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Who Should Interpret Our Statutes and How It Affects Our Separation of Powers

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Abstract: *Federal courts abdicate their duty to interpret statutes when they defer to executive branch agencies' interpretations of statutes. It is the courts' duty to say what the law is—even when that law is ambiguous. The Supreme Court's reasoning in* King v. Burwell *authorizes the federal courts to find just about any statute to be ambiguous, and its* Chevron *decision commands that agencies be given deference to fill those ambiguities. Combining this deference with* King*'s post-hoc rationalization as a new rule of statutory interpretation, we will continue down a dangerous path to erasing our separation of powers and consolidating legislative and judicial power in the Executive. Judges must reclaim their role in interpreting statutes so that we are not left with the "tyranny" about which our Founding Fathers and Justice Story warned us.*

The interpretation of statutes is so often decisive in cases of national importance, which touch all our lives. Specifically, I want to talk with you about how courts are relinquishing the power to interpret Congress's statutes through deference to executive agency interpretations. This undermines our system of separation of powers. It tends to decrease the powers of Congress and the judiciary while vesting more power in the Executive and its many administrative subsidiaries.

This trend toward abandonment of judicial statutory interpretation gained a solid foothold 30 years ago in the often-cited *Chevron* case. I believe the trend was worsened by the Supreme Court's opinion last term, *King v. Burwell*, the decision in the Patient Protection and Affordable Care Act case.[1] That is the case where the Supreme Court held that although Congress passed a statute which limited

Key Points

- In reviewing an agency's construction of a statute under *Chevron* deference, courts determine whether that statute is silent or ambiguous with respect to the issue at hand. If so, courts defer to an agency's reasonable interpretation of the statute.
- Deferring to an agency opens the door for agencies to exercise judicial power.
- It is easy to find a "possible" ambiguity and pass the buck to the agency to interpret the statute, but the core of the judicial role is interpreting a statute's most likely meaning based on the words that Congress wrote.
- The reasoning of *King v. Burwell* authorizes courts to find nearly any statute to be ambiguous, and *Chevron* commands that agencies be given deference to fill those ambiguities. As a result, the executive, legislative, and judicial powers are combined in the Executive.

This paper, in its entirety, can be found at **http://report.heritage.org/hl1272**

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tax credits to taxpayers who bought health insurance policies through an "exchange established by a State," Congress really meant an "exchange established by a State *or the Federal Government*."

I do not intend to address the political consequences of that decision or speculate what would have happened had the Court come out the other way. Instead, my focus is on how the majority's decision to ignore the basic rules for reading a statute has potentially opened the floodgates for further aggrandizement of power in the executive branch.

Our System of Separation of Powers

Justice Joseph Story recognized the genius of our system of separation of powers in his famous *Commentaries on the Constitution*. He wrote, "Every government must include within its scope, at least if it is to possess suitable stability and energy, the exercise of three great powers, upon which all governments are supposed to rest, viz. the executive, the legislative, and the judicial powers."[2] In "absolute governments," Story explained, "the whole executive, legislative, and judicial powers are, at least in their final result, exclusively confined to a single individual; and such a form of government is denominated a despotism, as the whole sovereignty of the state is vested in him."[3]

Relying on Montesquieu, Blackstone, and the authors of the Federalist Papers, Justice Story recounted, "It has been deemed a maxim of vital importance, that these powers should for ever be kept separate and distinct."[4] And Chief Justice John Marshall famously declared in *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is."[5]

The power to interpret statutes affects the balance of the separation of powers. Again, Justice Story explained the importance of the judiciary's independence in interpreting statutes:

> Where there is no judicial department to interpret, pronounce, and execute the law, to decide controversies and to enforce rights, the government must either perish by its own imbecility, or the other departments of government must usurp powers, for the purpose of commanding obedience, to the destruction of liberty.[6]

The Presentment Clause in Article I of the Constitution reads: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States."[7] In other words, the bill contains the words upon which the House and Senate vote, and those words become law only if the House and Senate agree to them and the President does not veto the passed bill, absent a two-thirds majority overriding the veto.

