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## ESSAY

# SOPRA? SO WHAT? *CHEVRON* REFORM MISSES THE TARGET ENTIRELY

KRISTIN E. HICKMAN\*

Washington D.C. is awash with proposals for regulatory reform these days. The REINS Act,<sup>1</sup> the Separation of Powers Restoration Act,<sup>2</sup> the Regulatory Accountability Act,<sup>3</sup> the One In, One Out Act,<sup>4</sup> the RED Tape Act,<sup>5</sup> the Sunshine for Regulatory Decrees and Settlements Act<sup>6</sup>—these are just a few examples. The Administrative Conference of the United States has written and maintains a list of regulatory reform legislation from 2011 to 2017. It runs seventy-four pages.<sup>7</sup>

Partly, this is a sign of our times. Congressional Republicans have pushed regulatory reform, largely in reaction to Obama Administration regulatory actions.<sup>8</sup> President Trump came into office promising to “drain the

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1. Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. (2017).

2. Separation of Powers Restoration Act of 2017, H.R. 76, 115th Cong. (2017).

3. Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017).

4. One In, One Out Act, H.R. 674, 115th Cong. (2017).

5. RED Tape Act of 2017, S. 56, 115th Cong. (2017).

6. Sunshine for Regulatory Decrees and Settlements Act of 2017, S. 119, 115th Cong. (2017).

7. See Memorandum from Admin. Conference Interns on Regulatory and Admin. Reform Legislation to Reeve Bull, Admin. Conference Research Chief (Jan. 30, 2017), <https://www.acus.gov/sites/default/files/documents/Regulatory%20Reform%20Legislation%20Memo%202-13-2017.pdf>.

8. E.g., Orrin Hatch & John Ratcliffe, *Sen. Hatch, Rep. Ratcliffe: It's Time to Restore Accountability to Our Runaway Bureaucracy*, FOX NEWS (June 7, 2016), <http://www.foxnews.com/opinion/2016/06/07/sen-hatch-rep-ratcliffe-its-time-to-restore-accountability-to-our-runaway-bureaucracy.html>; Vikram David Amar, *Chevron Deference and the Proposed "Separation of Pow-*

swamp,” tame the bureaucrats, and scale back the regulatory state.<sup>9</sup> But calls for regulatory reform also reflect the fact that the Administrative Procedure Act (APA) was enacted by Congress in 1946.<sup>10</sup> The APA has gotten creaky with age. Government practices have not only expanded in number but changed in various ways that simply were not contemplated seventy years ago. Most administrative law scholars, irrespective of their political and policy preferences, agree that the APA could use some updating.

I want to focus on one particular regulatory reform proposal, the Separation of Powers Restoration Act, or SOPRA, and its variations.<sup>11</sup> SOPRA’s primary target is the *Chevron* doctrine, which calls for judicial deference to agency interpretations of statutes under certain circumstances.<sup>12</sup> SOPRA is designed to counter *Auer* deference<sup>13</sup> as well, but *Auer* is something of an afterthought. Curtailing *Chevron* is what gets the juices flowing when contemplating SOPRA. But the SOPRA proposal has changed fairly substantially from when it was introduced, and those changes reflect both the challenges and the limitations that SOPRA encounters.

My own view is that SOPRA is aimed at the wrong target. In a recent article, Nick Bednar and I argue that the objective of those seeking to constrain the administrative state should be curtailing the number of broad congressional delegations of agency policymaking discretion, not eliminating *Chevron* deference.<sup>14</sup> But before I turn to that argument and to SOPRA and its variations, a bit of background on administrative law is in order. The evolution of SOPRA only makes sense if one understands the broader administrative law context that surrounds the *Chevron* doctrine and SOPRA’s efforts to do away with it.

To start, I will provide a very brief, simplistic history of administrative law doctrine as it relates to *Chevron*. Congress has long relied on agencies to administer regulatory statutes. Administrative law scholars like to point to 1887 and the establishment of the Interstate Commerce Commission to

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*ers Restoration Act of 2016*”: *A Sign of the Times*, JUSTICIA: VERDICT (July 26, 2016), <https://verdict.justia.com/2016/07/26/chevron-deference-proposed-separation-powers-restoration-act-2016-sign-times>.

