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Chevron and *Chadha*: Reconsidering the Legislative Veto

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Chevron v. Natural Resources Defense Council*, the most notorious decision in the history of federal administrative law, is dead. Yet* Chevron *did not exist in a vacuum. It was a central part, but only one part, of a broader effort in administrative law to strengthen "presidential rather than congressional policymaking," in the words of William Eskridge and John Ferejohn. Another key part of that effort was the Supreme Court's decision, just one year before* Chevron*, in* INS v. Chadha*. This article argues that* Chevron *and* Chadha *were interrelated, and that* Chadha *was wrongly decided. The demise of* Chevron *introduces the opportunity to revisit* Chadha*.*

In Chadha*, the Court engaged in "selective formalism," adopting a functionalist approach to nondelegation combined with a formalist approach to legislative vetoes. This incoherent approach led to logical inconsistencies in the opinion: according to the majority, the Attorney General's decision to reverse Chadha's deportation was non-legislative, because if it were, that would amount to an impermissible delegation of legislative power; but the House of Representatives' decision to reinstate his deportation was legislative, and thus was subject to bicameralism and presentment.* Chadha*'s selective formalism destroyed a key mechanism for ensuring Congress's control over the administrative state, and paved the ground for* Chevron*'s incorrect assumptions about congressional intent to grant interpretive power to the executive branch. Thus, the decision was not simply wrong on functionalist grounds, as others have argued, but on formalist grounds as well.*

The Court's decision in Loper*, which overturned* Chevron*, suggested a new approach to statutory delegations in now-famous footnotes. The Court argued that some statutory provisions are simply delegations of policymaking discretion to agencies. This reframing opens the door to a reconsideration of* Chadha*. Instead of focusing our attention on interpretation of vague statutory provisions, trying to identify murky indices of congressional intent, this reframing accepts congressional delegations of discretionary authority to agencies. If the Court is unwilling to enforce meaningful limits on such delegations, it should accept the logical conclusion and acknowledge that Congress may overturn agencies' "non-legislative" decisions without having to go through bicameralism and presentment. Thus,* Chadha *should be reversed if the Court is unwilling to revive the nondelegation doctrine.*

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Introduction

Chevron is dead. A year before *Chevron* was born, in *INS v. Chadha,* the Supreme Court declared the death of the legislative veto.[2] Together, William Eskridge and John Ferejohn argue, these two decisions "implemented [the Court's] preference for presidential rather than congressional policymaking."[3] This Article contends that *Chadha* and *Chevron* are linked not only temporally, but also logically: the Court's distortion of regulatory statutes in *Chadha* led to mistaken presumptions about congressional intent that served as the foundation for the *Chevron* doctrine.[4] With *Chevron* gone, and Congress in decline, now is the time to reconsider the legislative veto.

This article advances three related arguments. First, the timing of the *Chadha* and *Chevron* decisions is not coincidental. *Chevron* emerged in part because the Court in *Chadha* transferred authority over the implementation of law from Congress to the executive branch. Prior to *Chadha*, a tense détente existed between opponents and supporters of the administrative state. In this détente Congress could enact broad statutes transferring authority to administrative agencies to implement vague statutes because Congress was restructured to ensure the administrative state would remain accountable to Congress.[5] Legislative veto provisions were critical to maintaining this accountability. When the Court abolished this accountability mechanism, it increased the space for agencies to be the chief statutory implementers.

Under this pre-*Chadha* arrangement, the nondelegation doctrine would die a quiet death under the convenient fiction that agency decisions implementing statutes involve the exercise of non-legislative powers. Courts today still commonly express this view. The argument goes something like this:

> Article I of the Constitution states that Congress cannot transfer legislative power to agencies.
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> Congress passes statutes with broad, vague provisions, transferring authority to agencies to make and enforce rules promoting workplace safety, pure food and drugs, orderly markets, and so on.

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[2] *INS v. Chadha*, 462 U.S. 919 (1983).

[3] William Eskridge and John Ferejohn, "The Article I, Section 7 Game," *Georgetown Law Journal* 80 (1992), 564.

[4] I find persuasive Gary Lawson and Stephen Kam's argument that *Chevron* itself should be distinguished from the doctrine, and that the Court's intention in *Chevron* itself was not to establish a new test for agency interpretations of law. See Gary S. Lawson and Stephen Kam, *Making Law Out of Nothing At All: The Origins of the* Chevron *Doctrine*, 65 Admin. L. Rev. 1 (2013). But it would be cumbersome to refer to "the *Chevron* doctrine" every time, so *"Chevron*" often appears in this article as a shorthand expression.

[5] David R. Rosenbloom, "Whose Bureaucracy is this, Anyway? Congress' 1946 Answer," *PS: Political Science and Politics* 34 (2001): 773-777; Rosenbloom, "1946: Framing a Lasting Congressional Response to the Administrative State," *Administrative Law Review* 50 (1998): 173-197; Joseph Postell, "The Decision of 1946: The Legislative Reorganization Act and Administrative Procedure Act," *George Mason Law Review* 28 (2020): 605-642.

> When agencies make and enforce these rules, they are not making law, but are executing the laws enacted by Congress.
>
> Therefore, these statutes do not violate the nondelegation doctrine, because agencies' decisions are not legislative decisions.

This article's second argument is that legislative veto provisions are constitutionally permissible if one accepts this argument. If one presumes that agency actions are not exercises of legislative power, then legislative vetoes of these actions are also not exercises of legislative power. If legislative vetoes are not legislative determinations, Article I's bicameralism and presentment procedures would not apply to them, because they only apply to lawmaking. Under this premise, Congress (or even one house of Congress) is not making new law when it enacts a legislative veto resolution, because the same decision was not lawmaking when it was made by an agency.

The alternative view – that the agency action in question is legislative – would implicate the nondelegation doctrine. To put it simply: one can either have the nondelegation doctrine, or the legislative veto, but one can't have neither. Either an agency has been given the power to make law, in violation of the nondelegation principle, or it hasn't, in which case the legislative veto does not make law.[6]

This theory is premised on a critical presumption: statutes do not transfer legislative power to agencies but merely authorize non-legislative powers. This article's third argument is that administrative law before *Loper* dealt with this presumption, in part, by acting as if a large number of agency decisions were interpretations of law rather than exercises of policymaking discretion.

This categorization, which was governed by the Court's *Chevron*-related jurisprudence for the past several decades, steadily unraveled, in part due to challenges related to divining Congress's intent. *Chevron* was initially justified as a presumption about legislative intent. If a statutory gap existed, it was an implicit indication of Congress's intent to grant interpretive authority to the agency. But this was difficult to maintain with respect to a variety of contexts

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[6] This argument closely resembles that of Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 Cornell L. Rev. 1 (1994). McCutchen argues that the legislative veto should be understood "as a form of constitutional damage control" authorizing an institution that "would be unconstitutional if considered as an original matter" but is acceptable as a compensation for another unconstitutional institution that exists as a matter of precedent. McCutchen, at 2-3. McCutchen explicitly refers to the legislative veto: "[t]he legislative veto would be unconstitutional if considered as an original matter. However, open-ended delegation of legislative authority to administrative agencies is also unconstitutional." Thus, the former should be accepted as a compensation for the latter. My argument takes a slightly different approach: if one follows the logic of the Court's nondelegation jurisprudence, which eschews a robust nondelegation principle, then one must accept legislative vetoes as exercises of non-legislative power, which need not be subjected to bicameralism and presentment. My argument is that *Chadha* was wrongly decided not merely on functionalist grounds but on formalist grounds, if one follows the logic of the Court's nondelegation jurisprudence.

such as major questions or instances where the agency did not have authority to act with the force of law. These types of cases, and others, led courts to carve out various exceptions from the general presumption upon which *Chevron* relied.

The deeper problem with *Chevron*'s approach, however, was that the underlying statutes really did not have a meaning, and the agencies were really making policy choices rather than interpreting the law.

With *Chevron*'s demise, the Court has an opportunity to revive the more coherent pre-*Chevron* and pre-*Chadha* approach. Under this approach, a vast multitude of agency decisions do not involve constructions of statutes, but are simply exercises of discretion delegated by Congress. Assuming – as the pre-*Chadha* approach assumed – that such statutes do not impermissibly delegate legislative power, judicial review of agency legal interpretations must focus on whether the agency's action was *ultra vires* or clearly inconsistent with the statute's language. If the answer to these questions is "no," then the agency's decision is an exercise of discretion authorized by Congress, and the remaining question is whether the agency's action was permissible.[7]

In other words, under this more coherent approach the range of questions formerly governed by *Chevron* will be much more limited, primarily to whether the agency's action was within the authority granted by Congress, while the range of questions governed by so-called "hard look" review will be much wider, under the presumption that most decisions aren't really addressed by a statutory provision with a discernible meaning but are exercises of discretion.[8]

If we think of these questions as matters of policy or of legal specification, the picture changes fundamentally. One very important implication of this reframing is that the Court's decision in *INS v. Chadha* was mistaken. Legislative vetoes, under this theory, are not making new law but are clarifying Congress's intent in how the law should be implemented. Because legislative vetoes do not make law, they are not subject to bicameralism and presentment requirements.

Part I of this article describes the history of the legislative veto and the Court's incoherent "selective formalism" in its *Chadha* opinion. Part II discusses *Chevron* and why it was not just temporally but also logically related to the outcome in *Chadha*. The turn to agency statutory interpretation and congressional intent was related to the Court's elimination of the legislative veto as a check on agency action. Part III defends the central contention of the article, namely that if one presumes that agency actions do not implicate the nondelegation doctrine, then legislative vetoes are not exercises of legislative power. Part IV responds to the question: if

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[7] As always, other relevant constitutional, procedural, and factual challenges would still apply.

[8] This seems to resemble *Chevron*'s inquiry, but now explicitly turning "Step Two" of the inquiry into "hard look" review under the APA. See Richard J. Pierce, Jr., Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 Vand. L. Rev. 301 (1988); Gary Lawson, *"Then What"?: A Framework for Life Without* Chevron*,* 60 Wake Forest L. Rev. 57 (2025), 85-95.

legislative vetoes are not exercises of legislative power, what are they? It argues that they must be understood as construction or specification of law, if they are not understood as exercises of legislative power. Part V briefly argues that revisiting *Chadha* could help to strengthen Congress at a time when the institution is in serious and systemic decline.[9] A brief conclusion follows.

