In Defense of a Little Judiciary: A Textual and Constitutional Foundation for *Chevron*

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I. INTRODUCTION

The bedrock of modern administrative law faces a mutiny. For decades, the *Chevron* doctrine required federal courts to defer to an agency's reasonable interpretation of an ambiguous statute that it administers.[1] *Chevron* was premised on the across-the-board presumption that Congress delegates enforcement discretion to agencies when it legislates ambiguously, and that agencies—rather than courts—properly resolve statutory ambiguities in the course of policy administration.[2] In other words, *Chevron* championed the role of the political branches in creating and executing law.[3]

That consensus is under siege. Courts began by chipping away at the background presumption of delegation.[4] But increasingly, judges have declared open season on *Chevron* writ large, arguing it upsets the proper balance of power between the branches of government.[5] This trend is notable,

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1. Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837, 840, 844, 866 (1984); *see also* City of Arlington v. FCC, 569 U.S. 290, 296 (2013) ("Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.").

2. *City of Arlington*, 569 U.S. at 296 ("*Chevron* is rooted in a background presumption . . . 'that Congress, when it left ambiguity in a statute' administered by an agency, 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" (quoting Smiley v. Citibank, (S.D.), N.A., 517 U.S. 735, 740–41 (1996))); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion."); United States v. Mead Corp., 533 U.S. 218, 257 (2001) (Scalia, J., dissenting) ("*Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates: Ambiguity means Congress intended agency discretion.").

3. *See, e.g.*, *City of Arlington*, 569 U.S. at 296, 307; *Brand X*, 545 U.S. at 980 ("Filling [statutory] gaps . . . involves difficult policy choices that agencies are better equipped to make than courts." (citing *Chevron*, 467 U.S. at 865–66)).

4. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (declining to apply–*Chevron* deference to certain issues of "economic and political significance" (quoting Util. Air Regulatory Grp. v. EPA (UARG), 134 S. Ct. 2427, 2444 (2014))); *Mead Corp.*, 533 U.S. at 231–34 (establishing framework for deciding whether *Chevron* applies to an ambiguity at all).

5. *See, e.g.*, Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring) ("In an appropriate case, this Court should reconsider that fiction of *Chevron* and its progeny."); Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("*Chevron* deference raises serious separation-of-powers questions."); Waterkeeper All. v. EPA, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring) ("An Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name."); Egan v. Del. River Port. Auth., 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring) ("*Chevron* . . . and [its] like are . . . contrary to the roles assigned to the separate branches of government . . . ."); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* pretty clearly involves neither . . . [the] executive functions [of fact-finding or detail specification] and . . . appears

not for its critique of centralized power in bureaucracies—that's old hat—but for its implicit embrace of judicial supremacy.[6] Indeed, nearly every skeptic of *Chevron* genuflects at the altar of *Marbury*, trumpeting the judiciary's power to "say what the law is."[7] That is a fitting response for jurists laboring to throw off the yoke of a decision long considered the "counter-*Marbury* for the administrative state."[8] But does the critique have any purchase?

In a word, no. Textualist and originalist critiques of administrative deference largely rest on the following rationales: (1) *Chevron* flatly contradicts the plain text of the Administrative Procedure Act (APA), which empowers courts—not agencies—to interpret statutory provisions;[9] and (2) *Chevron* violates the separation of powers as originally understood. To be sure, these criticisms invoke *Marbury*, general separation-of-powers principles in *The Federalist*, commentary by pre-founding political thinkers, and the text of the Constitution and APA.[10] But largely absent is discussion of

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instead to qualify as a violation of the separation of powers."); Hicks v. Colvin, No. 16-154, 2016 WL 7436050, at *4 (E.D. Ky. Dec. 21, 2016) ("For good reason, jurists have begun to ask whether [the *Chevron*] state of affairs violates the separation of powers.").

6. *See, e.g.*, *City of Arlington*, 596 U.S. at 304 ("Make no mistake—the ultimate target here is *Chevron* itself. . . . The effect would be to transfer any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts."); Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1989) ("*Chevron*'s rule . . . is simply a sound recognition that a political branch, the executive, has a greater claim to make policy choices than the judiciary." (citing *Chevron*, 467 U.S. at 843)).

7. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *accord Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring); *Waterkeeper All.*, 853 F.3d at 539 (Brown, J., concurring) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177); *Egan*, 851 F.3d at 278 (Jordan, J., concurring) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177); *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

8. Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283 (1986) ("Affording deference to an agency's legal analysis, however, seems facially contrary to the fundamental principle . . . that 'it is emphatically the duty of the judicial department to say what the law is.'" (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006) ("*Chevron* is properly understood as a kind of counter-*Marbury* for the administrative state.").

9. *See* 5 U.S.C. § 706 (2012) ("To the extent necessary to decision and when presented, the reviewing court shall . . . interpret constitutional and statutory provisions . . . .").

10. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 926–27 (2016) (noting that recent critics of *Chevron* "cite[ ] Chief Justice Marshall's directive in Marbury that courts must 'say what the law is'; the text of the Vesting Clauses of Articles I and III; James Madison's and Alexander Hamilton's

founding-era cases concerning deference to executive interpretation of ambiguous statutes.[11] And the scholarship that does exist is all over the map[12] —both supporters and opponents of *Chevron* claim history is on their side.[13] This "wide spectrum of historical interpretation . . . suggests that the roots" of the *Chevron* doctrine "remain poorly understood."[14]

This Article hopes to help fill that "important gap in the administrative law literature."[15] And it proceeds in three parts. Part II offers a brief history of the *Chevron* doctrine and its discontents. It traces the doctrine's origin and scope and ends by articulating the textualist and originalist critique of *Chevron* described above. Part III grapples with that criticism and offers a textualist and originalist defense of *Chevron*. Section III.A describes the textual footing for *Chevron* in the APA and argues that *Chevron*—if not commanded by the APA—does not upset the role it envisions for courts. Section III.B describes the approach of founding-era courts to administrative deference and suggests that they establish a proto-*Chevron* consensus. Part IV is more ambitious—it articulates a separation-of-powers basis for administrative deference. Section IV.A explains that courts in the early Republic recognized the President's Article II authority to exercise policymaking discretion conferred by law. And exercises of that discretion were generally held unreviewable by courts. Section IV.B argues that the original public meaning of Article II supports *Chevron*, drawing on early-American and pre-founding English political theory. Make no mistake: I come to praise *Chevron*, not to bury it.[16]

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statements on the importance of the separation of powers in *The Federalist*; similar general statements by Montesquieu, William Blackstone, and other pre-Founding authors; and the text of section 706 of the APA" (footnotes omitted)).

11. *See id.* at 927 ("[T]hough *Chevron* was premised on a jurisprudential tradition, that tradition plays no part in the current debate."); *see also id.* at 918 (noting "[t]he lacuna in the scholarship on the roots and historical development of judicial deference").

12. *See id.* at 913–14 (collecting historical accounts of the jurisprudential basis for *Chevron*).

13. *Compare* United States v. Mead Corp., 533 U.S. 218, 257 (2001) (Scalia, J., dissenting) (explaining that, historically, "[j]udicial control of federal officers was primarily exercised through the prerogative writ of mandamus," which "would not issue unless the executive officer was acting plainly beyond the scope of his authority"), *with* Michigan v. EPA, 135 S. Ct. 2699, 2713–14 (2015) (Thomas, J., concurring) (noting the "paltry efforts" to understand the constitutional origins of deference and arguing that *Chevron* is inconsistent with separation of powers as originally understood). *See generally* Bamzai, *supra* note 10, at 912–14 (discussing different historical accounts of deference).

14. Bamzai, *supra* note 10, at 914.

15. *Id.* at 929.

16. *Cf.* WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR act 3, sc. 2 ("I come to bury Caesar, not to praise him.").