9. See, e.g., Michael D. Shear & Gardiner Harris, *Trump Wants to ‘Drain the Swamp,’ but Change Will Be Complex and Costly*, NEW YORK TIMES (Nov. 10, 2016), <https://www.nytimes.com/2016/11/11/us/politics/trump-government.html>; CBS News, *Donald Trump says it is time to “drain the swamp” in D.C.*, YOUTUBE (Oct. 21, 2016), <https://youtu.be/PxWu69vrdhA?t=31m15s>.

10. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–59, 701-06 (2016)).

11. See *infra* notes 51–67 (discussing versions of SOPRA).

12. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

13. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (calling for courts to give “controlling” weight to agency interpretations of agency regulations).

14. See Nicholas R. Bednar & Kristin E. Hickman, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1461 (2017) (“To the extent that courts and commentators want to curtail the administrative state, they should focus their efforts on rolling back congressional delegations of policymaking discretion to agency officials rather than overturning *Chevron*.”).

regulate railroads as the beginning of the modern regulatory state.<sup>15</sup> Jerry Mashaw has written extensively offering earlier examples dating all the way back to the founding.<sup>16</sup> A particularly salient example comes from several decades after the founding but before 1887—the Steamship Safety Commission, which was established in 1852 to develop rules for the purpose of reducing the incidents of destructive, and often fatal, steamship explosions.<sup>17</sup> Steamships exploded in the 1830s and 1840s with troubling regularity,<sup>18</sup> so Congress created a commission to issue rules and license steamship operators to reduce those explosions.

Now, obviously, government has grown substantially since the founding, and certainly since the mid- to late-1800s as well. What is important,

15. See, e.g., Patrick M. Corrigan & Richard L. Revesz, *The Genesis of Independent Agencies*, 92 N.Y.U. L. REV. 637, 661 n.125 (2017) (citing LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 384, (1973) (noting that “[t]he creation of the Interstate Commerce Commission, in 1887, has been taken to be a kind of genesis” of federal administrative law)); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 571 (1992) (describing that event as “when Congress launched the modern administrative state”).

16. See Jerry Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1260 (2006) (“From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and provided for judicial review of administrative action. And the first independent agency at the national level was not the ICC, but the Patent Office, created ninety-seven years earlier.”); see also Jerry Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636 (2007); Jerry Mashaw, *Administration and “The Democracy”: Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568 (2008) [hereinafter Mashaw, *From Jackson to Lincoln*]; Jerry Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362 (2010).

17. See Mashaw, *From Jackson to Lincoln*, *supra* note 16, at 1628–1666.

18. See JAMES T. LLOYD, *LLOYD’S STEAMBOAT DIRECTORY, AND DISASTERS ON THE WESTERN WATERS* 67–79 (1856) (describing this era’s steamboat explosions; for example, the explosions of the *Grampus*, *Helen McGregor*, *Rob Roy* and others). Lloyd’s poignant account of the *Ben Franklin*’s demise gives a sense of the horrors involved:

The steamboat *Ben Franklin*, on the day of this awful occurrence, was backing out from her wharf at Mobile, in order to make her regular trip to Montgomery. Scarcely had she disengaged herself from the wharf, when the explosion took place, producing a concussion which seemed to shake the whole city to its foundations. The entire population of Mobile, alarmed by the terrific detonation, was drawn to the spot to witness a spectacle which must have harrowed every soul with astonishment and horror. This fine boat, which had on that very morning floated so gallantly on the bosom of the lake, was now a shattered wreck, while numbers of her passengers and crew were lying on the decks, either motionless and mutilated corpses, or agonized sufferers panting and struggling in the grasp of death.” *Id.* at 74. “[A]mong the mangled corpses, not a few retained scarcely any vestige of the human form, so that the identification of particular persons was impossible.”