Part I: The Legislative Veto and its Death in Chadha

A. The Rise of Delegation and Legislative Veto Provisions

The legislative veto was well established by the time the Court handed down its decision in *Chadha*. The earliest examples of legislative vetoes can be found immediately after the ratification of the Constitution, including the Northwest Ordinance of 1789, as Justice White noted in his dissenting opinion in *Chadha* itself.[10] One scholar suggests that George Washington's decision "to racially integrate the Continental Army in 1775 with the caveat that the Second Continental Congress could overrule the action" is a sign of an informal legislative veto that existed during the colonial period.[11]

But such provisions were relatively uncommon, likely because "lawmakers serving in early Congresses were initially cautious in their approach to delegating responsibilities to both legislative and executive agents" during the early years of the republic.[12] The increase in delegation beginning in the Progressive and New Deal periods led to an increase in the use of

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[9] This theme of a "supine legislature" produced in part by *Chadha* is central to Josh Chafetz, *The* Chadha *Presidency*, (draft uploaded 1/22/26), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5360131 (quote at 4).

[10] *Chadha*, 982-984, n. 17.

[11] Michael J. Berry, THE MODERN LEGISLATIVE VETO (2016), at 20. I adopt a stricter definition of a legislative veto throughout this article, and so I disagree that this is an example of a legislative veto. Washington was willing to reverse his policy if the Continental Congress objected, but that is different from saying that he would be legally obligated to change the policy if the Continental Congress formally acted to reverse it. Berry seems to acknowledge this by denoting this example an informal legislative veto.

[12] Berry, *supra* note X, at 112. This claim is hotly contested in recent scholarship. For critics of the view that the early Congresses were careful to avoid delegating power, see especially Julian Davis Mortenson and Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 Ga. L. Rev. 81 (2021); Nicholas Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power*, 130 Yale L. J. 1288 (2021). See also Jerry L. Mashaw, Creating the Administrative Constitution (2012). Other scholars argue that nondelegation was indeed a powerful restraint on the early Congresses, including Gary S. Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002); Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L. J. 1490 (2021); Philip Hamburger, *Delegating or Divesting?*, 115 N.W. U. L. Rev. 88 (2020); Aaron Gordon, *Nondelegation Misinformation: A Reply to the Skeptics*, 75 Baylor L. Rev. 152 (2023). I have generally sided with those who argue that nondelegation did restrain the early Congresses. See Joseph Postell, *"The People Surrender Nothing": Social Compact Theory, Republicanism, and the Modern Administrative State*, 81 Mo. L. Rev. (2016); Joseph Postell and Paul D. Moreno, *Not Dead Yet – Or Never Born? The Reality of the Nondelegation Doctrine*, 3 Const. Stud. 41 (2018); Joseph Postell, *The Nondelegation Doctrine After* Gundy, 13 N.Y.U. Journal of Law and Liberty 280 (2019); Joseph Postell, Bureaucracy in America (2017), 67-79, 96-102.

legislative veto provisions. Congress began to utilize legislative vetoes more regularly by the end of the Hoover administration, when it attached a legislative veto provision to a 1932 law granting reorganization authority to the President. "Congress was understandably reluctant to delegate such extraordinary reorganization authority" to Hoover, because doing so would strengthen the executive branch relative to the legislature.[13] Thus, Congress attached a one-house legislative veto provision to the law granting Hoover the reorganization authority. Similar to modern statutes such as the War Powers Resolution, the Budget and Impoundment Act, and the Congressional Review Act, the 1932 law required the president to submit his reorganization plans to Congress, which had sixty days to consider the submission. Unlike those other statutes, however, *either* chamber could pass a disapproval resolution to veto the reorganization. The 1932 law did not require a bicameral resolution that was presented to the President for signature.

Thus, the first modern instance of a legislative veto was tightly connected with Congress's willingness to delegate authority to the executive branch. Without that reservation of veto authority Congress would likely not have given the power to Hoover in the first place. Moreover, the first modern legislative veto was hardly a dead letter: "every reorganization proposal put forth by President Hoover failed to pass congressional review."[14]

The number of legislative veto provisions exploded after the first modern provision was enacted in 1932. Although there was an initial phase after 1932 during which the constitutionality of legislative veto provisions was contested, eventually their use became widespread. President Hoover's Attorney General, William Mitchell, objected to a legislative veto provision authorizing a congressional committee to reverse federal tax refunds, not because such a veto would be a legislative action that failed to comply with bicameralism and presentment, but because it would "entrust to members of the legislative branch…executive functions in the execution of the law."[15] Mitchell's constitutional objections to legislative vetoes was based on broader separation of powers concerns, namely that the legislature was intruding upon the executive power, not exercising legislative powers outside of Article I's requirements for lawmaking.

Hoover's successor, Franklin Roosevelt, engaged in a lengthy battle with Congress over reorganization authority that eventually culminated in the passage of the Reorganization Act of 1939.[16] That law allowed Congress to reject a President's reorganization plan with a concurrent resolution of disapproval, which required bicameral passage but not presentment to the President for signature. Roosevelt utilized reorganization authority under the 1939 Act to establish the Executive Office of the President.[17] Eventually Congress modified the reorganization approval

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[13] Berry, *supra* note X, at 23.
[14] Berry, *supra* note X, at 24.
[15] Mitchell 1933, cited in Berry, *supra* note X, at 31.
[16] For excellent discussions of the political and institutional dynamics at play during the reorganization fight, see Richard Polenberg, REORGANIZING ROOSEVELT'S GOVERNMENT (1966), and Sidney M. Milkis, THE PRESIDENT AND THE PARTIES (1993), 113-146.
[17] See Milkis, *supra* note X, at [].

process in 1949 to allow a single house of Congress to reject a reorganization plan, and the Senate used this authority to reject President Truman's attempt to create a Department of Welfare.[18]

The use of legislative vetoes increased dramatically in the late 1960s and 1970s, as Democratic congresses turned to the mechanism to protect their policies from hostile presidents. As Michael Berry explains, "[t]he watershed enactment that altered the landscape of veto oversight was an energy conservation initiative that passed in 1975," in which a Democratic Congress sought to delegate power to the Ford administration but retain ultimate control to reverse decisions with which it disagreed.[19] Like the grant of reorganization power during the Hoover administration, Congress linked legislative veto provisions with delegations of authority to the executive branch. The Congress was willing to delegate because it was not abdicating its power; the veto provision was central to delegating the power in the first place. The 1975 Energy Policy and Conservation Act (EPCA) contained over a dozen separate legislative veto provisions governing a variety of policy actions such as the Strategic Petroleum Reserve Plan,[20] International Oil Allocation,[21] and Average Fuel Economy Standards for passenger automobiles.[22] The EPCA provided that any "energy action" required by the statute to be submitted to Congress could be overturned if "either House passes a resolution stating in substance that such House does not favor such action" within 15 calendar days.[23] Eleven energy actions were submitted to Congress, and although none were overturned, several were seriously considered and received roll call votes after congressional committees carefully examined them.[24]

The EPCA illustrates the expansion and the change that took place in the use of legislative vetoes during the 1960s and 1970s. The number of legislative vetoes increased, but more importantly, the subject matter changed. Legislative veto provisions in the early 20th Century were largely focused on executive reorganization plans. These newer legislative vetoes, by contrast, gave Congress control over specific policy choices made by administrators. In addition to EPCA, Congress inserted legislative veto provisions in the Trade Act of 1974, the Federal Election Campaign Act (FECA) Amendments of 1976, the Federal Land Policy Act of 1976, the Natural Gas Policy Act of 1978, the Airline Deregulation Act of 1978, and the Federal Trade Commission Improvement Act of 1980. In 1976 the House of Representatives nearly enacted a government-wide legislative veto, but the measure came two votes short of the 2/3

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[18] Berry, *supra* note X, at 34.
[19] Berry, *supra* note X, at 39.
[20] Sec. 159.
[21] Sec. 251.
[22] Sec. 502.
[23] Sec. 551(c)(1).
[24] See the summary in Berry, *supra* note X, at 39-40. For a fuller account see John E. Chubb, INTEREST GROUPS AND THE BUREAUCRACY (1983).

supermajority to enact legislation under suspension of the rules.[25] The proposed measure would have required any rule promulgated through the informal rulemaking procedures of 5 U.S.C. §553 to be submitted to Congress before taking effect, subject to a veto by either house of Congress within sixty days.[26] A similar proposal co-sponsored by more than half of the House membership was introduced in 1981.

In these various statutes Congress granted authority to administrative agencies to promulgate rules governing campaign finance, natural gas pricing, and antitrust, to abrogate public land leases, and to issue employment protection regulations, but reserved to itself the authority to overturn those rules and decisions. Congress also used the veto provisions to overturn administrative rules, especially those from the Federal Election Commission, before the Court's decision in *Chadha*.[27] While the specific counts vary, scholars generally agree that between 200-300 legislative veto provisions were enacted at the time *Chadha* was decided, and most of those were enacted during the 1970s.[28]

Congress used these legislative vetoes to accommodate the rise of the administrative state, while maintaining some semblance of control over it. This was especially critical in the 1970s, as Congress's "resurged" in the wake of the Nixon presidency and the Watergate scandal.[29] Reformers in Congress saw the rise of an "imperial presidency" or at least an "administrative presidency" and used legislative vetoes to maintain its authority over the administrative state.[30] In short, members of Congress were willing to cede some of their decisionmaking authority to administrators because they were not ceding ultimate control over those decisions.[31] The legislative veto provisions were central to the statutory schemes they were creating and the delegations they were willing to countenance.

B. Opposition from the Executive and Judicial Branches

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[25] Harold H. Bruff and Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977), 1370.
[26] Bruff and Gellhorn, *supra* note X, at 1370.
[27] See Herbert E. Alexander, "FECA and the Legislative Veto Decision," Campaigns and Elections (1983): 40-42.
[28] Jonathan B. Fellows, "Congressional Oversight Through Legislative Veto after *INS v. Chadha*," Cornell Law Review 69 (1984): 1244-1266; John R. Bolton and Kevin G. Abrams, "The Judicial and Congressional Response to the Invalidation of the Legislative Veto," *Journal of Law and Politics* (1984), 300.
[29] James Sundquist, *The Decline and Resurgence of Congress*; Murray Dry, *The Congressional Veto and the Constitutional Separation of Powers*, in The Presidency in the Constitutional Order (1981), at 196 ("the congressional veto has been important to Congress in the reclamation of constitutional powers during the post-Watergate era.").
[30] Arthur Schlesinger, *The Imperial Presidency*; Richard Nathan, *The Administrative Presidency*.
[31] See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 L. Contemp. Prob. 273 (1993): "Through the use of the legislative veto, Congress delegated power to the executive branch on the condition that Congress could control executive decisions without having to pass another law." See also Berry, *supra* note X, at 85: "it is unlikely that Congress would send the president a bill devoid of such [legislative veto provisions] without also revoking powers delegated to the executive."