II. *CHEVRON*: A BRIEF HISTORY

Chevron established a "now-canonical" framework for reviewing an agency's interpretation of a statute it administers.[17] To start, a court uses "traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue."[18] If congressional intent is clear, "that is the end of the matter"—both the court and the agency "must give effect" to the manifest will of the legislature.[19] But "if [a] statute is silent or ambiguous with respect to [a] specific issue, the question for [a] court is whether the agency's [interpretation] is based on a permissible construction of the statute."[20] That result flows necessarily from an agency's power to formulate policy and "'fill any gap left, implicitly or explicitly, by Congress.'"[21]

Chevron's framework "provides a stable background rule" that "[s]tatutory ambiguities will be resolved," within reasonable bounds, "not by the courts but by [an] administering agency."[22] In other words, an agency's construction of an ambiguous statute is not to be set aside unless "arbitrary, capricious, or manifestly contrary" to congressional will.[23] In this way, *Chevron* offers agencies flexibility to pursue different—and yes, opposite—policy goals than their predecessors.[24] Put differently, it prevents ossification of federal law.[25]

As a matter of scope, *Chevron*'s rule applies across the board—to big, jurisdictional matters, as well "humdrum, run-of-the-mill" minutiae.[26] Any distinction between those categories is "a mirage";[27] a semantic difference without a limiting principle.[28] In every case, "[n]o matter how it is framed,"

17. City of Arlington v. FCC, 569 U.S. 290, 296 (2013); *see* Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837, 842–44 (1984).
18. *Chevron*, 467 U.S. at 842, 843 n.9.
19. *Id.* at 842–43.
20. *Id.* at 843.
21. *Id.* (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).
22. *City of Arlington*, 569 U.S. at 296.
23. *Chevron*, 467 U.S. at 844.
24. *See* United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (explaining that, under *Chevron*, ambiguities "create a space, so to speak, for the exercise of continuing agency discretion" and that *Chevron* leaves matters of discretion "within the control of the Executive Branch for the future").
25. *See id.*
26. *City of Arlington*, 569 U.S. at 297.
27. *Id.*
28. *Id.* at 300 ("[E]very new application of a broad statutory term can be reframed as a questionable extension of the agency's jurisdiction.").

the question facing a court reviewing agency action is whether an agency strayed beyond its authority.[29] All *Chevron* inquiries collapse into whether an agency's action was *ultra vires*.[30]

Moreover, efforts to rein in *Chevron* are fraught with risk. Aside from line-drawing problems, sorting agency action into substantial, insubstantial, jurisdictional, and non-jurisdictional buckets would "transfer any number of interpretive decisions . . . about how best to construe an ambiguous [statute] in light of competing policy interests" from executive agencies to federal courts.[31] It would also invite chaos, replacing *Chevron*'s blanket presumption with an ad hoc, totality-of-the-circumstances test that would replicate the incoherence of pre-*Chevron* case law.[32] Perhaps most importantly, the *Chevron* framework also reinforces separation-of-powers norms. Though rules and adjudications "take 'legislative' and 'judicial' forms," agency action in a zone of ambiguity is an exercise of *executive* power.[33] But only such power as the legislature confers. "Congress knows how to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion."[34] And when it comes to regulation, courts should not do for Congress what Congress can do for itself.[35]

That has not stopped courts from trying. Over the years, and for different reasons, not everyone has bought in to the *Chevron* consensus. The first wave of judicial skepticism began by questioning whether ambiguity necessarily implies delegation to executive agencies.[36] *Chevron*'s blanket presumption was supplemented with a statute-by-statute analysis of whether "Congress delegated authority to the agency generally to make rules carrying the force of law."[37] So, judges "tailor deference to variety"[38]—rules made

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29. *Id.* at 297.

30. *See id.* ("Both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires."); *see also id.* at 301 ("[T]he question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not.").

31. *Id.* at 304.

32. *See id.* at 307 (noting that determining whether a "particular issue" was committed to agency discretion under a totality of the circumstances would "render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*" (emphasis omitted)); *see also* United States v. Mead Corp. 533 U.S. 218, 250 (2001) (Scalia, J., dissenting) (arguing that a statute-by-statute, totality-of-the-circumstances approach "is a recipe for uncertainty, unpredictability, and endless litigation").

33. *City of Arlington*, 569 U.S. at 304 n.4.

34. *Id.* at 296.

35. *See id.*

36. *See Mead Corp.*, 533 U.S. at 231–38 (2001).

37. *Id.* at 226–27.

38. *Id.* at 236.

pursuant to formal, notice-and-comment procedures, by a centralized group of decisionmakers, with binding force of law receive deference; rules that do not are "beyond the *Chevron* pale."[39] An exception was also made for questions of "deep 'economic and political significance' . . . central to [a] statutory scheme."[40]

Certainly, these decisions undermine *Chevron*, replacing its blanket presumption with a patchwork of caveats. But at least they honored *Chevron* in the breach.[41] Reframed, each caveat offers an account of agency action that lacks the force of law or exceeds the reasonable discretion conferred by Congress: in *United States v. Mead Corp.*, tariff classifications "churned out at a rate of 10,000 a year at [the Custom Service's] 46 . . . offices" could not reasonably be considered the "authoritative" position of the agency;[42] in *King v. Burwell*, Congress spoke directly—albeit clumsily—to the availability of tax credits for insurance purchased on federal exchanges;[43] consequently, the IRS lacked any discretion to deviate from that mandate;[44] in *Utility Air Regulatory Group v. EPA*, the EPA's application of the Clean Air Act exceeded statutory authorization to issue permits for "a relative handful of large sources capable of shouldering heavy procedural and substantive burdens";[45] and in *FDA v. Brown & Williamson Tobacco Corp.*, the FDA lacked authority to regulate the tobacco industry under the Food, Drug, and Cosmetic Act, especially in light of Congress's

39. *Id.* at 227, 234 (explaining that delegation may be evidenced by an "agency's power to engage in adjudication or notice-and-comment rulemaking"); *see also id.* at 228–34 (describing factors considered in affording deference).

40. King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (quoting Util. Air Regulatory Grp. v. EPA (UARG), 134 S. Ct. 2427, 2444 (2014)) (declining to apply *Chevron* to tax credits available on federally-created healthcare exchanges); *cf. UARG*, 134 S. Ct. at 2444 (declining to apply motor vehicle emissions standards to stationary sources and explaining that courts skeptically review newfound claims of "unheralded power" over a substantial portion of the American economy discovered in a "long-extant statute"); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 147 (2000) (holding that Congress did not delegate authority to the FDA to regulate tobacco).

41. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 242–47 (2006) (recasting *Chevron* Step Zero decisions as Step One decisions).

42. 533 U.S. at 233–34 (2001); *see also* Sunstein, *supra* note 41, at 230–31 (noting the "pragmatic" difficulty of deferring to numerous letter-rulings issued by "lower-level functionaries").

43. 135 S. Ct. at 2489–96.

44. *Id.* at 2489 (declining to apply *Chevron* and noting that "[t]his is not a case for the IRS").

45. 134 S. Ct. at 2442–44.

subsequent tobacco-specific legislation.[46] Framed in this way, each "limitation" of *Chevron* actually reinforces and applies its framework by asking whether an agency's action was *ultra vires*.[47] Importantly, none of those decisions challenges *Chevron*'s statutory or constitutional basis.

Not so for new critiques, which address *Chevron* head-on. Believing regulation has run amok in the hands of power-hungry bureaucrats, some in the judiciary now seek to starve the administrative state of its perceived lifeblood—the *Chevron* doctrine.[48] The lines of attack are generally twofold: (1) *Chevron* flouts the plain text of the APA, which vests courts—not agencies—with power over statutory interpretation;[49] and (2) *Chevron* warps the original understanding of separation of powers.[50] The consequence—according to *Chevron*'s discontents—is a textual and constitutional distortion that concentrates vast governing power in the administrative state.

As to the APA, some have noted *Chevron*'s apparent inconsistency with 5 U.S.C. § 706, which provides "[t]o the extent necessary to decision and when presented, [a] reviewing court shall . . . interpret . . . statutory provisions."[51] At a glance, this provision seems to contemplate very different interpretive roles for courts and agencies than *Chevron*. Indeed, interpretive rules are exempt from the APA's notice-and-comment rulemaking procedures altogether[52] on the theory that such rules—"as merely interpretations of

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46. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 131–61 (2000); Sunstein, *supra* note 41, at 247 (arguing that *Brown & Williamson* is "best read as [a] Step One decision[ ]").

47. Indeed, *UARG* and *Brown & Williamson* apply *Chevron* expressly. *See UARG*, 134 S. Ct. at 2439 ("We review [the] EPA's interpretations of the Clean Air Act using the standard set forth in *Chevron*." (citation omitted)); *Brown & Williamson*, 529 U.S. at 132 ("Because this case involves an administrative agency's construction of a statute that it administers, our analysis is governed *Chevron*." (citation omitted)).