This is crucial. The legislators' collective intentions or plans and individual legislators' various reasons for approving the bill are not the law. Those intentions and reasons are not agreed to by a majority of both houses and the President. As Justice Antonin Scalia has said, "We are governed by laws, not by the intentions of legislators."[8]

Deferring to Executive Agencies: From *Chevron* to *King v. Burwell*

Chevron. The most well-known and accepted manner in which there is a breakdown in the Founders' careful separation of powers occurs when federal courts give deference to executive agencies' interpretations of Congress's statutes. This is called *Chevron* deference after the Supreme Court case that announced the standard for deferring to federal agencies, *Chevron U.S.A., Incorporated v. Natural Resources Defense Council, Incorporated*.[9]

Chevron tells us that when a court reviews an agency's construction of the statute which it administers,

1. 135 S. Ct. 2480 (2015).
2. 2 Joseph Story, Commentaries on the Constitution of the United States vii (1833).
3. *Id.*
4. *Id.*
5. 1 Cranch 137, 177 (1804).
6. 3 Story, *supra* note 2, xxxviii.
7. U.S. Const. art. I, § 7, cl. 2.
8. Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).
9. 467 U.S. 837 (1984).

the court must answer two questions. First, applying the traditional tools of statutory interpretation, the court must determine "whether Congress has directly spoken to the precise question at issue."[10] If the language of the statute is unambiguous, that is the end of the inquiry, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[11] But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[12] If the agency's construction is a reasonable interpretation of the statute, then the agency's interpretation is valid and will be afforded deference by the court.

Federal courts abdicate their duty to interpret statutes when they apply *Chevron* deference. This failure to interpret statutes undermines the separation of powers in two ways.

The basic rule of *Chevron* deference is that if a statute is ambiguous, the federal agency charged with implementing the statute can issue regulations interpreting it to mean whatever the agency wants within the bounds of that ambiguity. I suggest that federal courts abdicate their duty to interpret statutes when they apply *Chevron* deference. This failure to interpret statutes undermines the separation of powers in two ways.

First, it permits the executive branch, through its agencies, to make laws. An agency need only look for an ambiguity in a statute, and it can issue regulations that eliminate that ambiguity. In most instances, this permits an agency to make significant policy choices that the Founders left to Congress. The agency's regulations have the same force as a statute passed by Congress, yet they were not enacted by Congress.

Second, Chevron does not end at permitting agencies to exercise legislative power. It also opens the door for agencies to exercise judicial power too, taking the power to interpret a statute away from the judiciary. As Justice Clarence Thomas recently noted:

> *Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is the "best reading of an ambiguous statute" in favor of an agency's construction. It thus wrests from Courts the ultimate interpretative authority to "say what the law is" and hands it over to the Executive.[13]

But under *Chevron,* an agency is permitted to interpret the law only if the statute Congress passes is "ambiguous," and as the Supreme Court tells us, we must apply "the traditional tools of statutory construction" to determine whether the statute is ambiguous. By "traditional tools," I mean those canons of how to read words that have been used by courts for centuries, some of which are still sometimes referred to in their Latin forms. For example:

- If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*);
- A word or phrase is presumed to bear the same meaning throughout the text; and
- If there is a conflict between a general provision and a specific provision, the specific provision prevails (*generalia specialibus non derogant*).

You may think the tools of statutory construction will show that statutes are rarely ambiguous and, as a result, there is little worry that agencies will be given too much power to make the law. But I suggest you would be wrong.

King v. Burwell. That brings me to *King v. Burwell*'s challenge to the Affordable Care Act. Recall that the act had three major components.

First, the act requires insurers to provide the same rates for health insurance to everyone regardless of each person's actual health risks.

10. *Id.* at 842.
11. *Id.* at 842–43.
12. *Id.*
13. Michigan v. Environmental Protection Agency, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (internal citations omitted).

Second, the act requires almost everyone to purchase health insurance. This theoretically prevents people from waiting until they are sick to sign up for insurance, at which point the insurer would have to insure the sick person.

Third, the act provides subsidies to those living close to the poverty line to purchase health insurance.

Of particular relevance here, the act authorizes the Internal Revenue Service to give a tax credit if the taxpayer is enrolled in an insurance plan through "an Exchange established by the State."[14] If a State chooses not to establish its own exchange, the act provides that the Secretary of Health and Human Services "shall...establish and operate such Exchange within the State."[15] Thirty-four states chose not to establish their own exchanges, and as a result, the federal government established and ran exchanges in those states.