*Id.* at 75. See also Robert Gudmestad, *Rise of the Regulatory State: It All Began with Exploding Riverboats*, PITTSBURGH POST-GAZETTE (Feb. 10, 2013), <http://www.post-gazette.com/opinion/Op-Ed/2013/02/10/Rise-of-the-regulatory-state-It-all-began-with-exploding-riverboats/stories/201302100361> (“From 1816 to 1848, a total of 1,433 people died in steamboat accidents along the western rivers, then defined as any waterway in the Mississippi Valley. The fatality rate on these boats has been estimated at 155 deaths per 1 million passengers, a figure 1,000 times higher than travel on modern jet aircraft. While many of these could be blamed on ordinary collisions and fires, exploding boilers claimed many victims and soon became notorious in the public imagination.”).

though, is the scope and rhetorical framing of statutory grants of agency regulatory power, particularly rulemaking power. Early regulatory mandates were “specific authority” grants of rulemaking power.<sup>19</sup> Congress would identify a particular issue and order an agency to promulgate regulations to address that particular congressionally-identified issue. Take, for example, the relatively contemporary Clean Air Act.<sup>20</sup> It charges the Administrator of the Environmental Protection Agency (EPA) with adopting regulations “prescrib[ing] . . . standards applicable to the admission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines . . . .”<sup>21</sup> Other provisions in the Clean Air Act elaborate to some extent what those standards are to contain.<sup>22</sup> This grant of rulemaking power, while broad, is nevertheless targeted at a specific subject matter.

Going further back to the New Deal era, the Securities and Exchange Act of 1934, both as originally enacted and as amended since, calls upon the Securities and Exchange Commission (SEC) to adopt “rules and regulations” with respect to various substantive requirements “as necessary or appropriate in the public interest or for the protection of investors.”<sup>23</sup> For example, a lengthy provision governing the registration and regulation of securities brokers and dealers tells the SEC to “establish rules and regulations applicable to securities brokers or dealers, standards of training, experience, competence and such other qualifications as the commission finds necessary or appropriate in the public interest or for the protection of investors” including but not limited to tests that “include questions relating to bookkeeping, accounting, internal control over cash and securities, supervision of employees, maintenance of records, and other appropriate matters.”<sup>24</sup> Again, phrases like “necessary or appropriate in the public interest” and “for the protection of investors” create ample agency discretion beyond mere interpretation. Yet, the grants of authority are relatively specific in what the SEC is being asked to do.

Many regulatory statutes, going back at least to the New Deal era if not before, also contain “general authority” grants of rulemaking power.<sup>25</sup> These grants authorize the head of an agency to adopt “all needful rules and regulations for the enforcement of” a statute,<sup>26</sup> or other similar wording.<sup>27</sup>

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19. See, e.g., Bednar & Hickman, *supra* note 14, at 1447–49 (making this same point with examples).

20. Clean Air Act, 42 U.S.C. §§ 7401–7671 (2016).

21. 42 U.S.C. § 7521(a)(1).

22. See, e.g., 42 U.S.C. § 7521(b)(1)(A) (“The regulations under subsection (a) . . . shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.5 grams per vehicle mile of hydrocarbons and 15.0 grams per vehicle mile of carbon monoxide.”)

23. Securities and Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881-909.

24. 15 U.S.C. § 78o(7)(B) (2016).

25. See Bednar & Hickman, *supra* note 14, at 1447, 1459.

26. 26 U.S.C. § 7805(a).

In the 1930s, because of the *Panama Refining*<sup>28</sup> and *Schechter Poultry*<sup>29</sup> cases, general authority grants were not considered delegations of quasi-legislative rulemaking power because they lacked intelligible principles.<sup>30</sup> If a statute says “all necessary rules and regulations for the effectuation of the act,” where is the intelligible principle in that?

These general authority grants, at least in the 1930s and 1940s, and even through the 1950s, were thought merely to acknowledge the executive branch’s constitutional authority to interpret laws in the course of executing them.<sup>31</sup> The executive branch might communicate those interpretations, but such communications were not considered binding on anyone. They were merely the executive branch expressing its own views regarding statutory meaning.

