act of construction.<sup>78</sup> Instead, statutory construction constitutes statutory meaning through an act of juris-generative judgment that draws on normative considerations.<sup>79</sup>

Once the interpretation/construction distinction comes clearly into view, we can better make sense of *Chevron*’s suggestion that statutory “ambiguities” and “gaps” reflect “delegations” to administrative agencies.<sup>80</sup> *Chevron* rests on the premise that when Congress entrusts an agency with responsibility to administer a statute, it also entrusts the agency with primary responsibility to resolve linguistic ambiguities in the statute, selecting what it believes in good faith to be the best reading of the text from among the various plausible semantic meanings. Once the agency has identified a statute’s linguistic meaning, *Chevron* contemplates that the agency will also take the lead in statutory construction, determining the appropriate legal ramifications of the statute’s linguistic meaning in light of relevant normative considerations. Unlike statutory interpretation, the task of statutory construction does invite agencies to fill statutory “gaps,” specify the application of vaguely worded provisions, and resolve apparent contradictions by drawing on “policy” concerns and “considerations of the public good.” When agencies administer statutes, their role is not merely to avoid “error” in discerning a statute’s linguistic meaning but to exercise discretion in constructing the statute’s legal meaning from the applicable legal considerations. Thus, normative judgment is part and parcel of agency statutory construction.

Nonetheless, the fact that agency statutory construction invites recourse to normative considerations does not mean that agencies have free rein to indulge their own idiosyncratic policy preferences or political agendas. Statutory construction, like statutory interpretation, is subject to binding legal norms that constrain how agencies may define a statute’s legal meaning.<sup>81</sup> In particular, agency statutory construction is governed by two types of norms: (1) regime-specific norms specified by Congress and (2) trans-substantive norms that address broader systemic concerns. These two categories of norms apply

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77. See Solum, *supra* note 66, at 106–07.

78. Saiger, *supra* note 8, at 1273.

79. Solum, *supra* note 66, at 104.

80. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843–44 (1984).

81. See Barnett, *supra* note 66, at 69 (discussing decision rules for statutory construction).

not only to judicial statutory construction but also to agency statutory construction within *Chevron*'s zone of discretion.

Regime-specific norms inform statutory construction at both steps of *Chevron* analysis. At step one, courts consult a statute's intelligible principle when determining whether agency statutory construction is consistent with the statute's clear and unambiguous text. An agency's position must also bear a rational relationship to a statute's intelligible principle to satisfy reasonableness review at *Chevron* step two. Even when agency statutory interpretations and constructions qualify for *Chevron* deference, federal agencies must seek to interpret and discharge their statutory mandates in good faith.

Trans-substantive norms also inform statutory construction. Interpretive norms are "trans-substantive" if they are attentive to systemic concerns that transcend the specific statutory regime under review. For example, courts demarcate the outer limits of permissible statutory construction at step one by applying trans-substantive canons of statutory construction such as the canon of constitutional avoidance, the rule of lenity, and the canon against extraterritoriality.<sup>82</sup> These traditional tools of statutory construction reflect normative commitments that either derive from constitutional considerations or are believed to reflect norms that are embraced by Congress.<sup>83</sup> At step two, a court may also consider general normative considerations such as rationality, proportionality, and the rule of law in deciding whether an agency's proposed construction of a statute is "reasonable."<sup>84</sup> Additionally, courts at step two routinely consider issues associated with the practical implementation of statutory constructions, such as agency resource constraints and the impact of an agency's construction on other governmental programs, the national economy, and foreign relations.<sup>85</sup> As long as the statute itself does not foreclose consideration

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82. See Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 76–78 (2008).

83. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1376 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (stating that substantive canons "promote objectives of the legal system which transcend the wishes of any particular session of the legislature").

84. See *Republican Nat'l Cmt. v. FEC*, 76 F.3d 400, 406 (D.C. Cir. 1996) (concluding at step two that it was not reasonable to "believe that Congress authorized the [Federal Election] Commission to forbid political committees from accurately stating the law"); Sunstein, *supra* note 72, at 471 ("In interpreting statutes, courts employ a clear-statement principle in favor of the 'rule of law': a system in which legal rules exist, are clear rather than vague, do not apply retroactively, operate in the world as they do in the books, and do not contradict each other.").