During this period in which Congress increasingly attached legislative veto provisions to delegations of authority, resistance typically came from the executive branch.[32] President Ford signed the FECA Amendments of 1976 but attached a signing statement declaring that the legislative veto provision contained in the Amendments "violates the Constitution. I have therefore directed the Attorney General to challenge the constitutionality of this provision at the earliest possible opportunity."[33] President Carter explicitly declared that his administration would "not, under our reading of the Constitution consider [legislative veto provisions] legally binding."[34] The Reagan administration filed a brief against the constitutionality of the legislative veto in the *Chadha* case itself, and as this article discusses later, cited *Chadha* in opposition to the use of legislative vetoes after the decision was handed down.

It is not surprising that the executive branch would oppose the legislative veto, especially the one-house variety; the prospect of a single chamber of Congress overturning a major rule governing campaign finance or energy policy would place major constraints on the administrative state's discretion. Somewhat more surprising was the emergence of opposition by the bar. The American Bar Association also filed a brief in opposition to the legislative veto in the *Chadha* case, and some leading scholars in the legal academy stood opposed to the legislative veto. One such scholar, Antonin Scalia, testified against legislative vetoes multiple times before House subcommittees. On two occasions when a government-wide veto provision neared passage, Scalia came to the Hill to oppose it.

In 1976, as Assistant Attorney General in the Office of Legal Counsel, Scalia spoke in opposition to the proposed Executive Agreements Act, which would have provided congressional review of executive agreements.[35] In his testimony Scalia lamented the increased use of the legislative veto described above: "These devices are cropping up in virtually every type of new legislation that is coming from the Hill these days."[36] Scalia argued that legislative vetoes violate "the general principle of the separation of powers."[37] Congress can, of course, write detailed statutes that limit executive discretion, and thus "continue[] to have control" over policy, but if Congress decides "not to operate that way but to delegate authority to one of the other two branches, the very essence of the principle of separation of powers requires that once

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[32] See Berry, *supra* note X, at 60: "This trend [an "upsurge in veto statutes"] was met with fierce resistance by presidents of both parties."

[33] Gerald R. Ford, "Statement on Signing the Federal Election Campaign Amendments of 1976," May 11, 1976, https://www.presidency.ucsb.edu/documents/statement-signing-the-federal-election-campaign-act-amendments-1976.

[34] Jimmy Carter, "Legislative Vetoes Message to Congress," June 21, 1978, https://www.presidency.ucsb.edu/documents/legislative-vetoes-message-the-congress.

[35] Statement and Testimony of Antonin Scalia, in *Congressional Review of International Agreements*, Hearings before the House Subcommittee on International Security and Scientific Affairs, 94th Cong., 2nd Sess. (July 22, 1976), 182-200.

[36] Scalia, *supra* note X, at 184.

[37] Scalia, *supra* note X, at 184.

that authority is delegated, it has to be exercised by that other branch."[38] If Congress were to delegate authority but retain the authority to veto exercises of that authority, according to Scalia, Congress would "not only be legislating but also will be executing the law, and that violates the fundamental principle in question."[39] Scalia's analysis was premised on an acceptance of delegation to the executive branch.[40] Once authority is delegated to the executive branch, that authority is executive by definition. Thus, Congress may not exercise control over it. Scalia, in short, saw legislative vetoes as encroachments on executive power by Congress.[41]

In this and later testimony, Scalia expressed doubts about both the efficacy and the constitutionality of legislative vetoes. Congressional hearings in 1981 considered a broader proposal by Representative Elliott Levitas, a leading proponent of legislative vetoes in Congress, that would allow Congress to veto any proposed rule within 90 days with a concurrent resolution that would not require the President's signature. More than half of the House membership cosponsored the Levitas proposal.[42] Now a law professor at the University of Chicago, Scalia testified in opposition to the proposal, on the grounds that it would be too burdensome for members and their staff to monitor the vast number of rules promulgated by the administrative state. He focused more on the "practical aspects of the matter" and how it would "impinge[] upon the success or failure of regulatory reform."[43] And as he put it, "the real problem is that, by and large, Congress has not had the time to review agency regulations," not that Congress has done so but been thwarted by a presidential veto.[44]

In the leadup to *Chadha*, the executive branch and the bar had clearly staked positions in opposition to the legislative veto, which had broad support within Congress and which was an

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[38] Scalia, *supra* note X, at 184-5.

[39] Scalia, *supra* note X, at 185.

[40] Scalia's acceptance of legislative delegation, and thus of the basic pillars of the administrative state, is a theme discussed at length in Postell, BUREAUCRACY IN AMERICA, at 303-314.

[41] Scalia also offered the arguments that would serve as the basis of the majority opinion in *Chadha*, namely that legislative vetoes also violate Bicameralism and Presentment. See Scalia, *supra* note X, at 185-186.

[42] Berry, *supra* note X, at 42.

[43] Hearings before the Subcommittee on Rules of the House of the Committee on Rules, House of Representatives, 97th Congress, 1st Session on Various Legislative Veto Bills Introduced in the 97th Congress, October 7, 28, and November 19, 1981, at 200.

[44] Id., at 201. As discussed above, the actual history of the legislative veto and its use in the 1960s and 1970s presents counterexamples to Scalia's general claim. Scalia repeated this criticism in an article published in *Regulation* in 1981 titled "Legislative Veto: A False Remedy for System Overload." While Scalia reiterated his objection to the legislative veto on constitutional grounds, he argued that "[t]he problem has been, quite simply, that *both* houses [of Congress] have had neither the time nor the inclination to review agency rulemaking, just as they have had neither the time nor the inclination to write more detailed legislation in the first place, which would render the most significant rulemaking unnecessary." Scalia, *Legislative Veto: A False Remedy for System Overload*, 3 Regulation 19 (1979), 24. Scalia's assessment runs counter to the evidence adduced in this article, but it is supported by other studies which similarly conclude that Congress did not utilize legislative vetoes frequently before *Chadha*. See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977); Curtis A. Bradley, *Reassessing the Legislative Veto: The Statutory President, Foreign Affairs, and Congressional Workarounds*, 13 J. Leg. Analysis 439 (2021); Jessica Korn, THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO (1996).

increasingly-used tool to check the scope of delegations of authority to the executive branch. *Chadha* put an abrupt end to this emerging conflict between the branches.

C. Chadha's *Selective Formalism*

INS v. Chadha involved a challenge to provisions of the Immigration and Nationality Act (INA) that authorized the suspension of deportation of aliens, subject to a one-house legislative veto. The INA authorized the Attorney General to suspend deportation of an alien lawfully admitted upon application and under specified circumstances.[45] Jagdish Rai Chadha was born in Kenya, which at the time of his birth was a British colony, and visited the United States in 1966 with a British passport. He was admitted to a university in Ohio and studied there as a foreign exchange student. Upon Kenya's declaration of independence from Great Britain in 1963, Chadha became essentially stateless: Kenya granted citizenship to those who were born in Kenya as long as one of their parents was also born in Kenya, which excluded Chadha.[46] Great Britain excluded Chadha and other Kenyans from British citizenship in its Immigration Act of 1971. When Chadha's student visa expired in 1972, he lacked the right to return to either of the two countries.

Chadha applied for suspension of deportation according to the circumstances specified in the INA, and after an investigation, an immigration judge ordered that his deportation be suspended. Section 244(c)(1) of the INA required the Attorney General to send a report to Congress whenever deportation is suspended, along with an explanation of the facts, legal findings, and reasons for suspension. Section 244(c)(2) authorized either house of Congress to pass "a resolution stating in substance that it does not favor the suspension of such deportation," which would require the Attorney General to proceed with deportation. In short, the INA authorized either the House or Senate, acting alone, to reverse suspension proceedings by the passage of a simple resolution. In December of 1975, the chairman of the Judiciary Committee's Subcommittee on Immigration, Citizenship, and International Law introduced a resolution reversing the suspension of deportation of six aliens, including Chadha, apparently on the basis that they did not meet the statutory definition of hardship.[47] The resolution passed the House, and an immigration judge ordered Chadha's deportation in November of 1976. Chadha ultimately appealed to the Court of Appeals for the Ninth Circuit, which determined that §244(c)(2) was unconstitutional. The Supreme Court granted certiorari and affirmed the Ninth Circuit's decision.

The majority in *Chadha* engaged in "selective formalism." Its reasoning opened with highly formalistic language: "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to

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[45] INA §244(a)(1).
[46] Rebecca Bratspies, "Decolonizing *Chadha*," https://www.yalejreg.com/nc/decolonizing-chadha-by-rebecca-bratspies/.
[47] *Chadha*, 926.

the Constitution. Convenience and efficiency are not the primary objectives – or the hallmarks – of democratic government."[48] It explored the original meaning of Article I, Section 7's legislative procedures, quoting from the Convention debates, *The Federalist*, and other early American sources, to discern the primary concerns and fears the Framers wished to address in establishing the legislative process.[49] This exploration led the Court to conclude that "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories…to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."[50]

In short, the Court prefaced its analysis by setting up the inquiry on a formalistic basis – the Constitution's Framers feared tyranny and the encroachment of power, and the Constitution should be construed in light of these purposes. As the Court explained near the end of its opinion, "[t]he choices we discern as having been made in the Constitution Convention impose burdens on governmental processes that 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."[51] The Court's was more concerned with the possibility for arbitrary government than with the need for efficiency and workability.

The Court's formalistic approach drove its analysis of §244(c)(2), but it refused to apply its formalistic reasoning to related issues. It argued that a legislative action is subject to bicameralism and presentment if it is "legislative in its character and effect."[52] It further defined the decision at issue in the case as "essentially legislative" because it "had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials, and Chadha."[53] It then applied formalist analysis, suggesting that if Congress were to take an action altering the Chadha's legal rights, such an action was essentially legislative, and Congress could only address it after following the procedures in Article I, Section 7.

The Court was selective in its formalism, because it brushed aside the obvious question: if altering Chadha's legal rights is essentially legislative, then why is the executive branch permitted to do so?[54] Defining lawmaking decisions as those which "alter[] legal rights, duties,

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[48] *Chadha*, 944.
[49] *Chadha*, 946-951.
[50] *Chadha*, 951.
[51] *Chadha*, 959.
[52] *Chadha*, 952.
[53] *Chadha*, 952.
[54] In strictness, the Court *did* consider this question in nature in a footnote dismissing the claim that such decisions are legislative, as long as agencies make them. See *Chadha*, 953-4 n. 16: "some administrative agency action – rulemaking, for example – may resemble 'lawmaking.'…Clearly, however, in the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." Since the Attorney General is part of the executive branch, the Court continued, when he "performs his duties pursuant to [the statute], he does not exercise legislative power." By contrast, a one-house veto of the Attorney General's decisions under the statute "is clearly legislative in both character and effect." Justice Kavanaugh repeated this

and relations of persons" would define much of the administrative state's functions as legislative power, implicating the nondelegation principle.