All of that started to change in the 1960s, when rulemaking came into vogue as more efficient and democratically legitimate than case-by-case implementation of statutes through agency adjudication.<sup>32</sup> The nondelegation doctrine waned as a limitation on Congressional delegations of rulemaking power.<sup>33</sup> Legislation enacted by Congress authorized more agency rulemaking. Agencies asserted their statutory rulemaking powers more broadly. Courts through decisions like that of the D.C. Circuit in *National Petroleum Refiners Association v. FTC* endorsed those assertions of rulemaking power, either explicitly or implicitly.<sup>34</sup> Also, in the 1960s and 1970s, Congress enacted statutes that delegated more and broader discretionary rulemaking power to agencies.<sup>35</sup> So agencies adopted more regulations, and those regulations became more sweeping in what they tried to accomplish. The end result is that, since the 1960s and 1970s, agencies have relied on

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27. See, e.g., 21 U.S.C. § 371(a) (authorizing the Secretary of Health and Human Services “to promulgate regulations for the efficient enforcement of” the Federal Food, Drug, and Cosmetic Act); 29 U.S.C. §156 (giving the National Labor Relations Board the “authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of” the National Labor Relations Act).

28. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

29. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

30. See Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1565-67 (2006) (documenting this doctrinal history).

31. See U.S. CONST. art. II, § 3 (the President “shall take Care that the Laws be faithfully executed”).

32. See, e.g., 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §1.6 (5th ed. 2010) (describing factors contributing to the increase); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 546-49 (2002) (observing the same).

33. See, e.g., BERNARD SCHWARTZ, ADMINISTRATIVE LAW §12 (1976) (maintaining that the nondelegation doctrine “can not be taken literally”); Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 938 (2006) (“As demonstrated by the past seven decades of case law, the nondelegation doctrine has become virtually unenforceable.”).

34. See *Nat’l Petroleum Refiners Ass’n v. F.T.C.*, 482 F.2d 672 (D.C. Cir. 1973).

35. See Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 819, 824-825 (1988).

general authority rulemaking grants to adopt regulations filling gaps and clarifying ambiguities in statutory requirements, and courts have given those regulations the same legal force as regulations adopted pursuant to general authority rulemaking grants.

Enter judicial review and *Chevron* deference. Judges have to review challenges to the validity of the regulations that agencies adopt.<sup>36</sup> But despite an entire toolbox full of traditional tools of statutory construction, not all exercises of discretionary power are susceptible to common law reasoning using those tools of statutory construction. As the late Justice Scalia is said to have observed, sometimes, law just ends, and you really find yourself in the realm of policy choice rather than what we think of as legal interpretation.<sup>37</sup> *Chevron*'s two steps recognize that.<sup>38</sup> They recognize that when law ends, policymaking discretion begins. *Chevron*'s two steps counsel deference when judges enter this policymaking sphere. This, in some sense, derives from jurisprudence predating *Chevron*—courts have been upholding reasonable interpretations of specific authority delegations of discretionary rulemaking power for decades, since at least the 1930s.<sup>39</sup> When given a relatively open-ended specific authority grant which lacks a high-level of specificity about how agencies should exercise discretion, what is there for a court to interpret other than whether the agencies' exercise of that discretion is reasonable?

What was new with *Chevron* was the recognition that some delegations might be implicit, as was the case, for example, with the statutory question at issue in *Chevron* itself. There, the Supreme Court was presented with an under-defined statutory term combined with a general grant of rulemaking power. The case concerned what was known as the "bubble concept" under the Clean Air Act.<sup>40</sup> A permit was required to add or mod-

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36. See Administrative Procedure Act, 5 U.S.C. § 702 (2011) (allowing suit by party "adversely affected or aggrieved" by agency action).

37. I am paraphrasing a statement made by another scholar, whose identity I have forgotten, at an academic conference. I have been unable find the same or close language in print. But the phrase seems consistent with Scalia's articulated views regarding statutory ambiguity—that sometimes "Congress had no particular intent on the [particular statutory question], but meant to leave its resolution to the agency," that even more often Congress "didn't think about the matter at all," and that "*Chevron* is unquestionably better than" de novo review in such instances. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–17 (1989).

38. *Chevron* asks first whether the meaning of the statute is clear or ambiguous. If the statute is ambiguous, then *Chevron* asks whether the agency's interpretation is permissible or reasonable. A reviewing court must defer to the administering agency's permissible or reasonable interpretation of an ambiguous statute. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–843 (1984).