48. *See* Michigan v. EPA, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) (expressing alarm that the EPA "felt sufficiently emboldened by . . . precedent[ ] to make the bid for deference that it did"); Egan v. Del. River Port Auth., 851 F.3d 263, 280–81 (3d Cir. 2017) (Jordan, J., concurring) ("Deference to agencies . . . tends to the permanent expansion of the administrative state. . . . Agencies can make the ground rules and change them in the middle of the game."); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring) (suggesting that *Chevron* emboldens administrative agencies "in their capacity and willingness to interpret statutes aggressively").

49. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring) ("Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations."); *Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring) ("[I]n the APA[,] Congress expressly vested the courts with the responsibility to 'interpret statutory provisions' and overturn agency action inconsistent with those interpretations." (quoting 5 U.S.C. § 706 (2012))).

50. *See* cases cited *supra* note 5.

51. 5 U.S.C. § 706.

52. *Id.* § 553(b)(A) ("Except when notice or hearing is required by statute, this subsection does not apply . . . to interpretive rules . . . .").

statutory provisions"—are subject to plenary judicial review.[53] On this view, the APA puts the lie to *Chevron*'s underlying presumption: that Congress impliedly delegated authority to agencies, rather than courts, to construe statutory ambiguities.[54] Put differently, "*Chevron*'s claim about legislative intentions is no more than a fiction—and one that requires a pretty hefty suspension of disbelief at that."[55]

As to separation of powers, some argue that, under *Chevron*, agencies usurp legislative and judicial authority. With respect to legislative power, "[the] whole point" of *Chevron* is the delegation of authority to the executive branch.[56] And within bounds, that is appropriate.[57] But if *Chevron* allows policy volte-faces on matters concerning jurisdiction or "huge swaths" of the economy, to what extent can it really be faithful to the "substantial guidance" required by the nondelegation doctrine?[58] *Chevron*, then, not only "diminishes the role of Congress,"[59] but "runs headlong into the teeth" of Article I's Vesting clause.[60] And it neuters an already modest nondelegation doctrine[61] by allowing agencies to pursue whatever policy goals they wish "without any particular fidelity" to statutory text.[62] With respect to judicial power, *Chevron* robs the judiciary of its power to "say what the law is."[63]

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53. S. DOC. NO. 79-248, at 18 (2d sess. 1946).

54. *See Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring) ("[I]n the APA Congress expressly vested courts with the responsibility to 'interpret statutory provisions' and overturn agency action inconsistent with those interpretations. Meanwhile not a word can be found here about delegating legislative authority to agencies." (citation omitted) (quoting 5 U.S.C. § 706)).

55. *Id.*

56. *Id.* at 1154; *see* Egan v. Del. River Port Auth., 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring).

57. *See* J.W. Hapton Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which [a] person or body . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power."). An extended discussion of the nondelegation doctrine is beyond the scope of this Article. I leave for future work analysis on the scope and impact of that doctrine on deference.

58. *Gutierrez-Brizuela*, 834 F.3d at 1154–55 (Gorsuch, J. concurring).

59. *Egan*, 851 F.3d at 279 (Jordan, J., concurring).

60. Michigan v. EPA, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring).

61. *See id.* (explaining that precedent "bring[s] into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference").

62. *Id.*

63. *Id.* at 2712 (Thomas, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); *accord Egan*, 851 F.3d at 278 (Jordan, J., concurring) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177); Waterkeeper All. v. EPA, 853 F.3d 527, 539 (D.C.

By allowing the executive to resolve statutory ambiguities, "*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty."[64] It pushes judges "further and further away" from their constitutional responsibility of checking the political branches[65] and precludes them from exercising independent judgment.[66] In sum, *Chevron* concentrates almost all government power in the administrative state. And by vesting agencies with authority to create, interpret, and enforce the law,[67] individual liberty is placed at risk.[68]

III. *CHEVRON*: A TEXTUAL & HISTORICAL BASIS

Or so the critique goes. Part II offered an account of the emerging "Article III renaissance" against *Chevron*.[69] Part III offers a textual and historical riposte. Section III.A analyzes the APA and concludes that *Chevron*—if not expressly permitted by § 706—does not usurp the interpretive role it prescribes for courts. Indeed, even where granting deference, courts *do* interpret statutes to identify ambiguities and assess the reasonableness of an agency's construction. Section III.B chronicles the approach of founding and antebellum-era courts towards administrative deference, and argues it foreshadows the *Chevron* consensus. In this way, Part III offers a more rigorous discussion of administrative deference than the judicial criticisms set out above, none of which offer extended engagement with the text of the APA or early judicial practice.

Cir. 2017) (Brown, J., concurring) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177); *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

64. *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

65. *Egan*, 851 F.3d at 279 (Jordan, J., concurring).

66. *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring) (quoting Perez v. Mortg. Bankers Assn., 135 S. Ct. 1199, 1217 (2015)); *see* Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 75–81 (2000).

67. *See Egan*, 851 F.3d at 280 (Jordan, J., concurring) ("When the power to create and interpret and enforce the law is vested in a single branch of government, the risk of arbitrary conduct is high and individual liberty is in jeopardy."); *Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J., concurring) ("Under its terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive).").

68. *See Egan*, 851 F.3d at 280 (Jordan, J., concurring) (explaining that *Chevron*'s violation of the separation of powers, by permitting arbitrary and shifting agency action, threatens individual liberty); *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) (describing notice and equal protection concerns raised by *Chevron*).

69. Waterkeeper All. v. EPA, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring).

A. The Administrative Procedures Act: A Textual Basis for Deference

The APA commands courts to interpret statutes.[70] But it is far from clear that judges abdicate that duty in *Chevron*'s name. Under *Chevron*, courts determine *de novo* the existence or non-existence of a statutory ambiguity. And even then, an agency's interpretation cannot exceed the bounds of the reasonable. Courts applying *Chevron*, therefore, *do* engage in statutory interpretation.[71] And nothing in the APA requires more. To the contrary, APA standards of review lend support to *Chevron*'s framework. Under § 706, courts must "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[72] That is *Chevron* with the steps reversed.[73]

None of this is to say the APA commands *Chevron*. After all, § 706 establishes multiple, seemingly conflicting standards of review.[74] But it does suggest that critics of *Chevron* overstate their case. By its plain terms "[n]othing" in the APA "affects other limitations on judicial review."[75] And the standards of review provided in the APA do not even apply to "agency action . . . committed to agency discretion by law."[76] "[J]udicial review [was] conferred only to correct 'an abuse of discretion granted by law.'"[77] Within

70. *See* 5 U.S.C. § 706 (2012).

71. John F. Manning, Chevron *and the Reasonable Legislator*, 128 HARV. L. REV. 457, 459 (2014) ("[T]he reviewing court fulfills its duty to 'interpret' the statute by determining whether the agency has stayed within the bounds of its assigned discretion—that is, whether the agency has construed its organic act reasonably.").

72. 5 U.S.C. § 706.

73. *See* Michael P. Healy, *Reconciling* Chevron, Mead, *and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1, 32–46 (2011) (recasting *Chevron* in terms of standards of judicial review provided for in § 706).

74. *See* 5 U.S.C. § 706 ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.").

75. *Id.* § 702.

76. *Id.* § 701.

77. S. DOC. NO. 79-248, at 36 (2d Sess. 1946).

that zone of discretion, the APA expressly contemplated that agencies would "determine not merely whether they have power but whether and why, upon the facts, their discretion should be exercised."[78]

The drafters of the APA understood that Congress—not courts—would be the branch responsible for reining in that discretion. Legislative history confirms that "[t]he expansion of . . . administrative discretion [would] be remedied, if at all, by the more precise statement of the statutory definitions and directions or limitations in legislation conferring administrative powers."[79]

In any case, whatever their relationship, the standards provided in § 706 simply codified longstanding judicial practice.[80] That is, they "restat[ed] the present law as to the scope of judicial review" in terms of "general . . . principles."[81] If one of those principles was deference to executive interpretations of ambiguous statutes, *Chevron* can hardly be considered an abdication of judicial responsibility. And the precursor to the APA—the Report from the Attorney General's Committee on Administrative Procedure—suggests deference was part and parcel of judicial review. It noted, "where [a] statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body . . . as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it."[82] If that rule of deference stems from the separation of powers, *Chevron* may even have a constitutional pedigree.

B. Early Judicial Practice: A Historic Basis for Deference

Section II.A identified a textual foothold for *Chevron* in the APA. Section II.B argues *Chevron* is consistent with early judicial practice. Section II.B.1 discusses founding-era and antebellum caselaw involving deference to executive interpretations of statute. It also describes and rejects efforts to recast these cases as inconsistent with *Chevron*. Section II.B.2 discusses the practical foundations of deference, and argues the framework employed by early courts codified a proto-*Chevron* doctrine.