Congress pressed this question in its brief. "By the Court's own formalistic definition of 'legislative power,' Congress argued, the power to suspend deportations was just as 'legislative' as the power to veto the suspension. If the Court were set on formalism," Eric Claeys explains, "it would need to explain why the Attorney General, an executive officer, could exercise legislative power without raising nondelegation problems."[55] But the Court declined to address Congress's claim, other than to dismiss it as "only a question of delegation doctrine."[56] As Theodore Olson later observed, the Court's opinion in *Chadha* "defined 'lawmaking' by describing the activity that Congress could not perform except in the manner prescribed in the presentment clauses of the Constitution. But, curiously, in defining 'lawmaking' in that context, the Court implicitly upheld Congress' authority to delegate that power to the executive branch."[57]

Justice Powell's concurring opinion pressed a version of the separation of powers controversy. In his view, the legislative veto provision in *Chadha* was unconstitutional because it was judicial in character, not legislative. Determining that Chadha and five others should not have their deportation suspended was a "clearly adjudicatory" decision, not a legislative decision.[58] Deciding the case on this ground would, in Powell's view, potentially spare other legislative vetoes where Congress was not making adjudicatory decisions.

D. Severing Legislative Vetoes and Delegation

The *Chadha* decision prompted two separate dissenting opinions. Justice Rehnquist's brief dissent focused on severability. Rehnquist argued that Congress did not clearly intend the legislative veto provision to be severable from the suspension authority the statute granted to the Attorney General. While the statute contained a general severability clause, Rehnquist argued that such clauses only create a "presumption" in favor of severability.[59] That presumption must be tested against Congress's intent, and in this case, Rehnquist argued that "Congress was unwilling to give the Executive Branch permission to suspend deportation on its own."[60] He

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argument in the Court's most recent nondelegation decision, *Consumers' Research v. FCC*, 606 U.S. ___ (2025) (Kavanaugh, J., concurring), slip op. at 4 n.3. E. Donald Elliot remarks that this footnote "would do Lewis Carroll proud….But the exercise in semantics misses the point." Elliot, "*INS v. Chadha*: The Administrative Constitution, and the Legislative Veto," *Supreme Court Review* (1984), 146. The problem with the Court's argument is its circularity: while the Attorney General's action under the statute "resemble[s] lawmaking," it is not lawmaking because the Attorney General does not exercise legislative power but executive power. A one-house veto of that same decision, on the other hand, is clearly legislative in character and effect.

[55] Eric Claeys, "Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts," *Constitutional Commentary* 21 (2004), 427.

[56] *Chadha*, at 953-954 n.16.

[57] Olson remarks, *Panel II: Presidential Lawmaking Powers*, 68 Wash. U. L. Quart. 533 (1990), at 545.

[58] *Chadha*, 969.

[59] *Chadha*, 1013.

[60] *Chadha*, 1015.

noted that "Congress consistently rejected requests from the Executive for complete discretion in this area. Congress always insisted on retaining ultimate control….it has never been disposed to give the Executive Branch a free hand."[61] If Congress was only willing to delegate power to the executive branch in cases where it retained veto authority over specific decisions, then it would be nonsensical to sever the veto provisions from the delegation of authority, striking the former while retaining the latter.

Rehnquist's opinion seemed to offer an invitation to test the severability question in future cases. While the Court in *Chadha* ruled the veto provision to be severable from the suspension authority, future cases might involve different statutory contexts, and lead to different outcomes. The *Chadha* majority stated that the invalid statutory provisions should be severed from statutory delegations "[u]nless it is evident that the Legislature would not have enacted those provisions" without the legislative veto attached to them.[62] In the weeks following the *Chadha* decision the Court affirmed a lower court decision striking down a legislative veto in the Natural Gas Policy Act of 1978, and finding the provision severable from the statute's delegation of authority to promulgate gas pricing rules.[63] Rehnquist's invitation to test severability has largely gone ignored.[64] As one account summarizes, "courts have tended to find veto statutes severable from the remainder of the law" in cases since *Chadha* was handed down.[65]

After *Chadha* was decided, most commentators understood the majority opinion to mean that all legislative veto provisions were unconstitutional.[66] Justice Powell's concurring opinion suggested as much.[67] In a dissenting opinion, Justice White agreed that the decision "sounds the death knell for nearly 200 other statutory provisions" containing legislative vetoes, and argued that the decision "strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history."[68] White's dissent focused on the broader implications of the decision, especially if it would eventually be understood as invalidating all legislative vetoes.

Justice White's dissent chastised the majority for "the apparent sweep" of its opinion as well as its practical implications.[69] The opinion not only struck hundreds of statutory provisions

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[61] *Chadha*, 1015.
[62] *Chadha*, 932, citing *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210 (1932).
[63] *Process Gas Consumers Group v. Consumers Energy Council of America* 463 U.S. 1216 (1983).
[64] For a notable recent exception, see Chafetz, *The* Chadha *Presidency*, *supra* note X, at 4 (calling the severability portion of the *Chadha* opinion a "highly consequential, but frequently overlooked, choice."); see also Joseph Postell, Chadha*'s Mistakes and the Diminished Congress*, Civitas Outlook, Dec. 8, 2025, https://www.civitasinstitute.org/research/chadhas-mistakes-and-the-diminished-congress.
[65] Berry, *supra* note X, at 76. There are a few exceptions, which are discussed id., at 76-80.
[66] Fellows, "Congressional Oversight Through Legislative Veto," 1255-1258. However, see Louis Fisher, "The Legislative Veto: Invalidated, it Survives," *Law and Contemporary Problems* 56 (1993): 273-292.
[67] *Chadha*, 959.
[68] *Chadha*, 967, 1002. See also 974 ("The Court's Art. I analysis appears to invalidate all legislative vetoes irrespective of form or subject.").
[69] *Chadha*, 974.

unnecessarily, but also "reflect[ed] a profoundly different conception of the Constitution than that held by the courts which sanctioned the modern administrative state." The decision, in Justice White's view, would cut the administrative state off from "the body immediately responsive to the people."[70] The practical consequences of the decision would be destructive, significantly altering the relationship between Congress and the administrative state in a way that would lead to a less accountable administrative state.

However, Justice White's challenge to the majority's opinion on the merits was more muddled. He argued that the history of legislative veto provisions, which dated all the way back to the Northwest Ordinance of 1789 (enacted by the First Congress), proved that legislative vetoes were not equivalent to laws that needed to go through bicameralism and presentment.[71] Legislative vetoes, in his view, were not enacting new legislation but providing Congress with a check on enacting new legislation. The main purposes of the bicameralism and presentment requirements were to prevent Congress from enacting new laws without going through those mechanisms. Vetoes prevent laws from being enacted, but do not enact new laws. As Justice White put it, "the legislative veto no more allows one House of Congress to make law than does the Presidential veto confer such power upon the President."[72] "The power to exercise a legislative veto," Justice White maintained, "is not the power to write a new law without bicameral approval or Presidential consideration."[73] Bicameralism and presentment are necessary to make law. Legislative vetoes prevent law from being made.

Justice White also defended the legislative veto on other grounds, which were in some tension with his formalist analysis. He conceded the necessity of broad delegations of legislative power, and couched the legislative veto provisions as a necessary accommodation to the reality of modern administrative government. He accused the majority of "ignor[ing] that legislative authority is routinely delegated to the Executive Branch" and independent agencies.[74] Because the Court had sanctioned these delegations of "legislative authority," it must follow that "Art. I does not require all action with the effect of legislation to be passed as a law."[75]

In theory these delegations are supposed to merely "fill up the details," Justice White argued, but in practice "restrictions on the scope of power that could be delegated [have] diminished and all but disappeared."[76] While the "wisdom and the constitutionality of these broad delegations are matters that still have not been put to rest," as long as the Court acquiesces in them, it must follow that "legislative power can be exercised by independent agencies and

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[70] *Chadha*, 1002-1003. Internal quotations omitted. See also 972-3: "the legislative veto…is an important if not indispensable political invention that…assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking."
[71] *Chadha*, 982-984, n. 17.
[72] *Chadha*, 980.
[73] *Chadha*, 980.
[74] *Chadha*, 984.
[75] *Chadha*, 985.
[76] *Chadha*, 985.

Executive departments without the passage of new legislation."[77] In short, if the Court is willing to allow agencies to make law outside of the Article I process, then it should accept Congress making law outside of the Article I process.[78] As Justice White summarized, "*If* Congress may delegate lawmaking power to independent and Executive agencies, it is most difficult to understand Art. I as prohibiting Congress from also reserving a check on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicameral approval and without the President's signature."[79] This would represent a far more systematic evasion of bicameralism and presentment than the piecemeal interventions that legislative vetoes authorize.

Part II: Chevron, Chadha, and Congressional Intent: The Road to Presidentialism

Chadha provoked a strong initial reaction from Congress. As Part I argued, Congress tied many of its delegations of authority to the executive branch to legislative veto provisions. With the latter now shorn from those delegations, Congress's oversight of the administrative state necessarily diminished. As one commentary explained, "[t]he existing vast delegations of authority to the President, executive agencies, and independent regulatory commissions, now likely freed from congressional inhibition through the exercise of a legislative veto, *per se* seemed to call for attention from the lawmakers."[80]

Spearheading the response was Representative Elliott Levitas, the sponsor of the general legislative veto statute that Congress nearly enacted in 1976 and 1981. Levitas turned to what he called "son of legislative veto," statutory provisions that would require congressional approval before major agency rules could be enforced.[81] Levitas sponsored an amendment to the Consumer Product Safety Commission (CPSC) reauthorization bill that would require congressional approval before CPSC regulations could be enforced.[82] One senator went even

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[77] *Chadha*, 985.

[78] Justice White's argument is different from, but resembles the argument I advance in Part III – if the Court will not apply the nondelegation doctrine to police broad delegations of power to the administrative state, then it must allow Congress to make law outside of the Art. I process too. The difference between our arguments is that he explicitly defines these actions as legislative in nature, and therefore accepts other forms of legislation outside of Art. I; whereas in Part III I argue that if we define these actions as non-legislative, then the legislative veto is also not an exercise of legislative power. My argument seems better fitted to the Court's current approach to the nondelegation doctrine.