Congress delegated to an agency—here the IRS—the task of deciding who was entitled to a tax credit to help purchase health insurance. The IRS found the language authorizing tax credits for insurance plans purchased on an exchange "established by the State" to be ambiguous, so it issued a regulation that authorized tax credits for health insurance policies purchased through federal exchanges as well as those purchased though state exchanges.

The plaintiffs in *King* challenged that regulation, arguing that the statute by its own terms permits tax credits to be issued only for plans purchased on an exchange "established by the State." Their state, Virginia, had no state exchange, only a federal exchange. If the *King* plaintiffs were right, the unavailability of tax credits to these low-income plaintiffs would excuse them from the requirement of the individual mandate. They would not have to buy health insurance at all.

The Court of Appeals for the Fourth Circuit agreed with the executive branch that the phrase "established by the State" was ambiguous and the IRS's rule was within the reasonable bounds of that ambiguity. Under *Chevron* deference, then, the IRS could provide subsidies to individuals who purchased health insurance on a federal exchange.

The Supreme Court took the case and affirmed the Fourth Circuit, with Chief Justice John Roberts writing the opinion on behalf of the six justices in the majority. The issue as framed by the majority appeared to be clear: "whether a Federal Exchange is 'established by the State.'" It strains our language to think that the answer to that question is anything but "No," because a "State" is defined in the Act as one of the "50 States and the District of Columbia." Indeed, in perhaps the understatement of the year, the majority admitted the "most natural reading" of the phrase "established by the State" is that subsidies are available only for insurance plans purchased on an exchange actually established by a state.

But the majority did not stop its analysis there as it should have. Instead, the majority found that when read "in context" of the "statutory scheme," the clarity of "established by the State" somehow became obscured. The "context" referred to was that if "established by the State" meant what it said, then tax credits to individuals would be unavailable in the 34 states that chose not to establish their own exchanges.

Mind you, this "context" was created not by looking at the act when it was enacted, but by using hindsight as to how 34 states had, in fact, reacted to it. Because the Court's majority found that this would cause the insurance markets in those states to enter a "death spiral" and that this could not have been "Congress's plan," the majority found that it was "possible" that "established by the State" had more than one meaning.

The majority found Congress had a "plan" to achieve universal health care coverage. The best way to implement that universal coverage would be to interpret the phrase "an Exchange established by the State" as ambiguous. According to the majority, "The phrase may be limited in its reach to State Exchanges. But it is also possible that the phrase refers to *all* Exchanges—both State and Federal—at least for purposes of tax credits."[16]

Though the majority found the phrase "established by the State" to be ambiguous, it did not defer to the IRS's interpretation of that phrase under *Chevron* deference, for reasons I will explain later. Instead, the majority took it upon itself to interpret the phrase "established by the State." To do so,

14. 42 U.S.C. § 18031(f)(3)(A).

15. 42 U.S.C. § 18041(c)(1).

16. *King*, 135 S. Ct. at 2491.

rather than getting down to the work of applying the traditional tools of statutory interpretation—that is, doing the traditional work of judges—the majority sought to achieve what it conceived was the overarching purpose of Congress's "plan": universal coverage. It proceeded to do so on the unspoken premise that Congress couldn't possibly have guessed wrong as to whether its incentives to the states to create exchanges would succeed, and if Congress did guess wrong, it was the Court's duty to straighten things out in the manner that the Executive wanted rather than to allow Congress to fix the act.

This is akin to concluding which of two stocks, A or B, an investor purchased by looking to which has since had the greatest rise in value. Of course, we can assume that the investor wanted to maximize his investment, just as Congress wanted to maximize health care coverage, but wouldn't the more valid approach simply be to look at the investor's order slip to see what it said? Here, the majority in *King* used its assumption that Congress wanted to maximize the number of enrollees in Obamacare and couldn't possibly have made an erroneous prediction as to how states would react.

I suggest this is post-hoc rationalization, not statutory interpretation. To determine the meaning of the statute, the Court should have started and ended as we did with the investor's order slip: in other words, the words that Congress wrote.