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78. *Id.* at 34.

79. *Id.* at 40.

80. *See id.* at 39 (explaining that the APA "seeks merely to restate the several categories of questions of law subject to judicial review . . . repeated by courts in the course of judicial decisions or opinions").

81. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 93, 108 (1947).

82. S. REP. NO. 77-8, at 90–91 (1st Sess. 1941).

1. Ambiguities & Origins of Deference

The framers well understood the problem of statutory ambiguity. In fact, Federalist No. 37 recognized it as inevitable.[83] Writing as Publius, James Madison observed that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal."[84] Imprecision is the natural consequence of "the complexity of objects" regulated and the medium of legislation—the written word.[85] And "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas."[86] Linguistic inaccuracy, then, "must be greater or less, according to the complexity and novelty of the objects defined."[87] Meaning is "liquidated and ascertained by a series of particular discussions and adjudications."[88]

At the founding, discussions and adjudications featured deference to executive interpretations of statutes. As early as 1827, the Supreme Court recognized that "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."[89] In subsequent years, that principle was affirmed again and again.[90] But what, exactly, was the basis for deference?

Some suggest temporal proximity and unbroken executive practice account for judicial deference to departmental interpretations.[91] That is the position taken by the most in-depth scholarly treatment of *Chevron* from an originalist

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83. *See* THE FEDERALIST NO. 37, at 182–83 (James Madison) (Yale Univ. Press ed., 2009).

84. *Id.* at 182.

85. *Id.* at 182–83; *see also id.* at 183 ("Here, then, are three sources of vague and incorrect definitions: indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas. Any one of these must produce a certain degree of obscurity.").

86. *Id.* at 183.

87. *Id.*

88. *Id.* at 182.

89. Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827).

90. *See, e.g.*, Hahn v. United States, 107 U.S. 402, 406 (1882); Hedden v. Iselin, 31 F. 266, 268 (C.C.S.D.N.Y. 1887); Graham v. United States, 18 Ct. Cl. 83, 91 (1883); Hahn v. United States, 14 Ct. Cl. 305, 318 (1878).

91. *See* Bamzai, *supra* note 10, at 943–47 (arguing that deference to longstanding, contemporaneous constructions was a canon of construction in the early Republic).

perspective.[92] And there is case law to that effect.[93] A contemporaneous construction by the executive sheds light on a statute's likely meaning—actions taken immediately after the passage of a law often reflect or speak to the problems a statute was designed to address. But that is not inconsistent with *Chevron*. On that account, executive practice sheds light on statutory meaning at *Chevron* Step One, and often constitutes a reasonable exercise of discretion at *Chevron* Step Two. And cases refusing to grant deference are not to the contrary: some involved statutory language plainly contradicting an executive construction;[94] others involved impairments to vested rights—in other words, quasi-retroactive applications of an interpretation;[95] others

92. *See id.*

93. *See, e.g.*, Merritt v. Cameron, 137 U.S. 542, 552 (1890) (declining to grant deference to Treasury Department practice which was not "uniform," and noting "a construction of a statute by a department charged with its execution [is not] held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time"); *Hahn*, 107 U.S. at 404–05 ("The findings in this case show . . . that such distribution was made in accordance with the uniform practice of the Treasury Department . . . ."); United States v. Moore, 95 U.S. 760, 762 (1877) ("It has always heretofore obtained in the Navy Department."); *Hedden*, 31 F. at 268 ("The plaintiff in error relies upon the construction of the law adopted by the treasury department . . . consistently adhered to by that department ever since the act . . . went into effect."); *see also* Bamzai, *supra* note 10, at 44–47 (discussing cases).

94. *See, e.g.*, United States v. Healy, 160 U.S. 136, 145–49 (1895) (declining to grant deference to non-uniform executive practice, but noting that "[i]f any doubt could exist as to the object of section six . . . that doubt must be removed by the explicit language of added section seven"); City of Panama, 101 U.S. 453, 461 (1879) ("Were the meaning of the act doubtful, *which cannot be admitted*, the rule is universal that the contemporaneous construction of such a statute is entitled to great respect." (emphasis added)); *Moore*, 95 U.S. at 763 ("The difficulty has arisen from [the parties] not having been careful to harmonize the language of the sections. Hence the seeming conflict. But the intention of Congress is clear, and that intention constitutes the law."); *Hedden*, 31 F. at 268 ("There is no ambiguity, and no room for difference of opinion, as to the meaning of the language of section 2930, nor has there been since the act of 1842."); *Graham*, 18 Ct. Cl. at 92–93 ("The law on which the appellee bases his claim is plain and unambiguous. We must give it its natural and obvious meaning, and thus interpreted it leaves the appellant no ground to stand on." (quoting United States v. Temple, 105 U.S. 97, 99 (1881))).

95. *See, e.g.*, United States v. Ala. Great S. R.R., 142 U.S. 615, 621 (1892) ("It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government."); United States v. Hill, 120 U.S. 169, 182 (1887) ("[A] court seeking to administer justice would long hesitate before permitting the United States to go back, and not only as against the clerk; but as against the surety on his bond, reopen what had been settled with such abundant and formal sanction."); *City of Panama*, 101 U.S. at 461 (noting that deference to longstanding practice is appropriate where "a different interpretation would impair vested rights"); United States v. Union Pac. Ry. Co., 37 F. 551, 556 (C.C.D. Colo. 1889) ("[R]eliance upon the stability of title evidenced by patents from the government . . . should not be disturbed in the case at bar.").

still counseled judicial acquiescence to longstanding, uniform executive practice.[96] But none flatly contradict *Chevron*.

That is unsurprising. At a fundamental level, the contemporary construction account does not explain why executive interpretations received *deference*, as opposed to merely persuasive force.[97] After all, courts seem equally well disposed to construe statutes contemporaneously. So, the ambiguity that triggered deference must have carried different implications for the executive than the judiciary. Executive constructions controlled "only . . . where the language of [a] law [wa]s ambiguous."[98] And that was the consequence of the executive's constitutional responsibility to enforce statutes: "[t]he officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret."[99] As a result, "the construction given to a statute by those charged with the duty of executing it [was] . . . entitled to the most respectful consideration, and [would] not be overruled without cogent reasons."[100] Section II.B.2 explores the practical basis for that rule.

2. Proto-Chevron: A Practical Foundation for Deference

As today, statutes in the early Republic contained ambiguities and silences. And in them lurked questions about the relationship between legislation,

96. *See, e.g.*, Merritt v. Cameron, 137 U.S. 542, 552 (1890) ("There is no such long and uninterrupted acquiescence in a regulation of a department, or departmental construction of a statute, as will bring the case within the rule . . . that in case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and should not be disregarded without the most cogent and persuasive reasons."); United States v. Philbrick, 120 U.S. 52, 58–59 (1887) ("[T]he power of the Secretary to establish rules and regulations for the apportionment of the sums set apart by Congress . . . having been frequently exercised prior to 1835, without objection by the legislative branch of the government; and since that act, as well as the one of 1866, is an implied recognition of the practice established in the Navy Department prior to 1835, we are not disposed, at this late day, to question the validity of the order of May 23, 1866.").

97. *See Hedden*, 31 F. at 268 (giving "controlling" weight); *Graham*, 18 Ct. Cl. at 93 (granting "determining" effect).

98. *Hedden*, 31 F. at 268; *see also Graham*, 18 Ct. Cl. at 93 ("The rule which gives determining weight to contemporaneous construction put upon a statute, by those charged with its execution, applies only in cases of ambiguity and doubt.").

99. *Moore*, 95 U.S. at 763; *accord* Bowen v. United States, 14 Ct. Cl. 162, 173–74 (1878) (quoting *Moore*, 95 U.S. at 763).