[79] *Chadha*, 986-7. Emphasis added.

[80] Michael J. Horan, *Of Train Wrecks, Time Bombs, and Skinned Cats: The Congressional Response to the Fall of the Legislative Veto*, 13 J. Leg. 22 (1986), 23-4.

[81] Elliott H. Levitas and Stanley M. Brand, *The Post Legislative Veto Response: A Call to Congressional Arms*, 12 Hof. L. Rev. 593 (1984), at 614. See also Levitas and Brand, *Congressional Review of Executive and Agency Actions After* Chadha*: "The Son of Legislative Veto" Lives On*, 72 Geo. L. J. 801 (1983).

[82] Horan, *supra* note X, at 29.

further and proposed a constitutional amendment that would authorize the use of legislative veto provisions.[83]

Congress's reply to *Chadha*, however, ran headlong into the emerging "presidentialist" school of administrative law, which applauded the Court's ruling. Prominent officials in the Reagan Administration supported the *Chadha* decision for curtailing the "imperial Congress" and its attempts to seize control of the administrative state.[84] Theodore Olson, then-Assistant Attorney General in the Office of Legal Counsel, applauded the decision as "a timely halt to a gradual but major erosion of presidential authority" that had taken place in previous decades, "an erosion threatening the balance of power between the two branches of our national government so carefully structured in Philadelphia in 1787."[85] Representative Levitas approached the Reagan Administration about holding a "conference on power-sharing" to discuss the different means of control over the administrative state possessed by the legislative and executive branches. John Roberts, then an associate with the White House Counsel, treated Levitas's proposal with scorn: "There already has, of course, been a 'Conference on Power Sharing.' It took place in Philadelphia's Constitutional Hall in 1787, and someone should tell Levitas about it."[86] Although candidate Ronald Reagan endorsed the legislative veto on the campaign trail, he tended to oppose the legislative veto as President and vowed to implement statutes consistent with the *Chadha* decision after it was handed down.[87] In sum, *Chadha* dovetailed nicely with the Reagan Administration's broader efforts to enhance presidential control over the administrative state and reduce congressional interference.

With *Chadha* in the rear view, the focus of interbranch relations shifted to statutory interpretation. A year after the Court decided *Chadha*, it handed down its landmark decision in *Chevron v. NRDC*.[88] The emergence of the *Chevron* doctrine was a natural progression from the Court's invalidation of the legislative veto in *Chadha*.

Chevron, as most readers will recall, involved the Environmental Protection Agency's definition of a statutory term in the Clean Air Act: "stationary source." The EPA promulgated a rule to "adopt a plantwide definition of the term," often referred to as the "bubble concept," which treated all of the sources of pollution from a single facility as a single "stationary source" rather than multiple sources, as if all of the sources were under a single bubble.[89]

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[83] Berry, *supra* note X, at 83.
[84] For "imperial Congress," see Gordon S. Jones and John Marini, THE IMPERIAL CONGRESS: CRISIS IN THE SEPARATION OF POWERS (1989).
[85] Theodore Olson, *After the Legislative Veto: Restoring the Separation of Powers*, Regulation 19 (1983), at 19.
[86] John G. Roberts Memorandum to Fred F. Fielding, August 4, 1983, in John G. Roberts Files, Box 31, Folder 5 of 6, "JGR/Legislative Veto," p. 41,
[87] Berry, *supra* note X, at 13, 85.
[88] 467 U.S. 837 (1984).
[89]

The Court upheld the rule's interpretation of "stationary source" after laying out a now-famous two-step test:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter….If, however, the court determines Congress has not directly addressed the precise question at issue….the question for the court is whether the agency's answer is based on a permissible construction of the statute.[90]

It is not clear that the Court was attempting to stake out a new test for judicial review of agencies' interpretations of law,[91] but the *Chevron* doctrine quickly took on life in the D.C. Circuit Court of Appeals and became one of the most controversial doctrines in American law. Especially vexing for the administrative state's critics was the doctrine's contention that agencies should receive deference from courts when interpreting law, given that the interpretation of law is frequently believed to be "the proper and peculiar province of the courts."[92]

Although the Court in *Chevron* advanced a number of arguments in favor of the proposition that courts should defer to reasonable interpretations of ambiguous statutes, the role of congressional intent was central to the Court's reasoning. The Court noted that statutes contain both explicit and implicit delegations of authority to interpret statutory provisions.[93] Whether the delegation is explicit or implicit, however, according to *Chevron* "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by an administrator of an agency."[94] Statutory ambiguities, the Court asserted in *Chevron*, indicated that Congress "did not have a specific intention" with respect to an issue, and thus implicitly intended for the agency to which authority was delegated to settle the matter.[95]

In other words, a statutory ambiguity, though it indicated a lack of clear congressional intent, was itself an indication of congressional intent to hand the matter over to the agency. The Court acknowledged that the ambiguity at issue in *Chevron* itself may indicate congressional intent to give the Administrator authority to define "stationary source," or it may simply have resulted from the inability of Congress "to forge a coalition on either side of the question."[96] All of the possible explanations for a statutory ambiguity, the Court suggested, were compatible with the implicit delegation theory of congressional intent.

In the voluminous commentary spawned by the emergence of the *Chevron* doctrine, congressional intent took center stage as a justification for the doctrine. For instance, Thomas

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91 See Gary S. Lawson and Stephen Kam, *Making Law Out of Nothing At All: The Origins of the* Chevron *Doctrine*, 65 Admin. L. Rev. 1 (2013).

92 *Federalist* no. 78

93 *Chevron*, 467 U.S. at 843-844.

94 *Chevron*, 467 U.S. at 844.

95 *Chevron*, 467 U.S. at 845.

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

Merrill and Kristin Hickman's landmark commentary on *Chevron* explained that both "*Chevron* itself and most post-*Chevron* decisions describe the doctrine as flowing from the implicit instructions of Congress."[97] They conclude that while "*Chevron's* attribution of a general intention to Congress that agencies be the front-line interpreters of regulatory statutes has been described even by its strongest defender as 'fictional'…the congressional-intent theory is the best of the three explanations for the legal foundation of *Chevron* deference."[98] Other scholars have similarly concluded that the doctrine was ultimately (if not originally) based on congressional intent.[99] While there were traces of other arguments for *Chevron* (such as expertise and accountability) in the Court's original opinion, and legal commentaries offered alternative grounds for the doctrine, the Court seemed most willing to endorse the notion that statutory ambiguity was an indication of congressional intent to hand the matter off to the agency for resolution. Ultimately, the Court itself endorsed congressional intent as the basis for the *Chevron* doctrine in subsequent cases.[100]

In short, the Court eventually came to ground the *Chevron* doctrine in a theory of congressional intent. This theory claimed that statutory ambiguities constituted indications of an implicit congressional intent that agencies have interpretive authority to resolve those ambiguities.[101] It would be impossible to maintain such a theory prior to the Court's decision in *Chadha*, for the simple reason that many statutory ambiguities were coupled with legislative veto provisions in which *Congress*, not the agencies or the courts, would resolve ambiguities by reviewing and reversing agencies' implementation of statutes. Without *Chadha*, *Chevron*'s theory of congressional intent could not be credibly maintained.

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[97] Thomas W. Merrill and Kristin Hickman, Chevron'*s Domain*, 869.

[98] Merrill and Hickman, *supra* note X, at 871-2.

[99] See, for instance, Abbe R. Gluck, *What 30 Years of* Chevron *Teach us About the Rest of Statutory Interpretation*, 83 Fordham L. Rev. 607, 620 ("It is true that *Chevron*…initially rested on a variety of not necessarily consistent normative bases….One way to understand the march from *Chevron* to *Mead* is as an evolution from a broad and ambiguously justified approach to delegation to one focused on *one* particular justification – congressional intent to delegate."); Jacob E. Gersen and Adrian Vermeule, *Delegating to Enemies*, 112 Col. L. Rev. 2193, 2233-4 ("In *United States v. Mead*, the Supreme Court clarified that the *Chevron* doctrine rests on Congress's implicit delegation of law-making authority to agencies. This view does not necessarily derive from the original *Chevron* decision.")

[100] See especially *U.S. v. Mead Corp.,* 533 U.S. 218 (2001), at 229-30. Justice Scalia, the doctrine's most stalwart defender, explicitly grounded *Chevron* in a theory about congressional intent. See *Mead*, at 241 (Scalia, J., dissenting) ("The doctrine of *Chevron*…was rooted in a legal presumption of congressional intent."); Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511 (1989), at 516 ("The extent to which courts should defer to agency interpretations of law is ultimately a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue." Internal citations omitted.)

[101] The Court acknowledged this eventual grounding of the *Chevron* doctrine in congressional intent in *Loper*. See slip. op. at 20: In the years after *Chevron* was handed down the Court "revisited the doctrine's justifications. Eventually, the Court decided that *Chevron* rested on a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency." (Internal citations omitted.)

The difficulty, as discussed in Part I of this article, is that the theory of congressional intent was a fiction, at least with respect to regulatory statutes written before *Chadha* was handed down. Prior to *Chadha*, statutory ambiguities were not necessarily implicit delegations of interpretive authority to agencies. Many were assignments of initial authority to agencies, subject to congressional approval.

Chevron and *Chadha* thus worked together to promote a weakening of Congress and an emerging presidentialism that was at odds with, rather than in accordance with, congressional intent. It also led to a rise in judicial review of statutory interpretation. Without Congress standing ready to review agencies' statutory implementation, courts eventually stepped in to address cases involving contested statutory provisions. One problem with this development, which led eventually to *Loper Bright*, was that it treated much of agency discretion as statutory interpretation, rather than exercises of discretionary authority.

Part III: *Loper,* Delegation, and Statutory Interpretation

Chevron eventually became known as a landmark decision because of the growth of controversies raising questions of statutory interpretation. A full account of this development would necessitate a separate article (or series of articles). In short, in the decades following its creation the *Chevron* doctrine was applied to a host of controversial questions involving agencies implementing broadly-worded statutes, where the meaning of the statutory provision was deemed to be the central dispute.

In putting an end to *Chevron*, the Court's opinion in *Loper* suggested that many *Chevron* cases could be reconceptualized not as statutory interpretation cases, but as cases involving delegation of discretionary authority to agencies. In such cases, the ambiguity of the law means that there is no real law to interpret. But in reframing some cases this way, the Court indicated its acceptance of congressional delegation. This Part argues that the Court's acceptance allows for a reconsideration of the holding in *Chadha*.