So, according to the majority, despite the words that Congress used, what Congress really meant was that subsidies were available for insurance plans purchased both on a state exchange and a federal exchange because it would be implausible to think Congress intended the "death spiral" to ruin insurance markets. But is it implausible that Congress guessed wrong on what it would take to motivate the states to create exchanges? Had Congress guessed right about what incentives the states would need to set up exchanges, then states would have created exchanges, and there would have been no "death spiral." I submit that it is not for us, the judiciary, to fix a statute that is clear in its language just because Congress's predictions of how the statute would operate were inaccurate.

Applying the Traditional Rules of Statutory Interpretation. Justice Scalia's dissent rebuts the majority's failure to apply the traditional rules of statutory interpretation and its ultimate conclusion that "established by the State" could mean "established by the State and Federal Government." Justice Scalia starts with a cardinal tool of statutory interpretation: Follow the "plain meaning" of the words Congress used. The plain meaning of "established by the State" is, of course, "established by the State." Therefore, that phrase cannot mean "established by the state and Federal government."

Justice Scalia then turned to another traditional tool: the "structure" of the statute, which he explained is a "tool for understanding the terms of the law, not an excuse for rewriting them."[17] In that regard, Justice Scalia noted that the statute sharply distinguishes between state exchanges and a federal exchange. He found it "curious that the Court is willing to subordinate the express words of the section that grants tax credits to the mere implications of other provisions with only tangential connections to tax credits."[18]

Even if the majority was correct that "these provisions 'would make little sense' if no tax credits were available on federal Exchanges...it would show only oddity, not ambiguity."[19] Courts do "not revise legislation...just because the text as written creates an apparent anomaly."[20] Federal courts have "no free-floating power 'to rescue Congress from its drafting errors.'"[21] The judiciary's "task is to apply the text, not to improve upon it."[22]

Justice Scalia then turned to yet another common interpretive tool: "the need to give effect, if possible, to every clause and word of a statute." Under the act, there are only two types of exchanges: federal and state. By interpreting "established by the State" to mean both federal and state exchanges, the

17. *Id.* at 2497 (Scalia, J., dissenting).
18. *Id.* at 2500.
19. *Id.*
20. *Id.* (internal citation omitted).
21. *Id.* at 2504 (internal citation omitted).
22. *Id.* at 2505.

Court reads out entirely the limiting clause "by the State." This violates the principle that all words in a statute be given meaning.

Moreover, Justice Scalia points to the statute's varying use of the term "Exchange" in isolation and "Exchange established by the state." The justice notes, "It is "common sense that any speaker who says 'Exchange' some of the time but 'Exchange established by the State' the rest of the time, probably means something by the contrast."[23] Finally, any ambiguity in the word "State" is eradicated by the statute's explicit definition of the word "State" to include "each of the 50 States and the District of Columbia."

The majority brushes this analysis off, explaining that the rule against superfluous words is "not absolute," and conclusorily states, "rigorous application of the canon does not seem a particularly useful guide to a fair construction of the statute."[24] The majority doesn't tell us why an application of the canon would be "unfair," much less cause an inaccuracy in interpretation. The cases the majority cites in support of this limp application of the canon are of no help in figuring out when we are to apply the canon "rigorously."

You get the picture: The majority was wrong. The phrase "established by the State" is not at all ambiguous, and the structure of the statute confirms rather than undermines the natural reading of the phrase.

Opening the Floodgates for Deference to Executive Agencies

As I discussed at the outset, the Constitution tells Congress that it must exercise its legislative power through the Presentment Clause. Both houses of Congress must agree on the statute's language, but both houses do not have to agree on what the "intent" of the bill is. Senators and representatives can and do have different views on how a statute will operate in practice.

In *King*, the majority ignored the words Congress used and instead divined its own version of what must have been the "plan" of Congress. However, the "plan" actually stated in the plain language of the statute was to have the states set up exchanges so that their citizens could get tax credits.

In my view, even though *King* did not apply *Chevron* deference, the majority's opinion does not limit *Chevron*'s applicability. To the contrary, the majority's efforts to find an ambiguity in the statutory text where none existed and the majority's failure to apply the traditional tools of statutory interpretation undermine our separation of powers. This opens the floodgates for judicial deference to agency actions under *Chevron*. If the Supreme Court can find "established by the State" to be ambiguous, then almost every statute is ambiguous and subject to being interpreted not by its words, but by the Court's notion of what was Congress's plan—in hindsight.

And the Court's reasons for not applying *Chevron* deference are not a significant limiting principle. The Court explained that "[i]n extraordinary cases," the federal courts should not defer to the agency. *King* was one such case for two reasons.