85. See, e.g., *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (observing that "[*Chevron*] deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations' " (quoting *INS v.*

of trans-substantive norms,<sup>86</sup> courts may fairly presume that Congress would have expected the agency to consider such factors during statutory construction. Accordingly, these trans-substantive norms are usually legally relevant considerations that federal agencies may take into account during statutory construction.<sup>87</sup>

The regime-specific and trans-substantive norms that govern agency statutory construction apply even within *Chevron*'s zone of discretion. Just as agencies are legally obligated to resolve textual ambiguities by seeking in good faith to adopt the best interpretation of a statute's linguistic meaning, they also bear a legal obligation to conduct statutory construction in a manner that they believe will best respect and reconcile the relevant normative considerations. This requirement reflects the Constitution's continuing operation "outside the courts" as a legal constraint on executive branch discretion.<sup>88</sup> Under the constitutional principle of legislative supremacy, agencies must respect these normative considerations as legal conduct rules that trump their own independent policy preferences and the political agenda of the incumbent administration.

*Chevron* is often read to stand for the opposite proposition (i.e., that when an agency confronts vague or conflicting statutory principles or policies, it is free to resort to its own free-standing policy preferences).<sup>89</sup> Toward the end of the decision, the Court gestures toward this idea in dicta when it distinguishes judicial statutory construction from agency statutory construction:

Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive

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*Abudu*, 485 U.S. 94, 110 (1988)); *Animal Legal Def. Fund v. USDA*, 789 F.3d 1206, 1224 (11th Cir. 2015) (explaining that resource constraints are relevant to *Chevron*'s second step).

86. See *Massachusetts v. EPA*, 549 U.S. 497, 532–35 (2007) (holding that an agency may not base statutory construction on foreign relations and other policy concerns that are foreclosed by the statutory text and purpose).

87. Legal scholars have proposed other trans-substantive norms to guide statutory interpretation at step two, including norms associated with promoting democracy and combatting domination. See, e.g., Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995) (promoting democracy); Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209 (2015) (combatting domination).

88. James E. Fleming, *The Constitution Outside the Courts*, 86 CORNELL L. REV. 215 (2000) (book review); see also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); WHITTINGTON, *supra* note 66.

89. See, e.g., *Pierce*, *supra* note 5, at 200.

is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.<sup>90</sup>

By endorsing the idea that agencies may rely on the “wise policy” of the incumbent administration, the Court arguably encouraged agencies to look to extra-legal political factors whenever constitutional and statutory norms do not clearly direct agency statutory construction toward a specific outcome.

Although many legal scholars have embraced this idea,<sup>91</sup> it is not the only possible reading of *Chevron*. The assertion that agencies may make “policy” choices can also be understood, in the alternative, as an acknowledgement that Congress often requires agencies to take multiple policy considerations into account when deciding how to exercise entrusted power. Consequently, statutes regularly task agencies with “resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency.”<sup>92</sup> Indeed, in *Chevron* itself, the Court noted that the Clean Air Act (“CAA”) “plainly identifies the policy concerns that motivated the enactment,” including not only environmental protection but also “the allowance of reasonable economic growth.”<sup>93</sup> Congress obviously anticipated that the Environmental Protection Agency (“EPA”) would have to reconcile these disparate legislative priorities when determining the CAA’s application, and the Supreme Court wisely deferred to the EPA’s exercise of this entrusted discretionary judgment. But this does not mean that the EPA was free to base its reading of the CAA on policies wholly unrelated to the factors Congress expressly required or implicitly expected the agency to consider.

The traditional reading of *Chevron*—that agencies may decide questions of statutory interpretation and construction based on their own independent policy preferences—is inconsistent with well-established principles of administrative law. For decades, the Supreme Court has recognized that agency action may be set aside as arbitrary and capricious under the Administrative Procedure Act (“APA”)<sup>94</sup> if an agency relies on normative considerations that are divorced from the legal norms that apply to the action under the Constitution and the

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

91. See, e.g., Pierce, *supra* note 5, at 200 (descriptive); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 n.15 (2009) (normative).

92. *Chevron*, 467 U.S. at 865–66.

93. *Id.* at 863.

94. 5 U.S.C. § 706(2)(A).

governing statute.<sup>95</sup> In *Judulang v. Holder*,<sup>96</sup> for example, the Court underscored this requirement to disregard “extraneous” factors that are “unmoored from the purposes and concerns” of the relevant statute, explaining that this requirement is a core principle of “reasoned decision making” that agencies are never legally permitted to abandon.<sup>97</sup> However difficult the task, agencies must fill statutory “gaps” based on their best understanding of the relevant constitutional and statutory norms, without regard to extraneous normative factors such as their own policy preferences or the incumbent administration’s political agenda. An agency that transgresses this requirement exposes itself to judicial censure and reversal at *Chevron* step two,<sup>98</sup> because solicitude to constitutional and statutory principles is an essential corollary of the nondelegation doctrine, as discussed in Part I. Thus, *Chevron* deference is reserved exclusively for agency statutory constructions that are based on a reasonable effort to recover a statute’s semantic meaning or distill a statutory provision’s legal meaning from applicable constitutional and statutory norms.