39. See Kristin E. Hickman, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy?*, TEXAS L. REV. 89, 94-96 (2011).

40. *Chevron*, 467 U.S. at 841–842; see also Thomas W. Merrill, *The Story of Chevron: The Making of An Accidental Landmark*, 66 Admin. L. Rev. 253, 257-58 (2014) (describing the issue at greater length).

ify a “stationary source” of emissions.<sup>41</sup> The question was basically this: if a factory had two smokestacks and wanted to build a third, should emissions from the single new smokestack alone or total emissions from all three smokestacks together count in assessing the need for a permit? If the former, a permit was required for the new smokestack. If the latter, the factory might modify its original two smokestacks to ensure that the three smokestacks together would not emit more than the original two smokestacks did, and thereby avoid the need for a permit.<sup>42</sup>

The statute did not provide an answer to the question. It defined stationary source,<sup>43</sup> but that definition did not address the bubble issue at all. The legislative history, according to the Court, was completely silent on the topic.<sup>44</sup> The statute did not identify the issue specifically as one for the agency to address. The general authority rulemaking grant to the EPA was all the statute offered. The D.C. Circuit invalidated the EPA’s regulation as inconsistent with the Clean Air Act’s overall purpose of making our air cleaner.<sup>45</sup> Fine, but by relying on the overall purpose of the statute without recognizing compromises internal to its provisions, the D.C. Circuit’s decision created a one-way ratchet in interpreting the Clean Air Act. The Court, disagreeing, counseled deference to the agency instead.<sup>46</sup>

The other aspect of *Chevron* that was new was the comparative formalism of its two steps. As evidenced by thirty years of jurisprudence, however, *Chevron*’s two steps have proven quite slippery. At step one, for example, how clear is “clear”? Which traditional tools of statutory construction do we apply to discern statutory clarity before we go on to *Chevron*’s step two? Administrative law scholars still argue today about *Chevron*’s two steps and how they work, as well as what getting rid of *Chevron* might mean for the administrative state.

At the very least, it seems obvious that, in some cases, judges contort themselves into interpretive pretzels to find clarity in statutory meaning. Meanwhile, other judges “will find ambiguity in a stop sign.”<sup>47</sup> When a court declines to uphold a controversial interpretation of a statute, some people will say the court has not been deferential enough. When a court

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41. See *Chevron*, 467 U.S. at 840 n.2 (citing 40 C.F.R. §§ 51.18(j)(1)(i)–(ii) (1983)).

42. Merrill, *supra* note 40, at 258–59.

43. See 42 U.S.C. § 7602(z).

44. *Chevron*, 467 U.S. at 851 (“The 1977 Amendments contain no specific reference to the ‘bubble concept.’”).

45. Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 726–727 (D.C. Cir. 1982).

46. *Chevron*, 467 U.S. at 866 (“When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, . . . federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”).

47. Bednar & Hickman, *supra* note 14, at 1453 & 1455 n.439 (attributing this observation to an anonymous judge).



upholds a controversial agency interpretation of a statute, other people will say the court was too deferential. This is the world *Chevron* inhabits.

The *Chevron* standard has never been tightly moored to the text of the APA. The statute declares that “the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions.”<sup>48</sup> Yet, *Chevron* itself talks about the “reasonableness of agency interpretations,” which courts recognize as the opposite of agencies acting arbitrarily and capriciously.<sup>49</sup> In *Perez v. Mortgage Bankers Association*, Justice Scalia—long *Chevron*’s staunchest advocate—acknowledged that he really could not reconcile *Chevron* with the APA’s text.<sup>50</sup> If the Court could start all over again in our more textualist times, it might go a different way.

Enter SOPRA, which seeks to modify section 706 of the APA, again, for the precise purpose of trying to eliminate *Chevron* deference. The first version of SOPRA was adopted by the House of Representatives in 2016.<sup>51</sup> It was a very short, little bill—only two sections. The Senate did nothing with it after the House of Representatives adopted it. This early version of SOPRA aimed to amend section 706 merely to specify that courts shall “decide *de novo* all relevant questions of law.”<sup>52</sup> That is it, really—specification of *de novo* review—which of course is lacking in the APA at present.

My concern with this language is that it misses the target entirely. True, some judges engage in only the most shallow or superficial efforts at statutory construction at *Chevron* step one. But at least in theory, *Chevron* itself specifies that step one entails employing traditional tools of statutory construction to evaluate Congressional intent,<sup>53</sup> which sounds a lot like *de novo* review. And opinions of the Supreme Court employ virtually every tool in the statutory interpretation toolbox to find statutory clarity at *Chevron* step one and thereby avoid step two’s reasonableness inquiry.<sup>54</sup> That’s not every case, certainly, but it is many of them.