The majority's efforts in *King v. Burwell* to find an ambiguity in the statutory text where none existed and failure to apply the traditional tools of statutory interpretation undermine our separation of powers.

First, the tax credits presented a question of "deep economic and political significance" since they involve billions of dollars and affect health insurance prices for millions of people nationwide.

Second, the IRS has no particular expertise in "crafting health insurance policy," so its interpretation should not be given any deference.

But just what constitutes a question of "deep economic and political significance"? In the past, the Court has rarely held an issue to be a "major question" where *Chevron* deference is not applicable. Indeed, the *King* majority cited only two cases: a case which did not give *Chevron* deference to a law that was interpreted to make tobacco a "drug" under a federal drug act[25] and another in which an EPA interpretation would have resulted in the "unprecedented

23. *King*, 135 S. Ct. at 2499 (Scalia, J., dissenting).

24. *Id.* at 2492.

25. Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land."[26] This portentous language is not any sort of true limiting principle as to what statutory interpretations will be left to executive agencies.

The second reason is even less convincing. Sure, the IRS has no expertise in crafting health insurance policy, but the issue in this lawsuit was whether plaintiffs were eligible for tax credits, and that was squarely within the IRS bailiwick.

Therefore, by combining *Chevron* deference to executive agencies and *King*'s post-hoc rationalization as a new rule of statutory interpretation under which almost any statute can be found ambiguous, we will continue down the path to erasing our separation of powers and consolidating legislative and judicial power in the Executive. This is dangerous.

Lest you think this possibility is purely theoretical, I am sorry to report that courts are already relying on the mode of statutory interpretation in *King* to find plain statutes to be ambiguous and then using that contrived ambiguity to defer to an executive agency's interpretation of the statute. Just recently, the Second Circuit applied *King* in just this way.[27]

By combining *Chevron* deference to executive agencies and *King*'s post-hoc rationalization as a new rule of statutory interpretation under which almost any statute can be found ambiguous, we will continue down the path to erasing our separation of powers and consolidating legislative and judicial power in the Executive.

At issue was Dodd–Frank's protections, which provide that employers cannot retaliate against "whistleblowers." The Dodd–Frank statute defines a "whistleblower" as someone who reports wrongdoing "to the [Securities and Exchange] Commission." Yet the Second Circuit extended whistleblower protections to an employee who reported wrongdoing only to his firm and not to the SEC.

The majority used *King* to find an ambiguity based on its interpretation of "Congress's plan." It found it was unlikely that Congress failed to provide whistleblower protection for those who report Sarbanes–Oxley violations internally, despite the clear statutory text to the contrary. The Second Circuit majority then deferred under *Chevron* to the SEC's rule, interpreting whistleblower protection to extend to those who report wrongdoing only internally. In other words, the court abdicated its role to interpret the clear words that Congress wrote and allowed the agency to define what the contrived ambiguity should mean.

Indeed, some judges are so eager to interpret a statute to conform to what they think "must have been" Congress's plan that they use the "plan" they have discerned to interpret statutes even where they have found its words *not* ambiguous. This happened this month in a Ninth Circuit bankruptcy case, where even though the majority explicitly found the statute not to be ambiguous, it still engaged in post-hoc rationalization of what "Congress's plan" must have been to support its conclusion.[28]

Restoring the Role of the Judiciary by Cutting Back *Chevron*'s Applicability

If we have to live with *Chevron*, let's redefine the standard for ambiguity. For starters, it is too easy today for judges to find a statute ambiguous. Under the current standard used by most courts, an ambiguity exists when a statute is capable of being understood by reasonable persons as having two or more different meanings. For example, in *King*, the Chief Justice found it "possible that the phrase ['established by the State'] refers to *all* exchanges—both State and Federal."[29] This means that courts are quick to accept a party's claim or assertion of ambiguity and quick to invoke *Chevron* deference.

Of course, we should not discount the all-too-human inclination—present even in judges—to let

26. Utility Air Regulatory Group v. Environmental Protection Agency, 134 S. Ct. 2427, 2436 (2014).

27. Berman v. Neo@Ogilvy LLC, __ F.3d. __, No. 14-4626 (2d Cir. 2015).

28. *See* America's Servicing Company v. Schwartz-Tallard, __ F.3d __, 12-60052, slip. op. at *9–11 (9th Cir. 2015).