A. Loper *and Delegation*

The baseline holding of the Court's decision in *Loper* is that *Chevron* deference "cannot be squared with the APA [Administrative Procedure Act]."[102] Consequently, the Court held that "*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."[103] The Court's formulation is curious: historically, the issue in *Chevron* cases was not "whether an agency has acted within its statutory authority" but whether the agency's interpretation of an ambiguous statutory provision was reasonable. The Court's reformulation pivots from questions of statutory interpretation to *ultra vires* controversies about the limits of delegated authority.

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[102] *Loper*, slip op at 18.
[103] *Loper*, slip op at 35.

The question of delegated authority was central to the Court's discussion in two paragraphs that instantly became the focus of scholarly attention. After asserting its central holding, namely that "The APA…incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions,"[104] the Court announced a caveat: sometimes statutory provisions themselves have no meaning, other than to transfer authority to agencies.

As the Court explained, "In a case involving an agency…the statute's meaning may well be that the agency is authorized to exercise a degree of discretion."[105] The Court offered examples of such statutes, which often contain vague terms or phrases that grant flexibility, such as "appropriate," or "reasonable."[106] In these cases, the Court asserted, the task is not to interpret the statute to discern its meaning, but to acknowledge that it delegates authority to the agency: "When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring that the agency has engaged in reasoned decisionmaking within those boundaries."[107]

In other words, the Court's decision in *Loper* accepted that vague statutory terms create controversies that are not really about statutory interpretation. Instead, those cases involve delegations of authority to agencies to exercise discretion. As long as the delegation is constitutional, the court's job is not to construe the statute but to ensure that the agency has not acted beyond its delegated authority, and has also acted reasonably. In administrative law parlance, the Court seems to be signaling that many *Chevron* cases should have been considered not as matters of legal construction subject to *Chevron* review, but rather matters of agency discretion subject to "arbitrary and capricious" or "hard look" review.

B. Chevron's *Unsustainability*

This reading of the opinion helps to explain the Court's curious formulation about its holding that "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."[108] The Court's acceptance of delegation led it to conclude that most of the issues it historically confronted under *Chevron* were not about the meaning of statutes, but involved vague statutes that had no meaning other than to delegate authority to an agency.

Chevron proved unsustainable for several reasons, but this was one of the most significant. *Chevron*'s grounding in congressional intent led to deviations from the doctrine in

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[104] *Loper*, slip op at 16.
[105] *Loper*, slip op at 17.
[106] *Loper*, slip op at 17.
[107] *Loper*, slip op at 17-18. Internal citations omitted.
[108] *Loper*, slip op at 35.

cases where it seemed commonsensical that Congress could not have intended the agency to receive deference.[109] As the Court put it in *Loper*, "*Chevron's* justifying presumption [of congressional intent] is, as Members of this Court have often recognized, a fiction. So we have spent the better part of four decades imposing one limitation on *Chevron* after another, pruning its presumption on the understanding that where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is inapplicable."[110] A Court seemingly committed to textualism also constructed doctrines and exceptions to doctrines when applying textualism literally seemed at odds with what Congress intended.[111] It also confronted questions about how to discern Congress's intent, whether a multitudinous body such as Congress can even have such an intent, and whose intent matters.[112] This morass proved increasingly difficult for courts to navigate. At the same time, opposition to *Chevron* as a matter of principle continued to increase, and eventually the doctrine met its demise.[113]

But the Court's *Chevron* jurisprudence proved unsustainable not only because of its questionable presumption about congressional intent. It was also unsustainable because the doctrine was applied to cases that were not really about statutory interpretation. The statutes at issue were sufficiently vague that it was impossible to discern a clear or reasonable interpretation and use it to cabin the agency's discretion. In fact, the issues being adjudicated under *Chevron* were really about the policy choices being made by the agencies, in the exercise of discretion Congress afforded them through the statute.

To illustrate, consider the following analogy. My spouse and I enter into an agreement with a financial advisor to open and manage retirement accounts on our behalf. We authorize the advisor to move money to and from various mutual funds in order to "maximize the return" on

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[109] Cite all of the "Step Zero" and *King v. Burwell* exceptions.

[110] *Loper*, slip op at 26-7. See also slip op at 29, referring to "*Chevron's* fictional presumption of congressional intent."

[111] Cite the Major Questions doctrine cases and scholarship

[112] These questions have been especially prominent in the "major questions" doctrine cases, and have been the subject of a relatively vast literature. For a sample see Ryan Doerfler, "Who Cares How Congress Really Works?" *Duke Law Journal* 66 (2017): 979-1044; Beau J. Baumann, "Americana Administrative Law," *Georgetown Law Journal* 111 (2023): 465-527; Brian D. Feinstein, "Congress is an It: A New View of Legislative History," *Emory Law Journal* 73 (2024): 1317-1389; Jesse M. Cross, "Disaggregating Legislative Intent," *Fordham Law Review* 90 (2022): 2221-2268; Joseph Postell, "Does the Major Questions Doctrine Get Congress Right?" *Harvard Journal of Law and Public Policy Per Curiam* 15 (2024). Much of this dispute responds to a landmark article by Kenneth Shepsle, "Congress is a 'They,' Not an 'It': Legislative Intent as Oxymoron," *International Review of Law and Economics* 12 (1992): 239-256.

[113] Opposition to *Chevron* was mounting well before the doctrine was overturned. For a sampling of the opposition, see Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overturned*, 42 Conn. L. Rev. 779 (2010); Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. rev. 1187 (2016). Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2016), argued that *Chevron* was inconsistent with Section 706 of the APA, a position the Court ultimately adopted in *Loper Bright*. For a helpful overview, see Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 Georgetown J. L. P. P. 103 (2018).

our investment with an "adequate margin of safety" to protect us from potential losses. Our advisor makes a series of risky trades, and we lose a significant amount of money.

It would be tempting in this situation for us to throw the agreement in our advisor's face and say that he misinterpreted "adequate margin of safety," and for our advisor to reply that he was mandated to "maximize the return" on our investments. But in fact, our disagreement is not about the meaning of these terms. Those terms grant wide authority and discretion to the advisor to manage our funds. Our disagreement is actually about whether the advisor exercised his discretionary authority reasonably.

In other words, the case is not about how to interpret the legal document that authorized and defined the agent's authority, but about the exercise of discretionary authority. It is about the agent's policy choice.[114] *Chevron* treated these kinds of disputes as if they were disputes about interpreting the legal document that authorized and defined agency authority, as opposed to disputes about the exercise of discretionary authority.

A few examples illustrate this general trend. Take the Court's decision in *Gonzales v. Oregon*, a 2006 decision involving the Controlled Substances Act.[115] The Act mandated that certain substances could only be made available by a written, nonrefillable prescription by a physician. and such physicians were required to register with the Attorney General. The Attorney General was authorized to deny, suspend, or revoke a physician's registration if that physician's registration would be "inconsistent with the public interest."[116]

In 2001, in response to the legalization of assisted suicide in the State of Oregon, the Attorney General issued an interpretive rule declaring that the use of controlled substances to assist suicide is unlawful and could render a physician's registration inconsistent with the public interest.[117] The Court invalidated the interpretive rule on a number of grounds, including the notion that the rule was not entitled to *Chevron* deference because Congress had not actually given the Attorney General authority to make rules affecting a controversial practice authorized by state law. Both the majority and the dissent in *Gonzales* conducted painstaking analysis of statutory minutiae to determine whether the statute authorized *Chevron* deference, and whether the Attorney General's application of the phrase "public interest" was reasonable. Both the majority and the dissent treated the case as if it were about the meaning of "inconsistent with the public interest," when in fact the case was about whether the Attorney General had reasonably exercised his discretionary authority.

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[114] For similar arguments, see Nicholas R. Bednar and Kristin E. Hickman, "*Chevron*'s Inevitability," George Washington Law Review 85 (2017), 1398; and Kenneth A. Bamberger and Peter L. Strauss, "*Chevron*'s Two Steps," Virginia Law Review 95 (2009), 617.

[115] 546 U.S. 243 (2006).

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[117] 66 Fed. Reg. 56608 (2001).

A similar thing happened in *Michigan v. EPA*, a controversial 2015 decision involving regulation of hazardous emissions from power plants.[118] In *Michigan,* the Court determined that the EPA had unreasonably read a Clean Air Act provision directing the agency to regulate such emissions if, after performing a study, "regulation is appropriate and necessary."[119] The EPA interpreted this provision as authorizing it to ignore costs of regulation when determining whether "regulation is appropriate and necessary." In reversing the agency, once again after painstaking analysis of the statute, the Court concluded that "EPA strayed far beyond those bounds [of reasonable interpretation] when it read [the statute] to mean that it could ignore cost when deciding to regulate power plants."[120] As in *Gonzales*, the statute granted broad discretion through the use of a vague statutory command to regulate if doing so was "appropriate and necessary." The Court treated the issue as if it raised a question of statutory interpretation: the meaning of "appropriate and necessary," when in fact that phrase had no meaning other than to grant discretion to the agency. What the Court was actually concluding was that the agency's exercise of its discretion was unreasonable – not that the statute did not authorize the discretion in the first place.

C. The Opening to Revisit Chadha

In these cases and others, the Court treated questions involving vague statutory provisions as questions of statutory interpretation, governed by *Chevron*, rather than as questions about whether an agency had exercised discretion reasonably. This approach embroiled *Chevron* in a host of controversies that were not actually about statutory meaning. For a time, the Court attempted to compensate for this by carving out exceptions to *Chevron*, but still treating the issues as matters of statutory interpretation. *Loper* and its famous paragraphs seem to have finally corrected this mistake that led to *Chevron*'s unsustainability.[121] After *Loper*, courts will independently construe statutes without deferring to agencies' interpretations of those statutes, but it will also frequently be the case that the statute will be sufficiently ambiguous as to constitute a delegation of discretionary authority to the agency.

Seen in this light, *Chevron*'s connection to *Chadha* becomes clear. Prior to *Chadha*, if an agency pursued a policy that was at odds with Congress's intent, the primary control was Congress itself, through the legislative veto. Once *Chadha* swept aside that mechanism, the primary method for changing administrative policy (other than a change in administration) was to get a reviewing court to determine that it was contrary to the statute (or some other legal requirement).

The *Chadha* opinion advanced this very argument. The Court explained that judicial review stands ready to ensure that agencies follow the will of Congress, as solace to those who

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[118] 576 U.S. 743 (2015).