100. *Moore*, 95 U.S. at 763; *accord Bowen*, 14 Ct. Cl. at 173 (quoting *Moore*, 95 U.S. at 763).

regulation, and executive enforcement. Judges passed on such questions regularly, but in a more modern fashion than you might expect.[101] In fact, courts openly recognized that "attempt[ing] to regulate, by law, the minute movements of every part of the complicated machinery of government" was "a most unpardonable ignorance."[102] Even in the 1800s, there were "numberless things [to] be done, that c[ould] neither be anticipated nor defined," which were "essential to the proper action of the government."[103] As a result, courts acknowledged that prescription by prolix was neither practical nor desirable.[104]

Regulations filled the gap. As originally understood, Congress marked out the broad outlines of the law.[105] But, "of necessity, usages [were] established in every department of government" that "regulate[d] the rights and duties of those" in their charge.[106] In crafting rules, departmental and agency heads were "often compelled to exercise . . . discretion."[107] And though limited by law, an administering official was not required to "show [a] statutory provision for everything he d[id]."[108] In this way, departmental regulations comprised "a kind of common law," which could change with the political headwinds.[109] In fact, courts expressly noted the mutability of regulatory interpretations.[110] Of course, "no change of . . . usages c[ould] have a retrospective effect."[111] Nevertheless, an agency head had "the same power as another, to give a construction to an act which relates to the business of the department."[112]

An application of these principles is found in *United States v. Macdaniel*. In *Macdaniel*, the United States sued an ex-naval clerk for wrongfully collecting commissions on pensions disbursed in the course of his duties.[113] The dispute centered on an 1804 statute, which authorized the President

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101. *See, e.g.*, Reeside v. Walker, 52 U.S. (11 How.) 272 (1850); Gratiot v. United States, 40 U.S. (15 Pet.) 336 (1841); Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840); Kendall v. United States *ex rel*. Stokes, 37 U.S. (12 Pet.) 524 (1838); United States v. Macdaniel, 32 U.S. (7 Pet.) 1 (1833); United States v. Webster, 28 F. Cas. 509 (D. Me. 1840) (No. 16,658); United States v. Cadwalader, 25 F. Cas. 231 (E.D. Pa. 1835) (No. 14,706); United States v. Duval, 25 F. Cas. 953 (E.D. Pa. 1833) (No. 15,015).

102. *Macdaniel*, 32 U.S. (7 Pet.) at 14; *accord Webster*, 28 F. Cas. at 515.

103. *Id.* at 14–15.

104. *See id.*

105. *See id.* at 14 (noting that "the great outlines of [the law's] movements may be marked out").

106. *Id.* at 14–15.

107. *Id.* at 14.

108. *Id.*

109. *Id.* at 15.

110. *See id.* at 14 ("It will not be contended that one secretary has not the same power as another, to give a construction to an act which relates to the business of the department.").

111. *Id.* at 15.

112. *Id.* at 14.

113. *Id.* at 10–11.

to "attach to the [Washington] navy yard . . . a captain . . . who shall have the general care and superintendence of the same, and shall perform the duties of agent to the navy department."[114]

Before 1829—when Macdaniel was removed from office—the Secretary of the Navy interpreted the statute to allow the appointment of an agent, separate from the navy yard commandant, to administer servicemember and privateer pension funds.[115] Under that construction, Macdaniel collected a one percent commission on disbursements for a period of fifteen years.[116] In 1829, however, the Secretary changed course.[117] As reinterpreted, the 1804 statute permitted only the commander to perform agent-related duties.[118] To that end, the Secretary argued that Macdaniel's appointment and payment was unsupported by law.[119]

The Supreme Court disagreed.[120] But in doing so, it sustained the validity of both interpretations of the 1804 statute. To start, the absence of a statutory authorization for a disbursement agent did not render Macdaniel's appointment *ultra vires*.[121] To the contrary, the court explained that the practical realities of government precluded Congress from legislating every detail of the statutory scheme.[122] Consequently, the Secretary's action—appointing a disbursement agent—was reasonable given the inherent demands of administering a pension fund.[123] But it was equally reasonable for the

114. *Id.* at 12.
115. *Id.* at 12–14.
116. *Id.* at 14 ("The defendant having acted as agent for navy disbursements for a great number of years, under different secretaries, and having uniformly received one per cent, on the sums paid, as his compensation, he continues to discharge the duties and receive the compensation, until a new head of the department gives a different construction of the act of 1804, by which these duties are transferred to the commandant of the navy yard."); *see also id.* at 11, 16.
117. *See id.* at 13.
118. *Id.*
119. *Id.* at 14 ("It is insisted, that as there was no law which authorized the appointment of the defendant, his services can constitute no legal claim for compensation . . . .").
120. *See id.* at 16–17.
121. *Id.* at 15 ("It must be admitted, that there was no law authorizing the appointment of the defendant, nor was it considered necessary that there should be a special statutory provision on the subject."); *see also id.* at 14 (explaining that although an agency head "is limited in the exercise of his powers by the law . . . it does not follow that he must show statutory provision for everything he does").
122. *See id.* at 14.
123. *See id.* at 15–17 ("For the convenience of the officers of the navy and others who were engaged in the service of the department, certain disbursements became necessary; and as no law specially authorized the appointment of an agent for this purpose,

Secretary to conclude that the 1804 statute vested administrative duties in the commandant alone.[124] Thus, Macdaniel prevailed, not because the post-1829 interpretation was unreasonable, but because the government tried to apply it retroactively.[125] The court noted that Macdaniel made disbursements over a period of fifteen years "under different secretaries of the navy . . . at the same rate of compensation."[126] That charge "was sanctioned by the accounting officers of the treasury department" without any objection from Congress.[127] So, while the Secretary's revised interpretation of the statute could have prospective effect, the government could not—after changing course—claw back payments for services already rendered.[128]

Another application of proto-*Chevron* principles is seen in *United States v. Webster*. There, the United States sued an army officer for charging commissions on disbursements made in the course of his duties as quartermaster during the Seminole Wars.[129] In disallowing the commissions, the Department of the Treasury relied on an 1833 Army regulation that expressly prohibited "additional compensation" for officers disbursing funds at the direction of the War Department where such compensation "[was] not specially provided by law."[130] That regulation altered prior practice, whereby the War Department allowed extra compensation.[131]

The district court sided with the government,[132] and noted the parties' agreement that Army regulations—"prescribed by the [W]ar [D]epartment" and sanctioned by the President—carry "the force of law."[133] By "force of law," the court did not mean regulations could "control or annul an act of the legislature"; executive practices carried legal force only "when . . . consistent with the laws established by" Congress.[134] But consistency did

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they were required to be made by a clerk. . . . [This court] think[s] that the secretary of the navy, in authorizing the defendant to make the disbursements, on which the claim for compensation is founded, did not transcend those powers which, under the circumstances of the case, he might well exercise.").

124. *See id.* at 13–14.

125. *See id.* at 14 ("By this new construction, whether right or wrong, no injustice is done to the defendant, provided he shall be paid for services rendered under the former construction of the same act. But such compensation has been refused him.").

126. *Id.* at 16.

127. *Id.*

128. *See id.* at 14.

129. United States v. Webster, 28 F. Cas. 509, 510 (D. Me. 1840) (No. 16,658).

130. *Id.* at 516–17.

131. *See id.* at 517 (describing an 1835 Army regulation "which enumerate[d] in detail the cases in which extra compensation had been formerly allowed, and which [was] . . . disallowed for the future").

132. *See id.* ("The regulation of 1833 was in force when these disbursements were made; and it expressly denies any allowance . . . .").

133. *Id.* at 515.

134. *Id.*

not require express permission.[135] Though "[t]he great outlines of [an official's] powers and duties may [have] be[en] fixed . . . there [was] a wide field of detail and contingencies, which no human sagacity c[ould] foresee, and which, of course, [could not] be provided for by general laws."[136] Implementation details were "necessarily left to the judgment and discretion of those who ha[d] the immediate superintendence of the service," provided they operated within the bounds of a statute's "landmarks."[137]

As a consequence, "customs and usages bec[a]me established which constitute[d] a sort of common law of the service" the "highest evidence" of which were "printed and promulgated [regulations]."[138] Regulations comprised "a sort of complement of the statute-law upon the subject" and "affect[ed] the rights and obligations of those who [were] subject to them."[139] While in effect, such regulations were "binding."[140] But as the name implies, customary law could be "abrogated by the establishment of a contrary custom" by the "same authority" that prescribed an initial usage.[141] In every case, however, customs were required to conform to "the will of the legislature, expressed in the public laws."[142]

To be clear, the executive's role in regulation made a difference. Judges recognized that the executive—with its "immediate direction and superintendence" of departments and agencies—"ha[d] the best means of judging when" and how to reconcile competing policy interests in ambiguous statutes.[143] Even in the absence of a legislative command or established custom, "the decision of an executive department, confirmed by the president, if not absolutely conclusive, deserve[d] to be very gravely considered, before [being] overruled by [a] court."[144] That stemmed from