To be sure, the idea that agencies are legally obligated to conduct statutory interpretation and construction *in good faith*—adopting the reading that they actually believe best captures the statute’s semantic meaning and best advances the relevant legal norms—does not find clear expression in many judicial decisions. This should hardly come as a surprise, given the limited scope of judicial review under *Chevron*. Although *Chevron* requires courts to determine whether an agency’s statutory interpretation and construction is objectively reasonable, it does not invite courts to scrutinize an agency’s subjective belief in the superiority of its chosen position. Thus, although the Constitution requires that “the Laws be faithfully executed,”<sup>99</sup> courts are rarely called upon to assess whether an agency has actually executed its statutory mandate in good faith.

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95. See *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (explaining that agency action may be set aside under arbitrary and capricious review if “the agency has relied on factors which Congress has not intended it to consider”).

96. 132 S. Ct. 476 (2011).

97. *Id.* at 484, 486, 490. In *Judulang*, the agency action under review involved an exercise of statutory gap-filling, because the agency purported to exercise statutory authority that was not conferred expressly by the text of the Immigration and Nationality Act. See *id.* at 483 n.7.

98. *Id.* at 483 n.7 (explaining that “arbitrary and capricious” review under the APA is “the same” as reasonableness review under *Chevron* step two, because in both contexts “we ask whether an agency interpretation is arbitrary or capricious in substance” (internal quotation marks and citations omitted)); see also *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995) (“We recognize that, in some respects, *Chevron* review and arbitrary and capricious review overlap at the margins.”). Of course, on remand an agency may endorse the same statutory interpretation/construction based exclusively on permissible criteria.

99. U.S. CONST. art. II, § 3.

Even so, there is some evidence in the case law for the proposition that agency good faith is a legally binding conduct rule, not merely an ethical norm. For example, in *SKF USA Inc. v. United States*,<sup>100</sup> the Commerce Department sought a remand from the Federal Circuit to allow it to change a previous agency decision that it believed was incorrect on the merits.<sup>101</sup> The circuit court observed that if the agency's previous decision raised "a step one *Chevron* issue—that is, an issue as to whether the agency is either compelled or forbidden by the governing statute to reach a different result—a reviewing court . . . has considerable discretion [to either] decide the statutory issue, or . . . order a remand."<sup>102</sup> In contrast, "[w]here there is no step one *Chevron* issue, . . . a remand to the agency is required, absent the most unusual circumstances verging on *bad faith*."<sup>103</sup> The court thus asserted that it would be appropriate to give the agency an opportunity to select a reasonable interpretation only if the agency could be expected to make the decision based on the proper statutory criteria, not based on unrelated policy or political considerations. As the court found "no indication whatsoever that [the agency was] acting in bad faith" in the case at hand, it granted the agency's request for a remand.<sup>104</sup> Nonetheless, the court reserved the right to deny a remand in future cases where there was evidence that agencies could not be relied upon to pursue congressional priorities and honor constitutional norms in good faith.

The Supreme Court likewise has implied that an agency must adopt the statutory construction that it believes is best in light of the relevant legal considerations. In *FCC v. Fox Television Stations, Inc. (Fox I)*,<sup>105</sup> the Court held that when an agency substitutes one reasonable statutory construction for another within *Chevron*'s zone of discretion,<sup>106</sup> "it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one."<sup>107</sup> Rather, for purposes of judicial review, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and

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100. 254 F.3d 1022 (2001).

101. *Id.* at 1029.

102. *Id.*

103. *Id.* at 1029–30 (emphasis added).

104. *Id.* at 1030. Some state courts have held, as well, that bad faith is a possible basis for setting aside discretionary administrative actions. *See, e.g., Banfield v. Cortes*, 110 A.3d 155, 174 (Pa. 2015).

105. 556 U.S. 502 (2009).

106. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (holding that *stare decisis* does not apply when an agency abandons a reasonable statutory interpretation in favor of a different reasonable interpretation).

107. *Fox Television*, 556 U.S. at 515 (emphasis in original).

that the agency *believes* it to be better, which the conscious change of course adequately indicates.”<sup>108</sup> This passage from *Fox I* is often cited for the proposition that courts will not probe too deeply into an agency’s reasons for changing course in statutory interpretation.<sup>109</sup> Yet, in the very same breath the Court also emphasized that federal agencies are subject to a more demanding conduct rule: they may change course only if they actually believe that their new statutory interpretation or construction is superior to its predecessor. Although the Court did not say that a federal agency must adopt the statutory interpretation or construction that it considers *best*, this requirement of good faith statutory administration is arguably implicit in the Court’s reasoning. Thus, the Supreme Court appears to agree that federal agencies must adopt the statutory interpretations and constructions that they actually believe are best in light of the relevant linguistic and normative considerations.