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[121] See the quote from *Loper* cited above in Part III.B.

thought legislative vetoes were necessary for that purpose. As the Court put it, "Executive action under legislatively delegated authority…is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely."[122] If agencies step outside of the bounds of Congress's intent, the courts will be there to enforce adherence to regulatory statutes. This led to a rise in litigation over whether agencies violated the statutes which they administered. *Chevron* offered a simple test to deal with such cases.

One could read the Court's opinion in *Loper* as an endorsement of this view, as Gary Lawson, Christopher Walker, and Adrian Vermeule have argued.[123] Under *Chevron*, statutory ambiguity was treated as an indication of congressional intent to delegate interpretive authority to the agency. Without *Chevron*, courts will have to (per *Loper*) construe statutes using their "independent judgment."[124] That independent judgment will in many cases conclude that the agency has discretion to carry out the statute, and that the agency's action should be reviewed not as an interpretation of law, but as an exercise of policy discretion.[125] As Professor Lawson notes, "[t]his issue drew a great deal of attention during the oral argument in *Relentless v. Raimondo*."[126] As Vermeule explains, this is "an enormous…loophole, through which most if not all of the *Chevron* regime can easily fit."[127]

The foregoing suggests that *Chevron*'s demise will shift the focus from agencies' legal interpretations to agencies' exercises of discretion, but that the degree of deference afforded to agencies will change very little. But this paves the way for a more significant implication of *Chevron*'s demise. Now that authorizing statutes are likely to be read as granting discretion to agencies, courts will need to confront the tension in *Chadha*. The next part of this article

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[122] *Chadha*, 954 n. 16.

[123] Gary S. Lawson, *"Then What?": A Framework For Life Without* Chevron, 60 Wake Forest L. Rev. 57 (2025), 85-95; Christopher Walker, "A World Without Chevron?" *Law and Liberty*, May 22, 2024, https://lawliberty.org/forum/a-world-without-chevron/; Adrian Vermeule, "*Chevron* By Any Other Name," *The New Digest*, June 28, 2024, https://thenewdigest.substack.com/p/chevron-by-any-other-name.

[124] See, for instance, the slip. op. at 16, 29, and 35.

[125] As Walker explains, under the *Loper* approach "courts will conclude that the best interpretation of many statutory provisions is that Congress delegated policymaking authority to the agency to implement the broad statutory directive…And the inquiry turns from statutory interpretation to APA arbitrary and capricious review." Walker, "What *Loper Bright Enterprises v. Raimondo* Means for the Future of *Chevron* Deference," *Notice & Comment*, June 28, 2024, https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/.

[126] Lawson, *supra* note X, at 93.

[127] Vermeule, "*Chevron* By Any Other Name." Professor Lawson concurs: "a potential consequence of *Loper Bright/Relentless* is to encourage litigants and judges to slot at least some cases that previously would have wound up as "*Chevron* cases" into the world of hard-look review of policymaking," and thus "*Loper Bright/Relentless* will change relatively few case outcomes, though it might change the way those outcomes are explained." Lawson, *supra* note X, at 94. The exceptions would involve cases where an agency is allegedly exercising discretion in excess of what the statute authorized, and is *ultra vires*. Those cases would still revolve around the meaning of statutory terms. Once that question is settled, as it would be for most statutes that contain broad delegations, review would shift to whether the agency exercised its discretion consistent with Section 706 of the APA.

describes that tension. In short, either these statutes delegate legislative power to agencies, in violation of the nondelegation doctrine, or they grant non-legislative power to agencies, in which case legislative vetoes are not exercises of legislative power subject to bicameralism and presentment.

Part IV: What is a Legislative Veto?

To summarize: after a period of intense controversy around the legitimacy of the administrative state, particularly the nondelegation doctrine, Congress and the courts eventually accepted its existence and sought to keep it accountable. The legislative veto was a chief method of obtaining this accountability. The decline of the nondelegation doctrine presupposed that agency actions were non-legislative. But if that's the case, then legislative vetoes are not exercises of legislative power. The demise of the legislative veto post-*Chadha* increased pressure on the courts to resolve controversies over agency decisions. In the *Chevron* era, the Court attempted unsuccessfully to manage these controversies as matters of statutory interpretation, in a post-nondelegation world where statutes routinely lacked discernible meaning. In *Loper*, the Court potentially signaled a shift towards treating these controversies as committed to agency discretion.

This casts new light on the Court's reasoning in *Chadha*. The *Chadha* majority argued that legislative vetoes were exercises of legislative power because they altered legal rights, duties, and relations of persons.[128] But the Court's current approach to the nondelegation doctrine presumes that many decisions of this nature are not legislative, and therefore Congress can authorize administrative agencies to make them. Nor, potentially under *Loper*, are controversies surrounding these decisions matters of statutory interpretation. The law runs out and thus there is nothing to interpret. The decisions are exercises of agency discretion, legitimately transferred to agencies under the current application of the nondelegation doctrine. If Congress were to enact resolutions addressing those controversies, through either one or both chambers, it would not be exercising legislative power.[129] Thus, contrary to the Court's

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[128] In strictness, the Court rejected the claim that agency decisions were legislative in nature in a footnote. See *Chadha*, 953-4 n. 16: "some administrative agency action – rulemaking, for example – may resemble 'lawmaking.'…Clearly, however, in the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." Since the Attorney General is part of the executive branch, the Court continued, when he "performs his duties pursuant to [the statute], he does not exercise legislative power." By contrast, a one-house veto of the Attorney General's decisions under the statute "is clearly legislative in both character and effect." E. Donald Elliot remarks that this footnote "would do Lewis Carroll proud….But the exercise in semantics misses the point." Elliot, "*INS v. Chadha*: The Administrative Constitution, and the Legislative Veto," *Supreme Court Review* (1984), 146. The problem with the Court's argument is its circularity: while the Attorney General's action under the statute "resemble[s] lawmaking," it is not lawmaking because the Attorney General does not exercise legislative power but executive power. A one-house veto of that same decision, on the other hand, is clearly legislative in character and effect.

[129] See Antonin Scalia, "The Legislative Veto: A False Remedy for System Overload," *Regulation* 3 (1979), 20: "The validity of the legislative veto, then, turns quite simply upon whether it in reality constitutes lawmaking." While then-Professor Scalia rightly identified the crux of the issue, he disagreed with the analysis I offer in this article: "I think it is difficult to maintain that it does not [constitute lawmaking]."

contention in *Chadha*, those resolutions would not need to satisfy bicameralism and presentment requirements.

This raises two relatively obvious questions: what *are* such resolutions, if they are not legislative? And is Congress violating the separation of powers by exercising another branch's authority when it enacts such resolutions?

The distinction between interpretation and construction may offer a way through this problem. As Lawrence Solum and Cass Sunstein explain, statutory interpretation "calls for discerning the meaning of a statute," understood as the "linguistic meaning of the statute in context."[130] Statutory construction is different; it "calls for determining the legal effect of the statute, through implementation rules, specification, and other devices."[131] Solum and Sunstein argue that in the *Chevron* decision itself, the dispute over the meaning of the term "source" in the Clean Air Act was not a dispute about "the linguistic meaning of the word" but rather the implementation or construction of that term in the controversy over the bubble concept.[132] Statutes frequently create "construction zones" where the law "is vague or open-ended."[133]

In other words, one way to understand agency rules and implementation decisions is to treat them as constructions of statutes, rather than interpretations of statutes. This would enable courts to maintain the premise that such decisions are not legislative in nature, so that the nondelegation doctrine is not implicated. The decisions operate in a space between legislating and ministerial execution of law. But if that is true, then Congress can also address questions of construction without enacting new law through bicameralism and presentment.

Similarly, Ilan Wurman has argued that "although the [*Chevron*] doctrine treats agency implementations of statutes as interpretation, something else is in fact going on….a kind of interstitial lawmaking, gap-filling, policymaking power" which he calls "the specification power."[134] Wurman agrees with Solum and Sunstein that in the cases governed by *Chevron* the issues were not really about the interpretation of law, but were about something like construction or specification of the law. Specification cannot be challenged as a matter of legal interpretation. It is a discretionary act. But it is also not a lawmaking act according to the current application of the nondelegation doctrine. Thus it can be done by agencies that stand outside of Article I, but it can also be done by Congress itself, without making new law through the Article I, Section 7 process.

Part V: Resurrected Legislative Veto: Resurrected Congress?

The legislative veto is legally defensible under the theory, advanced in this article, that courts will not treat agency implementation of statutes as delegations of legislative power, and

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[130] Solum and Sunstein, "*Chevron* as Construction," *Cornell Law Review* 105 (2020), 1468 and n.15.
[131] Solum and Sunstein, "*Chevron* as Construction," 1468.
[132] Solum and Sunstein, "*Chevron* as Construction," 1469.
[133] Solum and Sunstein, "*Chevron* as Construction," 1470.
[134] Ilan Wurman, "The Specification Power," *University of Pennsylvania Law Review* 168 (2020), 693.

therefore Congress can veto such implementations without exercising legislative power itself. It is also normatively defensible as a means of restoring the administrative state's accountability to Congress.

Congress was not designed to be a responsive, majoritarian institution capable of acting collectively. It is well known that the Constitution's Framers feared legislative tyranny and majority tyranny, and these fears were central in their approach to designing Congress.[135] As James Madison famously proclaimed in *Federalist* no. 51, "In republican government, the legislative authority necessarily predominates." By extending the territory of the country, dividing representation into single-member districts, and dividing the legislative power into two houses, the Framers established high barriers for legislation. The arduous task of building a legislative coalition across the multiplicity of local interests and diverse constituencies making up the House and Senate would prevent majority factions from dominating Congress and avoid mutable legislation.

In the present day there are concerns that the Framers' solution to the problem of legislative dominance was *too* effective. The number of "vetogates," including committee checkpoints and the filibuster in the Senate, make it far easier for minorities to prevent the passage of new legislation responding to new problems.[136] All of these factors make it "hard for Congress to find its voice."[137]

Congress was willing to delegate legislative powers throughout the twentieth century in part because it retained the tools to ensure it would remain in the driver's seat. Members engaged in considerable hand-wringing in the decades leading up to the passage of the Administrative Procedure Act, concerned about the potential inevitability of congressional decline and presidential dominance in a modern age.[138] Over time, Congress organized itself to better manage and oversee the administrative state it created, and created fiscal and other oversight tools to ensure the bureaucracy's responsiveness to its priorities.