29. *King*, 135 S. Ct. at 2491.

someone else do the work. It is much easier to find a "possible" ambiguity and pass the buck to the agency to interpret the statute than to do the work of applying the traditional tools of statutory interpretation.

In my view, a statute is not ambiguous just because two reasonable people could disagree about its meaning. A statute is ambiguous only when it has two meanings that are equally probable. In a seemingly oft-forgotten footnote in *Chevron*, Justice John Paul Stevens declares that a court must employ the "traditional tools of statutory construction" to ascertain a statute's meaning.[30] Thus, to determine whether a statute is ambiguous, the courts should labor with these traditional tools of interpretation to determine the most probable meaning of a statute. If a court, employing these tools, discerns a statute's "natural meaning," the statute should not be found ambiguous.

The question may well be asked: How will judges determine which meaning is more probable? There are many traditional tools of statutory interpretation. Some may point one way; some, the other. Some may not even be applicable. Judges are accustomed to weighing factors, imbedded in rules, to determine outcomes. Every day, judges across the country weigh competing factors to make such determinations as whether to grant a preliminary injunction or to determine whether a trademark has been infringed. Weighing the relevance and effect of the traditional tools of statutory interpretation to determine what is the more probable meaning of a word or phrase involves the same weighing of sometimes complementary, sometimes contradictory considerations. It is what we as judges do.

This is the core of the judicial role: interpreting the most likely meaning of a statute based on the words that Congress wrote. I would suggest that if courts were to employ this standard of ambiguity, it would restrict *Chevron* deference to agencies in all but the most extraordinary circumstances.

However, I have an additional suggestion. We should reconsider all the assumptions underlying *Chevron* deference and consider *Chevron's* abandonment altogether. In other words, let's junk *Chevron*.

In the *Chevron* opinion, Justice Stevens claimed that the Court had "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[31] Justice Stevens justified deferring to the EPA's understanding of the statute regulating pollutants because "a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."[32] That is, judges have only "ordinary knowledge," while agency administrators have "expertise."

This is the core of the judicial role: interpreting the most likely meaning of a statute based on the words that Congress wrote. If courts were to employ this standard of ambiguity, it would restrict *Chevron* deference to agencies in all but the most extraordinary circumstances.

***Chevron* as a Reflection of Wilsonian Progressivism.** To me, this reasoning smacks of the early 20th century Wilsonian-Progressivism notion that modern life has become too complicated for strict adherence to our separation of powers and that we need "experts" and "administrators" to guide our lives through government. President Woodrow Wilson thought our separation of powers to be "inefficient" and believed that the administration of our government should be placed in the hands of these "politically disinterested" "experts" or "administrators."

In his "Study of Administration," then-professor Wilson wrote of "the distinction between *constitutional* and administrative questions."[33] He asserted, "The field of administration is a field of business. It is removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study."[34] Perhaps President

30. *Chevron*, 467 U.S. at 843 n. 9.
31. *Id.* at 844.
32. *Id.*
33. Woodrow Wilson, *The Study of Administration*, Political Science Quarterly (Nov. 1, 1886).
34. *Id.*

Wilson's faith in the prowess of experts might have been tempered by the rollout of the healthcare.gov website for insurance policies.

In particular, Wilson knew that the Progressive conception of administration could not fit within the Constitution's separation of powers scheme. Wilson forthrightly admitted in the "Study" that his whole conception of administration was foreign—indeed, it was based on the Prussian bureaucratic state championed in Hegel's *Philosophy of Right*.

As I mentioned, Justice Stevens thought that these so-called experts were needed to interpret statutes in areas outside the "ordinary knowledge" of the courts. This justification for agency deference rests on the premise that in highly complex and technical areas of regulation, agencies will have more expertise on the subject matter of the statute than the court, so agencies are better suited to make policy choices in interpreting the statute. And because many agencies work closely with Congress in drafting the statutes the agency is interpreting, they are better suited, the argument goes, to interpret the words that Congress wrote.

But this defense of agency deference misunderstands the relevant question and highlights one of the core problems with *Chevron* deference: It converts a question of statutory interpretation into one of policymaking. The question that must be answered when interpreting a statute is not what the best policy choice would be in this statutory scheme, but what the statute, as presented, means.