135. *See id.* at 515–16 ("[A]lthough no such order can be valid, when it is repugnant to an act of [C]ongress, a great many orders, in matters of detail, may be, and are, issued which are not inconsistent with the general law, although not expressly authorized by it.").
136. *Id.* at 515; *see also id.* ("[I]t is quite impossible that any statute should go into all the details of regulation required to maintain the police and discipline of the army, and still more so, that it should anticipate and provide for all the exigencies demanded for the prompt and effective action of the military force, amidst the vicissitudes and casualties occurring to an army, engaged in the active duties of a campaign.").
137. *Id.* at 515–16.
138. *Id.* at 516.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*

the "unavoidabl[e]" discretion conferred on executive officials by statutory ambiguity and silence.[145] It bears repeating that "legislation . . . can never go into all the minute detail[s] of regulation," which consequently "are left to the regulation of the department" charged with implementing a statute.[146]

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Founding-era administrative law, then, bears a striking resemblance to the *Chevron* consensus. Distilled, both affirm the following principles: Congress cannot, and should not, legislate every detail of a regulatory regime; as a result, open implementation questions pass to the executive, including agencies, for completion; to that end, administering officials may proscribe needful and appropriate regulations, even where not expressly provided for; such regulations must be reasonably consistent with the will of Congress; however, regulations may change, albeit without retroactive effect; and in any case, Congress may expressly limit the executive's exercise of discretion and enforcement as it sees fit.[147]

IV. *CHEVRON*: A CONSTITUTIONAL FOUNDATION

The foregoing establishes *Chevron*'s distinguished practical pedigree. But so what? Federal courts do not sit to philosophize about the most pragmatic form of government; they sit to interpret statutes and the Constitution as written.[148] And to weather the *Marbury* critique—that judges abdicate their constitutional duty in *Chevron*'s name—*Chevron* better be made of sterner stuff than the "legal fiction" most suppose it to be.[149] Yet, even proponents of *Chevron* squirm at the suggestion that deference might be

145. *See id.* at 515–16.

146. *Id.* at 517.

147. *Compare* United States v. Macdaniel, 32 U.S. (7 Pet.) 1, 13–17 (1833), *and Webster*, 28 F. Cas. at 515–17, *with* Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837, 833–45 (1984).

148. *See* THE FEDERALIST NO. 78, *supra* note 83, at 392 (Alexander Hamilton) ("The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."), 395 ("The courts must declare the sense of the law . . . .").

149. *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 ("In the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate."); Silberman, *supra* note 6, at 822 ("Congress is presumed to delegate, to the Executive, authority to make those choices within certain bounds.").

constitutionally compelled.[150] By their lights, Congress could textually "rebut *Chevron*'s presumption . . . by stripping the agency of deference" or "reverse [it] generically by amending" the APA.[151]

I am not so sure. Congress certainly *tries*—when legislating—to say what it means and mean what it says.[152] But that only begs the question; statutory text does not magically become clear at Congress's say-so. More fundamentally, any law that would prevent a judicial finding of ambiguity—or attendant deference to the executive—looks a lot like a decision rule that raises separation-of-powers concerns all its own.[153] Nothing in the Constitution suggests that the legislature may sit as the "judge[ ] of [its] own powers" or make "the construction they put upon them . . . conclusive [ ]on the other departments."[154] And the same goes for the executive. That observation brings *Chevron*'s constitutional foundation into view: *Chevron* is not about interpretation qua interpretation; it is about deference to presidential policy decisions within the scope of delegated authority.

Section III.A situates such deference within Article II. It argues that interpretation of ambiguous statutes is an exercise in policy discretion allowed by law. Under the political question doctrine, that discretion was historically unreviewable and received substantial deference from courts. Section III.B discusses the original public meaning of "executive power." It concludes that Anglo-American political theory supports a robust view of presidential power, encompassing discretionary action to carry laws into execution.

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150. *See, e.g.*, Scalia, *supra* note 149, at 515–16 (rejecting separation-of-powers basis for *Chevron*); Silberman, *supra* note 6, at 824 ("*Chevron* is [not] in any sense constitutionally dictated by the separation of powers.").

151. Silberman, *supra* note 6, at 824.

152. *See, e.g.*, Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); Oneale v. Thornton, 10 U.S. (6 Cranch) 53, 68 (1810) ("Men use a language calculated to express the idea they mean to convey.").

153. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871) ("Can [Congress] prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself. The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.").

154. THE FEDERALIST NO. 78, *supra* note 83, at 393 (Alexander Hamilton).

A. Ambiguity, Policy Discretion, & Statutory Interpretation

Courts defer to the executive, not because of a superior interpretive capacity, but because of a superior policymaking capacity.[155] And it is policy discretion that is offered in spaces of ambiguity. In the administration of duties imposed by Congress, "[t]he head of an executive department . . . is continually required to exercise judgment and discretion."[156] To that end, agency heads "must . . . expound[ ] the laws and resolutions of Congress, under which" they act.[157] In taking such action, agency officials partake in the "political duties imposed upon . . . the executive department [by the Constitution], the discharge of which is under the direction of the President."[158] In other words, when agency officials exercise discretion, they also exercise "executive power" "beyond the reach of any other department."[159]

Of course, not all actions are unreviewable. "Ministerial" duties involve no delegation of discretion and "are not [subject] to the direction of the President."[160] Lawsuits involving ministerial acts, therefore, do not "interfere[ ] . . . with the rights or duties of the executive."[161] The discretionary-ministerial distinction has deep roots in American jurisprudence.[162] And it has been developed primarily in writ of mandamus cases.

On one side of line, fall cases like *Kendall v. United States ex rel. Stokes*. There, the Supreme Court confronted a statute requiring the postmaster general to credit relators with the full amount of any award rendered by a solicitor statutorily empowered to settle and adjust contract claims against the government.[163] The court held the duty to credit to be "ministerial"—the postmaster general was "vested with no discretion or control over the decisions of the solicitor," but rather was "simply [required] to credit the relators with the full amount" owed.[164] As a result, the suit did not "involve[ ] any conflict between the executive and judicial" branches: enforcing the performance of a mere ministerial act did not endeavor "to direct or control

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155. *See* Silberman, *supra* note 6, at 822 ("*Chevron*'s rule . . . is simply a sound recognition that a political branch, the executive, has a greater claim to make policy choices than the judiciary." (citing Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984))).

156. Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840).

157. *Id.*

158. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 610 (1838), *rev'd sub nom.* Kendall v. Stokes, 44 U.S. (3 How.) 87 (1845).

159. *Id.* ("The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power.").

160. *Id.*

161. *Id.*

162. *See, e.g.*, *Decatur*, 39 U.S. (14 Pet.) at 497; *Kendall*, 37 U.S. (12 Pet.) at 524; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

163. *See Kendall*, 37 U.S. (12 Pet.) at 608–09, 613–14.

164. *Id.* at 611, 613.

the . . . discharge of any official duty, partaking in any respect of an executive character."[165]

On the other side of the line, fall cases like *Decatur v. Paulding*. In *Decatur*, the Supreme Court considered a claimant's entitlement to spousal pension benefits in addition to a pension already specially awarded her by Congress.[166] After successive Secretaries of the Navy denied her benefits claims, Decatur moved for mandamus to compel payment, which was ultimately denied by the D.C. Circuit.[167] Affirming the D.C. Circuit, the Supreme Court rearticulated *Kendall*'s "distinction . . . between a mere ministerial act, required to be done . . . and a duty imposed upon [the head of an executive department] in his official character . . . in which judgment and discretion are to be exercised."[168]

Denial of pension benefits—and statutory interpretation by the executive to that end—qualified as discretionary. Indeed, the court found all of the following actions involved some measure of discretion: the initial denial of Decatur's claim; reconsideration of that decision; statutory interpretation concerning entitlement to benefits; determinations of the amount owed, if any; and evaluation of pension fund's financial condition.[169] On review of those actions, the judiciary "had no right . . . to control [the executive's] judgment[ ] and guide him in the exercise of a discretion which the law had confided to him."[170] Judicial "interference . . . with the performance of the ordinary duties of the executive . . . would be productive of nothing but mischief" and would raise serious separation of powers concerns.[171]

Revived, the discretionary-ministerial distinction offers a constitutional basis for *Chevron* deference. That is to say, it supports the claim that agency officials interpreting ambiguous statutes exercise executive power under Article II.[172] Of course, not all agree. Some argue the discretionary-ministerial

165. *Id.* at 610.
166. 39 U.S. (14 Pet.) at 513–14.
167. *Id.* at 514.
168. *Id.* at 516–17 (citing *Kendall*, 37 U.S. (12 Pet.) at 614).
169. *Id.* at 515.
170. *Id.* at 517.
171. *Id.* at 516.
172. *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . ."); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 499 (1866) (contrasting ministerial duties with "the duty of the President in the exercise of the power to see that the laws are faithfully executed"). *See generally* Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280 (2006).