Of course, it would be naïve in the extreme to think that an agency’s legal obligation to interpret its statutory mandate in good faith can in practice “convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of presidential power.”<sup>110</sup> We should approach such claims to technocratic objectivity with great skepticism—particularly in contexts such as counter-terrorism, immigration, and gun control that have become battlegrounds for political partisanship. An agency’s political and policy commitments will inevitably color its assessment of the best interpretation of semantic ambiguities in a statute, as well as its efforts to clarify vague, incomplete, or facially contradictory provisions through statutory construction.<sup>111</sup>

It does not follow, however, that the distinction between statutory construction and autonomous policymaking is illusory. As Cass Sunstein has observed, it would be a mistake to conclude “that the

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108. *Id.* (emphasis in original).

109. See, e.g., Ronald M. Levin, *Hard Look Review, Policy Change, and Fox Television*, 65 U. MIAMI L. REV. 555 (2011).

110. *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981).

111. See Foote, *supra* note 20, at 695 (“[A]gencies carry out statutes with policy agendas, with expertise, with bureaucratic management objectives, with direct input from special interests and under express political direction. Judicial-style legal analysis of the intent of the enacting Congress is not a natural by-product of the administrative process.”); Michael Sant’Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 400 (2014) (observing that “although it is theoretically possible for a president to carefully interpret a statute without regard to his policy agenda, it is hard to imagine”); cf. *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 117 (2007) (Scalia, J., dissenting) (“What judges believe Congress ‘meant’ (apart from the text) has a disturbing but entirely unsurprising tendency to be whatever judges think Congress *must* have meant, i.e., *should* have meant.”).



existence of competing, and value-laden, principles is a reason to give up on the enterprise of statutory construction altogether, . . . to treat interpretation as inevitably indeterminate, or to rest content with the conclusion that statutes turn out to mean what people in authority say that they mean.”<sup>112</sup> Even within *Chevron*’s zone of discretion, agencies are subject to constitutional and statutory conduct rules that are designed to channel agency statutory interpretation.<sup>113</sup> These conduct rules are genuine legal obligations. In particular, agencies must use their entrusted discretionary authority to advance statutory interpretations that best reflect a statute’s linguistic meaning. And they must adopt statutory constructions that best constitute a statute’s legal meaning, in light of the applicable constitutional and statutory norms. Anything less would eviscerate the Constitution’s “intelligible principle” requirement by allowing agencies to treat statutory interpretation as a source of “unfettered” lawmaking power,<sup>114</sup> the classic case of legislative “delegation running riot.”<sup>115</sup>

#### CONCLUSION

Conventional wisdom suggests that *Chevron* deference marks the border between statutory interpretation and independent agency policymaking. This view is descriptively inaccurate and prescriptively unappealing. As Professor Saiger observes, the *Chevron* doctrine does not give federal agencies a blank check “to pick whichever interpretation best advances [their] policy preferences, subject only to the constraint that [their] selection should survive judicial review.”<sup>116</sup> Agencies are not entitled to base their statutory interpretations and constructions on policy concerns and political considerations that are unrelated to their statute’s semantic meaning and the legal norms that comprise their purposive mandate. Instead, agencies bear a legal

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112. Sunstein, *supra* note 72, at 504.

113. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring); see also Saiger, *supra* note 8, at 1256–57 (citing William N. Eskridge, Jr., *Expanding Chevron’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 433) (emphasizing Bill Eskridge’s point that an agency may not decline to pursue congressional goals, or subordinate those goals to other policy or political considerations, simply because this may call for the agency to exercise discretionary judgment).

114. *Currin v. Wallace*, 306 U.S. 1, 17 (1939).

115. *Yakus v. United States*, 321 U.S. 414, 426 (1944) (reasoning that courts should not strike down delegations as overbroad save in “an absence of standards for the guidance” of executive authority). In *Whitman v. American Trucking Associations*, the Supreme Court explained that an agency could not cure a standardless delegation by adopting an “intelligible principle” in its own regulatory guidelines. 531 U.S. 457, 473 (2001).

116. Saiger, *supra* note 8, at 1232.

obligation to interpret statutes in a manner that is faithful to the Constitution and advances the principles and purposes inscribed in their statutory mandates.