Many of these tools – reauthorization, appropriation, and oversight – remain in place, but in much weaker forms today than several decades ago.[139] The legislative veto was another important tool. The Court's invalidation of the legislative veto in *Chadha* has "contribut[ed] to unbalanced governance" and "systematically revers[ed] congressional expectations that were

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[135] For the classic statements, see *The Federalist*, no. 10, 48, and 51.

[136] Eskridge and Ferejohn, "The Article I, Section 7 Game," *Georgetown Law Journal* 80 (1992): 523-564; Eskridge, "Vetogates, *Chevron*, Preemption," *Notre Dame Law Review* 83 (2008): 1441-1494.

[137] Bruhl, "Supreme Court Review Act," 1.

[138] See the debates over the enactment of the Legislative Reorganization Act of 1946, as well as the lesser-known report of the American Political Science Association Committee on Congress in the 1940s. See Sundquist, *Decline and Resurgence of Congress*, and Daniel Stid, "Two Pathways for Congressional Reform," in *Is Congress Broken*?

[139] Joshua Chafetz, Congress's Constitution: Legislative Authority and the Separation of Powers (2012). Chafetz argues that (as of 2012) these tools are still quite robust, contrary to my contention here. We agree on what those tools are, in spite of our disagreement about their present effectiveness.

necessary parts of dozens and perhaps hundreds of statutory deals in the last several decades."[140] As Stanley Brand, the general counsel to the House of Representatives, put it when *Chadha* was handed down, it "took the Court 18 months to screw up what it took Congress 50 years to set up."[141] Congress was willing to delegate through vague statutory provisions because it expected that it would be able to oversee agency decisions without going through the onerous process the Constitution requires for legislative enactments. The existence of the legislative veto, even if not frequently employed, was arguably sufficient to induce agencies to consult members periodically before initiating decisions implementing statutes.[142]

This concern was lurking in the opinions in *Learning Resources v. Trump*, the tariff decision handed down by the Court in February 2026.[143] Like many laws enacted at that time, the statute at issue in *Learning Resources* (the International Emergency Economic Powers Act or IEEPA), contained a legislative veto when it was enacted in 1977. Post-*Chadha*, however, this legislative veto is no longer part of the statutory scheme. Justice Gorsuch's concurring opinion implicitly relied on the absence of a legislative veto provision:

> Another feature of our separation of powers makes the major questions doctrine especially salient. When a private agent oversteps, a principal may fix that problem prospectively by withdrawing the agent's authority. Under our Constitution, the remedy is not so simple. Once this Court reads a doubtful statute as granting the executive branch a given power, that power may prove almost impossible for Congress to retrieve. Any President keen on his own authority (and, again, what President isn't?) will have a strong incentive to veto legislation aimed at returning the power to Congress. Perhaps Congress can use other tools, including its appropriation authority, to influence how the President exercises his new power. Maybe Congress can sometimes even leverage those tools to induce the President to withhold a veto. But retrieving a lost power is no easy business in our constitutional order. And without doctrines like major questions, our system of separated powers and checks-and-balances threatens to give way to the continual and permanent accretion of power in the hands of one man. That is no recipe for a republic.[144]

For Justice Gorsuch, the major questions doctrine was necessary to empower Congress because of the numerous checks that the Constitution places on Congress's collective action. When Congress passes a statute, the executive can capitalize on ambiguities in the statute to authorize actions Congress did not intend to grant. If Congress has to act affirmatively, with the

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[140] William J. Eskridge, Jr. and John Ferejohn, "The Article I, Section 7 Game," *Georgetown Law Journal* 80 (1992), 563.
[141] Quoted in Horan, *supra* note X, at 29.
[142] Elliott, "*INS v. Chadha*," 150-154.
[143] 607 U.S. ___ (2026).
[144] *Learning Resources v. Trump,* J. Gorsuch, concurring, slip op. at 17.

President's consent, to reverse those actions, it will be easier to lock in the status quo by merely blocking congressional action that is difficult to complete.

Justice Gorsuch did not specifically mention *Chadha*, but his argument hinged on the absence of the legislative veto; if *Chadha* had not invalidated IEEPA's legislative veto, it would have been a relatively "easy business" for Congress to "retriev[e]" its "lost power." Justice Kavanaugh's dissenting opinion in *Learning Resources* emphasized Congress's "tools to limit the President's tariffs" through the use of appropriations or "directly via new legislation." Thus Justice Kavanaugh rejected Justice Gorsuch's claim that "both Houses of Congress would need to pass new legislation over a Presidential veto in order to limit these IEEPA tariffs."[145] Justice Kavanaugh was implicitly acknowledging the desirability of Congress acting outside of the legislative process to limit the President's power to issue tariffs, though he did not discuss the legislative veto as the most obvious tool that would strengthen Congress's hand.

Political scientists observed that Congress was in a state of "resurgence" by the end of the 1970s, as it responded vigorously to the Nixon presidency by reclaiming many of the powers it had ceded to the executive. However, *Chadha* played a role in stemming this resurgence, and *Chevron* added another powerful barrier to Congress's ability to limit the executive. While no single reform, including the legislative veto, will fix all of the problems ailing Congress in the 21st Century, resurrecting the legislative veto in the wake of *Chevron* would not only restore some coherence to the law surrounding delegation, but also reconnect Congress and the administrative state in a way that would promote accountability.

Conclusion

To summarize: after a period of intense controversy around the legitimacy of the administrative state, particularly the nondelegation doctrine, Congress and the courts eventually accepted its existence and sought to keep it accountable. The legislative veto was a chief method of obtaining this accountability. The decline of the nondelegation doctrine presupposed that agency actions were non-legislative. But if that's the case, then legislative vetoes are not exercises of legislative power. The demise of the legislative veto post-*Chadha* increased pressure on the courts to resolve controversies over agency decisions. In the *Chevron* era, the Court attempted unsuccessfully to manage these controversies as matters of statutory interpretation, in a post-nondelegation world where statutes routinely lacked discernible meaning. In *Loper*, the Court potentially signaled a retreat, and a shift towards treating these controversies as committed to agency discretion.

The majority in *Chadha* argued that legislative vetoes were exercises of legislative power because they altered legal rights, duties, and relations of persons.[146] But the Court's current

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[145] *Learning Resources v. Trump*, J. Kavanaugh, dissenting, slip op. at 9.

[146] To be fair, the Court addressed and rejected the claim that agency decisions that alter the legal rights and duties of persons amounted to lawmaking in a footnote. See *Chadha*, 953-4 n. 16. The Court replied: "some administrative agency action – rulemaking, for example – may resemble 'lawmaking.'…Clearly, however, in the

approach to the nondelegation doctrine presumes that many decisions of this nature are not legislative, and therefore Congress can authorize administrative agencies to make them. Nor, potentially under *Loper*, are controversies surrounding these decisions matters of statutory interpretation. The law runs out and thus there is nothing to interpret. The decisions are exercises of agency discretion, legitimately transferred to agencies under the current application of the nondelegation doctrine.

The implication of the Court's nondelegation jurisprudence and *Loper* is that if Congress were to enact resolutions reversing agency decisions, through either one or both chambers, it would not be exercising legislative power.[147] Thus, contrary to the Court's contention in *Chadha*, those resolutions would not need to satisfy bicameralism and presentment requirements.

There is lengthy historical precedent for this understanding. In 1896 the Senate Judiciary Committee published a report on the subject of joint and concurrent resolutions. The latter are not subject to the Constitution's presentment requirement. The Committee report attempted to distinguish matters that needed to satisfy presentment from those that do not. In the Committee's view, the question turned "not upon [an action's] mere form, but upon the fact whether they contain matter which is properly to be regarded as legislative in its character and effect….In brief, the nature of the substance of the question, and not its form, controls the question of its disposition."[148] As noted above, this is the very line of distinction the Court adopted in *Chadha*. Actions which are legislative must be submitted to the President, and actions which are not do not need to be presented. But if the Court's lax approach to the nondelegation is to be maintained, upon the fiction that agency actions are not legislative, then the substance of legislative vetoes of those decisions is also not legislative, and need not be presented to the President for signature.[149]

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framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." Since the Attorney General is part of the executive branch, the Court continued, when he "performs his duties pursuant to [the statute], he does not exercise legislative power." By contrast, a one-house veto of the Attorney General's decisions under the statute "is clearly legislative in both character and effect." The problem with the Court's argument is its circularity: while the Attorney General's action under the statute "resemble[s] lawmaking," it is not lawmaking because the Attorney General does not exercise legislative power but executive power. A one-house veto of that same decision, on the other hand, is clearly legislative in character and effect. E. Donald Elliot remarks that this footnote "would do Lewis Carroll proud….But the exercise in semantics misses the point." Elliot, "*INS v. Chadha*: The Administrative Constitution, and the Legislative Veto," *Supreme Court Review* (1984), 146.

[147] See Antonin Scalia, "The Legislative Veto: A False Remedy for System Overload," *Regulation* 3 (1979), 20: "The validity of the legislative veto, then, turns quite simply upon whether it in reality constitutes lawmaking." While then-Professor Scalia rightly identified the crux of the issue, he disagreed with the analysis I offer in this article: "I think it is difficult to maintain that it does not [constitute lawmaking]."

[148] See Dry, p. 206.

[149] To be clear, I think the Court's current approach is indeed based on a fiction, and I would celebrate its abandonment. My contention in this article is that those who do not believe it is a fiction must accept the legislative veto's legitimacy as a logical consequence.

The Court's current approach to the nondelegation relies on an equivocation about what an agency is doing when it implements statutes. In order to claim that the Constitution contains a nondelegation principle, but also that the administrative state's enabling statutes do not violate that principle, courts have maintained that agency implementation involves something like statutory specification, a quasi-legislative power.

To many, this equivocation is a convenient fiction. But if the Court continues to embrace it, it should also accept the logical consequences that flow from it. This article has argued that two important consequences follow. First, many of the most important cases in administrative law have been misidentified as cases involving statutory interpretation. Modern statutes in the regulatory state, however, are really not making law in any precise sense but are actually delegating discretion to agencies to fill in the law. In those cases, the better question is not "what does the statute mean?" but "did the agency exercise its discretion permissibly?"

Second, if agencies are not making law when they implement statutes, then Congress can intervene to change an agency's implementation without itself exercising legislative power. Thus, *Chadha* was wrongly decided. If *Chadha* were correctly decided, then congressional interventions are exercises of legislative power, but agencies' implementations are also exercises of legislative power, contrary to the nondelegation doctrine.

Courts cannot have it both ways. They can either enforce a nondelegation doctrine, or permit a legislative veto, but they cannot do neither. If the Court is unwilling to abandon its equivocations on the nondelegation doctrine, it should be willing to reconsider its ruling in *Chadha*.