distinction stems from the form of relief requested.[173] In other words, the nature of mandamus review put the rabbit in the hat, so to speak, in favor of the executive's preferred construction.[174]

As a descriptive matter, that is wrong. Courts also applied the distinction to cases involving injunctive relief.[175] And in specifically rejecting a mandamus-based account of deference, they noted that the nature of injunctive relief did not "take the case out of the general principles which forbid judicial interference with the exercise of [e]xecutive discretion."[176] Whatever the relief sought, "an officer to whom public duties are confided by law[] is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as part of his official functions."[177] Put differently, where "powers and duties are confided" in executive officials, "there exists no power in the courts, by any . . . process[], to act upon the officer so as to interfere with the exercise of that judgment."[178]

As a normative matter, the mandamus account of deference is unpersuasive. Critics point out that *Decatur* qualified its rule of deference with the following proviso:

> If a suit should come . . . which involved the construction of any of these laws, the Court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment.[179]

That is true, as far as it goes. But it isn't very far. After that passage, *Decatur* reiterated that courts "could not . . . revise [an agency head's] judgment in any case where the law authorized him to exercise discretion" or "guide and control his judgment . . . in the matters committed to his care."[180] And any judicial pronouncement could "be given [only] in a case in which [courts] have jurisdiction . . . to ascertain the rights of the parties in the cause before them."[181]

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173. *See* Bamzai, *supra* note 10, at 959 (arguing that the nature of mandamus review dictated deference to executive interpretations (quoting Den *ex dem.* Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856))).

174. *See id.*

175. *See, e.g.*, Gaines v. Thompson, 74 U.S. (7 Wall.) 347, 352 (1868) (rejecting the suggestion "that the relief sought . . . was through the writ of mandamus, and that the decisions are based upon the special principles applicable to the use of that writ"); *Johnson*, 71 U.S. (4 Wall.) at 499.

176. *Johnson*, 71 U.S. (4 Wall.) at 499; *accord Gaines*, 74 U.S. (7 Wall.) at 353.

177. *Gaines*, 74 U.S. (7 Wall.) at 352.

178. *Id.*

179. Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840); *see also* Bamzai, *supra* note 10, at 952 (discussing *Decatur*).

180. *Decatur*, 39 U.S. (14 Pet.) at 515.

181. *Id.*

Thus, *Decatur* makes clear that deference was the product not of the relief requested, but of the nature of the right at issue. And here is where things get interesting: *Marbury* supports that view. In fact, *Marbury* originated the discretion-ministerial distinction that provides deference with its constitutional pedigree.[182] Many forget that *Marbury* began by questioning judicial authority to review executive action, formulating what became known as the political question doctrine.[183] It explained, "whether the legality of an act of the head of a department be examinable" in court "always depend[s] on the nature of th[e] act."[184] Actions pursuant "to constitutional or legal discretion" or made as a "political or confidential agent[ ] of the executive" were only "politically examinable."[185] That is because, in such cases, officials act "merely to execute the will of the President."[186] "[W]here a specific duty is assigned by law," in contrast, and "individual rights depend upon the performance of that duty," judicial recourse is appropriate.[187]

Marbury, then, envisions a modest role for federal courts reviewing executive actions. Federal courts sit "to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have [] discretion."[188] So, political questions—or questions by law "submitted to the executive['s]" discretion—are nonjusticiable.[189] Best read, that threshold determination of justiciability was the "jurisdiction" referenced in *Decatur*. In fact, *Marbury* expressly described the political question doctrine as jurisdictional.[190] In any event, both *Marbury* and *Decatur* acknowledge that where a department head "acts in a case, in which executive discretion is to be exercised . . . any application to a court to control, in any respect, his conduct, [sh]ould be rejected without hesitation."[191]

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182. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 158, 166–67 (1803).

183. *See id*. at 163 ("It behoves us then to enquire whether there be . . . any ingredient which shall exempt [the case] from legal investigation, or exclude the injured party from legal redress."), 170 ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").

184. *Id.* at 165.

185. *Id.* at 166.

186. *Id.*

187. *Id.*

188. *Id.* at 170.

189. *Id.*

190. *See id.* ("It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment.").

191. *Id.* at 170–71; *see* Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840).

In discussing political questions, *Marbury* placed a premium on Article II authority, as manifest in presidential and departmental decisions. It explained that the Constitution vests the executive "with certain important political powers," the exercise of which requires "use of his own discretion."[192] "To aid . . . in the performance of these duties," the President "appoint[s] certain officers, who act by his authority and in conformity with his orders."[193] In exercising discretion under law, "their acts are his acts" and the judiciary retains "no power to control" them.[194] In this way, Article II authority—including discretion conferred by law—inheres in department and agency officials vis-à-vis their relationship with the executive. And the example given by the *Marbury* court confirms this fact. Remarking on the relationship between the President and executive officials, the court identified the statute creating the Department of State.[195]

These constitutional interests also reflect practical realities of governance. *Marbury* remarked that "[t]he intimate political relation . . . between the [P]resident . . . and the heads of departments . . . necessarily renders any legal investigation of the acts of" department heads "irksome as well as delicate."[196] And "intrud[ing] into the cabinet . . . to intermeddle with the prerogatives of the executive" risks entangling courts in policy administration.[197] Indeed, if all "contested [agency] business . . . [is] drawn from the officers to whom the law" confides such matters into the courts, judges "will find themselves converted into superintendents" of the day-to-day administration of government.[198] The discretionary-ministerial distinction guards against such a distortion of constitutional roles.

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This discussion suggests that *Chevron*'s critics both over-read and under-read *Marbury*. They over-read it by suggesting the power to "say what the law is" includes resolving competing policy choices offered in cases of ambiguity; they under-read it by ignoring its formulation of the political question doctrine, which provides for non-reviewability of discretionary decisions by executive officials. In fact, *Marbury* and its progeny—in articulating the discretionary-ministerial distinction—provide a constitutional

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192. *Marbury*, 5 U.S. (1 Cranch) at 165–66.
193. *Id.* at 166.
194. *Id.*
195. *See id.* ("[B]eing entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress establishing the department of foreign affairs.").
196. *Id.* at 169.
197. *Id.* at 170.
198. Litchfield v. Register, 15 F. Cas. 592, 595 (D. Iowa 1868) (No. 8,388).

basis for *Chevron* deference. Put simply, when an agency exercises policy discretion in the space of a statutory ambiguity, that action qualifies as an exercise of Article II power entitled to respect from the courts.

B. Executive Power

The original meaning of "executive power" confirms this reading. Article II vests "executive power" in a single magistrate—the President of the United States.[199] Originally understood, that power extended to day-to-day administration of government, in other words, "operations of the body politic."[200] From a presidential perspective, administration required specification of "details" which fell "peculiarly within the province of the executive department"—to wit, conduct of foreign relations, "preparatory plans of finance," "application and disbursement" of public monies, superintendence of the armed forces, and "other matters of a like nature."[201] Of course, "immediate management" was not directly carried out by the President, but by "assistants or deputies of the chief magistrate"[202] who share in Article II power.[203] Thus, by its plain terms, the Constitution expressly contemplates a role for agencies and departments in steering the ship of state.[204] And that ship's course was expected to change from administration to administration.[205]

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199. U.S. CONST. art. II, § 1, cl. 1; THE FEDERALIST NO. 69, *supra* note 83, at 347–48 (Alexander Hamilton) ("[T]he executive authority, with few exceptions, is to be vested in a single magistrate.").

200. THE FEDERALIST NO. 72, *supra* note 83, at 365 (Alexander Hamilton).

201. *Id.*

202. *Id.*

203. *See* James Madison, Notes on the Constitutional Convention (June 5, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 119 (Max Farrand ed., 1911) (hereinafter FARRAND'S RECORDS) ("A principal reason for unity in the Executive was that officers might be appointed by a single, responsible person.").

204. *See* U.S. CONST. art. II, § 2, cl. 1 ("[The President] may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices . . . ."); THE FEDERALIST NO. 84, *supra* note 83, at 437 (Alexander Hamilton) ("[T]he principal departments of the administration under the present government, are the same which will be required under the new. There are now a Secretary of War, a Secretary of Foreign Affairs, a Secretary for Domestic Affairs, a Board of Treasury . . . . These officers are indispensable under any system, and will suffice under the new as well as the old.").