Additionally, we must remember that it is the text of the statute that has the force of law, not the legislators' unexpressed intent. If anyone is to have traditional "expertise" in this area, it is judges, not some administrator from the EPA or IRS. Although administrators may have more expertise than the judiciary in the substantive area they are regulating, when it comes to interpreting statutory texts, our founding philosophy comes from Alexander Hamilton: "The interpretation of the laws is the proper and peculiar province of the courts."[35]

Another justification for agency deference is the notion that executive agencies are more politically accountable than Article III judges, and thus, agencies should be the ones interpreting ambiguities in congressional acts when such interpretation calls for public policy judgments. But the Constitution meant Article III judges not to be politically accountable; we are the one of three branches that does not stand for election, and this insulation means we should not abdicate our role to "say what the law is."

Although administrators may have more expertise than the judiciary in the substantive area they are regulating, when it comes to interpreting statutory texts, our founding philosophy comes from Alexander Hamilton: "The interpretation of the laws is the proper and peculiar province of the courts."

Furthermore, even assuming that Congress may delegate its own legislative power to the Executive, it has no constitutional authority to delegate judicial power, of which it has none. It is one thing for Congress to delegate to an agency the decision of how many offices to set up and where to set them up. It is quite another to delegate to the agency the power to interpret the words Congress used in the statute.

Article III of the Constitution vests "the judicial power of the United States" in the federal courts, not Congress. Part of this power—the power to interpret texts—has since the Founding been traditionally vested in the judiciary. It extends to "all cases in law and equity." That means cases where the statute is claimed to be ambiguous as well as where it is clear. Congress cannot delegate a power which it does not have and which the Constitution vests in a coequal branch of government.

Lastly, the Wilsonian-Progressivism idea that administrators will selflessly reflect "good government" policies runs aground on more recent studies in Public Choice Theory. Public Choice studies show that politicians and administrators usually act with their own self-interest in mind instead of the public's interest. They seek to maximize their utilization. Thus, agencies are more likely than the courts to interpret a statute not as Congress wrote it, but to add to their importance and power.

In *Chevron* itself, the Supreme Court noted that the EPA under the Carter Administration had

35. Federalist No. 78, at 466 (Hamilton) (Clinton Rossiter ed., 1961).

proposed a definition of "stationary source" and justified that definition as "more consistent with congressional intent" because it "would bring more sources or modifications for review." Of course, the more sources or modifications there are to review, the more EPA inspections will occur, and the more power will accrue to the EPA. As the courts permit administrators to have leeway in crafting policy and interpreting statutes, it is only natural those administrators will continue to push the limits of their power and expand the regulatory state.

Just last term, Justice Thomas recognized how aggressive administrators have become because of the deference that courts have given the Executive to interpret and apply congressional statutes. After the Supreme Court struck down an EPA regulation that imposed $9.6 billion a year in costs on power plants for a relatively measly $4 million–$6 million a year in benefits, Justice Thomas noted that "we should be alarmed that [the EPA] felt sufficiently emboldened by [our *Chevron*] precedents to make the bid for deference that it did here."[36]

Conclusion

We should be wary of the potential havoc *King* and *Chevron* can wreak on our separation of powers when applied together. To me, *King* has the potential to break down any true barrier between Congress, the Executive, and the Judiciary. Justice Story was right, of course. The consolidation of those powers into a single body is akin to an absolute government. We seem headed down that path. *King*'s reasoning authorizes the federal courts to find just about any statute to be ambiguous, and *Chevron* commands that agencies be given deference to fill those ambiguities. As a result, the executive, legislative, and judicial powers are combined in the same entity: the Executive.

If judges do not reengage their role in interpreting statutes, we may be left with the "tyranny" that Blackstone, Montesquieu, the authors of the Federalist Papers, and Justice Story himself warned us about. For the sake of preserving the separation of powers that Justice Story so valued, I hope we see a shift back in the correct direction soon. But if not, *King v. Burwell* is another step toward another "King" our Founders sought to escape.

—The Honorable Carlos T. Bea *serves as a judge on the United States Court of Appeals for the Ninth Circuit.*

36. Michigan v. Environmental Protection Agency, 135 S. Ct. at 2714 (Thomas, J., concurring).