In other words, *Chevron* step one, properly understood, already strongly resembles *de novo* review. Justice Scalia more or less argued as much in a 1989 Duke Law Review article, contending that he rarely found statutes so ambiguous that he needed to move to *Chevron*’s deferential sec-

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48. Administrative Procedure Act, 5 U.S.C. § 706 (2016).

49. *Chevron*, 467 U.S. at 863–864.

50. *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in judgment) (“Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies’ interpretations of statutes and regulations.”).

51. See Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. (2016).

52. *Id.* at § 2(3).

53. *Chevron*, 467 U.S. at 843 n.9.

54. See Bednar & Hickman, *supra* note 14, at 1423–1428. For glimpses into the toolbox, compare, for example, the opinions in *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014); *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004); and *F.D.A. v. Brown & Williamson Tobacco Corp.*, 520 U.S. 120 (2000).

ond step.<sup>55</sup> Yet, again, he acknowledged that sometimes traditional statutory interpretation fails to provide an answer, at which point policy discretion takes over, and that is when he said deference is appropriate.<sup>56</sup> So, if that is the way one reads *Chevron*, then what does version one of SOPRA actually accomplish?

SOPRA version two modified and expanded upon the first version of SOPRA and, in turn, was folded into a larger APA reform bill, the Regulatory Accountability Act.<sup>57</sup> The House of Representatives has passed this version as well, but the Senate has not.<sup>58</sup> This second version of SOPRA keeps the same de novo review language adopted in 2016, but adds further,

[I]f the reviewing court determines that a statutory or regulatory provision relevant to its decision contains a gap or ambiguity, the court shall not interpret or rely on that gap or ambiguity as an implicit delegation to the agency of legislative rulemaking authority, or a justification for interpreting agency authority expansively or for deferring to the agency's interpretation on the question of law.<sup>59</sup>

This language speaks to the applied delegations theory addressed by Sai Prakash in connection with this symposium.<sup>60</sup> And, as I see it, this language aims more clearly at the heart of the matter. Remember my suggestion that the real problem is not *Chevron* itself but rather congressional delegation of policymaking discretion.<sup>61</sup> As Nick Bednar and I have argued, *Chevron* is the wrong target. To the extent one is troubled by *Chevron* deference, the real objective ought to be curtailing congressional delegations of discretionary power to administrative agencies.<sup>62</sup> The modified SOPRA language quoted above at least recognizes that delegation is the correct target by instructing courts not to consider gaps or ambiguities in statutory provisions as implicit delegations of legislative rulemaking power. The concern that I have with this version of SOPRA is that the delegation horse is way, way, way out of the barn.

As noted above, for decades now, the courts have treated general authority regulations on par with specific authority regulations as legislative rules. By providing that a statutory gap or ambiguity is not delegation of

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55. Scalia, *supra* note 37, at 520.

56. *Id.* at 516-17; *see also supra* note 38 and accompanying text (making the same point).

57. Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. tit. II (2017).

58. On March 29, 2017, the Senate Committee on Small Business and Entrepreneurship held hearings. *See Regulatory Accountability Act of 2017: Hearing on H.R. 5 Before the S. Comm. on Small Bus. and Entrepreneurship*, 115th Cong. (2017).

59. H.R. 5, tit. II § 202.

60. *See* Saikrishna Bangalore Prakash, *The Past, Present, and Future of Presidential Power*, 14 U. ST. THOMAS L.J. 627 (2018).

61. *See supra* note 14 and accompanying text.

62. *See* Bednar & Hickman, *supra* note 14, at 1392 (“The real ‘problem’—to the extent one sees it as such—is not *Chevron* but rather unhappiness with the natural consequences of congressional reliance on agencies to resolve major policy issues.”).

legislative rulemaking power, SOPRA seems to suggest that decades of general authority regulations no longer carry the legal force of legislative rules. Other Regulatory Accountability Act provisions preserve the existing distinction between legislative rules and nonlegislative rules—i.e., interpretive rules or policy statements that are exempt from APA procedural requirements for rulemaking<sup>63</sup>—without suggesting that we alter how we distinguish legislative rules from nonlegislative rules.

Yet the revised SOPRA language seems to do exactly that. By stating that statutory gaps and ambiguities are not implicit delegations of legislative rulemaking authority,<sup>64</sup> the revised SOPRA seems to be reinstating the old notion that general grants of rulemaking power do not authorize agencies to adopt legally-binding, legislative rules. Given that we have around fifty years of general authority regulations that we recognize as legally binding, where does that leave us? What happens when you downgrade thousands of regulations governing primary behavior and extending government benefits from binding law to mere advice? Perhaps the revised SOPRA means only to make this characterization with respect to the standard of review, and does not mean to reclassify general authority regulations as nonlegislative rules that are exempt from APA rulemaking procedures and that lack legal force. The legislation simply is not clear on this point, and that lack of clarity risks raising doubts regarding the ongoing validity of decades of general authority regulations.<sup>65</sup>

I am at least concerned that SOPRA, whether out of petulance over supposedly “bad” applications of *Chevron* deference or a desire for a quick fix for executive overreach, does not engage in the careful but admittedly more difficult exercise of amending each individual statute to specify and clarify what discretionary powers Congress wants the administering agency to have. Instead, with very general and over-inclusive language, SOPRA could generate an earthquake of truly epic proportions to those who depend upon the consistency of the laws that govern them.

The solution may lie in the Senate’s arguably cooler heads. We do not have anything from the Senate yet. It has been suggested to me by people closer to the Senate than I am that the Senate will not go along with getting rid of *Chevron* deference, and that may be the case. An earlier version of the Regulatory Accountability Act proposed by Senator Rob Portman in 2015 modified section 706 of the APA in various ways, but none of those modifications concerned judicial review of agencies’ interpretations of statutes.<sup>66</sup> The Senate has not enacted SOPRA, and its version of the Regulatory Accountability Act does not include either version of SOPRA.<sup>67</sup>

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63. See 5 U.S.C. § 553(b)(3)(A) (2016).

64. Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. tit. II (2017).

65. Bednar & Hickman, *supra* note 14, at 1460.

66. See Regulatory Accountability Act of 2015, S. 2006, 114th Cong. § 4 (2015).

67. See Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017).

Maybe we are headed for a showdown between the Senate and the House on this. One last question: does any of this matter? That in and of itself is the subject of quite a bit of debate. One school of thought says getting rid of *Chevron* will reallocate power between the judiciary and the executive branch and restore the judiciary to its proper role.<sup>68</sup> Others think that very little would change. Political scientists and empirical analysis suggest that the standard of review makes very little difference in actual case outcomes.<sup>69</sup> My own view lies somewhere in the middle. In many or even most cases, the standard of review will not matter. In at least some cases, it will.

But once a statutory question crosses into the policymaking sphere, many if not most judges and justices are uncomfortable with making what they recognize as fundamentally policy-based decisions rather than traditional interpretive ones. In such cases, their inclination will be to defer to the agency. What tools will we give courts for expressing why they are deciding cases as they are? Will we going to make courts document some sort of fig leaf reliance on statutory text, history, and purpose as substantiating the outcome of a particular case? Or, will we let courts acknowledge that they are, in fact, deferring in some cases? Will we admit that, sometimes, resolving statutory ambiguity really does represent policymaking rather than interpretation, and accept that it is not the courts' job to make those policy choices?

*Chevron* allows transparency in judicial decision-making. It allows courts to signal when they feel like a particular decision falls within the policymaking sphere. If we are not willing to pursue the difficult task of curtailing congressional delegations of policymaking discretion to agencies, then acknowledging the reality of agency policymaking discretion and permitting that transparency in judicial decisionmaking can only benefit of our democratic principles and our Constitution.

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68. See, e.g., Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1240–42 (2016) (theorizing the implications of eliminating *Chevron* deference).

69. See, e.g., Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011) (surveying studies and concluding that practical differences among standards of review are negligible). But see Mark J. Richards, Joseph L. Smith & Herbert M. Kritzer, *Does Chevron Matter?*, 28 L. & POL'Y 444, 445 (2006) (arguing that “attitudes matter” and the Supreme Court evaluated key case factors differently before and after *Chevron*).