205. *See* THE FEDERALIST NO. 72, *supra* note 83, at 365 (Alexander Hamilton) ("To reverse and undo what has been done by a predecessor, is very often considered by a successor as the best proof he can give of his own capacity . . . and in addition to this propensity, where the alteration has been the result of public choice, the person substituted is warranted in

The founders understood that carrying laws into execution required discretion, which, in turn, often called for statutory interpretation. Indeed, on the floor of the Constitutional Convention, James Madison remarked that the chief difference between the executive and judiciary was not with respect to interpretation; "[t]he [executive] expounded [and] applied [laws] for certain purposes, as the [judiciary] did for others."[206] Rather, the difference consisted in the "much greater latitude" afforded the "opinion and discretion" of the executive in discharging his office.[207] It was understood that other executive officials would assist with this task, without whom the President "c[ould] do nothing of consequence."[208]

This view of executive power had deep roots in the Anglo-American tradition. In 1689, John Locke recognized that "the good of society requires . . . several things [] be left to the discretion of him that has the executive power."[209] The law cannot address everything, and legislators, try as they might, cannot "foresee and provide . . . [for] all that may be useful to the community."[210] As a result, certain details "must necessarily be left to the discretion of" the chief magistrate,[211] which encompasses "a latitude . . . to do many things . . . the laws do not [expressly] prescribe."[212] To be sure, the legislature may "resume [execution of the laws] out of [executive] hands, when they find cause" as in the case of "maladministration."[213] But the

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supposing that the dismission of his predecessor has proceeded from a dislike to his measures . . . .").

206. James Madison, Notes on the Constitutional Convention (July 17, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 203, at 34.

207. *Id.*

208. James Madison, Notes on the Constitutional Convention (July 19, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 203, at 54; *see also id.* (noting Gouverneur Morris's observation that "[t]here must be certain great officers of State; a minister of finance, of war, of foreign affairs &c . . . [who] will exercise their functions in subordination to the Executive"); James Madison, Notes on the Constitutional Convention (July 21, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 203, at 80 (recounting John Rutledge's statement that "[t]he Executive could advise with the officers of State, as of war, finance &c. and avail himself of their information and opinions"); James Madison, Notes on the Constitutional Convention (June 6, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 203, at 139 (noting Charles Pinkney's observation that "the heads of the principal departm[ents] . . . could be called on by the Executive Magistrate whenever he pleased to consult them").

209. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 159, at 91 (Thomas P. Peardon ed., 1952).

210. *Id.*

211. *Id.*

212. *Id.* § 160, at 92; *see also id.* ("[I]t is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make laws that will do no harm, if they are executed with an inflexible rigour . . . .").

213. *Id.* § 153, at 86; *see also* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper *for carrying into Execution* the foregoing Powers . . . ." (emphasis added)).

nature of executive power requires it "be always in being"[214] to carry into effect laws that remain in force.[215] Subordinate officials exist to aid in that task, and derive their authority from the "supreme" executive power.[216]

This understanding was also shared by Sir William Blackstone. To start, he affirmed the power of executive prerogative—that is, "the discretionary power of acting for the public good, where the positive laws are silent."[217] Of course, such power was not "absolute" and was subject to exceptions and boundaries set out by law.[218] But in many cases, discretion was *granted* by statute with prerogative delegated to the King's Privy Council, composed of the British equivalent of department heads.[219] That arrangement did not usurp legislative power. Although lawmaking was "entirely the work of . . . the legislative branch," the "manner, time, and circumstances of putting those laws in execution [was] frequently left to the discretion of the executive magistrate."[220] Consequently, edicts concerning implementation—called proclamations in England—"[we]re binding" so long as "they d[id] not either contradict the old laws or tend to establish new ones."[221]

In contrast, judges play no part in the policymaking process. As a structural matter, the executive and judiciary are separate institutions, with no power granted for judicial consultation on policy matters.[222] Speaking against a judicial presence in the cabinet, Elbridge Gerry noted, "[i]t was quite foreign from the nature of [the] office to make [courts] judges

214. LOCKE, *supra* note 209, § 153, at 86.

215. *Id.* § 144, at 82 ("[B]ecause the laws, that are at once and in a short time made have a constant and lasting force and need a perpetual execution or an attendance thereunto; therefore, it is necessary there should be a power always in being which should see to the execution of that laws that are made and remain in force.").

216. *Id.* § 151, at 85 (explaining that the chief magistrate "has in him the supreme execution from whom all inferior magistrates derive all their several subordinate powers").

217. 1 WILLIAM BLACKSTONE, COMMENTARIES *251–52.

218. *Id.* at *250 ("[T]he constitution hath expressly, or by evident consequence, laid down some exception or boundary; declaring that thus far the prerogative shall go, and no further.").

219. *See id.* at *260–65; *see also id.* at *237 n.1 ("In modern times, in practice, the exercise of many branches of the king's prerogative is from time to time delegated by statute to the privy council, as the granting licenses, &c; and acts are passed regulating foreign and domestic concerns, weights, measures, &c.").

220. *Id.* at *270.

221. *Id.*

222. THE FEDERALIST NO. 47, *supra* note 83, at 247 (James Madison) ("Were the power of judging . . . joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.").

of the policy of public measures";[223] such a role would "mak[e] Statesmen of [] Judges."[224] Nathaniel Gorham agreed, explaining that "Judges [] are not to be presumed to possess any peculiar knowledge of the mere policy of public measures."[225]

This conception provides a robust role for executive power.[226] But that is not inevitable. Technically, Congress could specify every manner of detail in promulgating a statutory scheme; however, that was not the constitutional design. The framers opposed "making the [e]xecutive the mere creature of the [l]egislature,"[227] and recognized "[i]t [wa]s one thing to be subordinate to the laws, but another to be dependent on" Congress.[228] And as a practical matter, "no statute [truly] can prescribe every implemental detail."[229] As a result, the executive necessarily exercises discretion in prescribing details required to carry a legislative program into effect.[230] Otherwise, the President is nothing more than a "messenger-boy," without even the power "to preserve legislative programs from destruction so that Congress will have something left to act upon."[231]

The growth of government, therefore, has predictably expanded agency power. And far from a deviation, the framers anticipated this result as flowing from the constitutional design. James Madison wrote that the consequence of "extend[ing] federal powers to every subject falling within the idea of the 'general welfare' . . . must be to enlarge the sphere of discretion allotted to the executive magistrate."[232] As government grows, "[t]he difficulty of providing uniform and particular regulations . . . [would] be increased."[233] And as a result, "a greater latitude [would be afforded] to the agency of that department which is always in existence, and which could best mould [sic] regulations . . . so as to suit them to the diversity of particular situations."[234]

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223. James Madison, Notes on the Constitutional Convention (June 4, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 203, at 97–98.

224. James Madison, Notes on the Constitutional Convention (July 21, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 203, at 75.

225. *Id.* at 73.

226. For a modern discussion of this view of executive power, see Goldsmith & Manning, *supra* note 172.

227. James Madison, Notes on the Constitutional Convention (June 2, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 203, at 86 (quoting George Mason).

228. THE FEDERALIST NO. 71, *supra* note 83, at 362 (Alexander Hamilton).

229. Goldsmith & Manning, *supra* note 172, at 2308.

230. *See id.* at 2303.

231. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 708–09 (1952) (Vinson, C.J., dissenting).

232. JAMES MADISON, VIRGINIA REPORT OF 1799–1800, at 201 (Richmond, J.W. Randolph 1850).

233. *Id.* at 201–02.

234. *Id.* at 202.

V. CONCLUSION

This Article set out to offer a textual and originalist defense of *Chevron* deference. But it does not condone the excesses of the administrative state. Critics of *Chevron*—and of bureaucracy more generally—are rightly concerned with centralization of power in administrative agencies. Their criticism, however, misses the mark. The text of the APA is far from clear, and certainly does not prohibit deference to agencies. And founding-era judicial practice cuts in *Chevron*'s favor. Early courts routinely deferred to executive statutory interpretations on the understanding that laws require exercises of discretion for implementation, which, in turn, qualify as an exertion of executive power under Article II. In short, *Chevron* has a remarkable practical and constitutional pedigree.

So, what—if not *Chevron*—accounts for the continued expansion of the administrative state? Conscious political choice. Congress and the President ensure bureaucratic growth in their passage and implementation of laws. And voters, not courts, must hold them accountable. Eliminating deference only elevates judges. That begets smaller government, but only of a kind—the unelected, life-tenured variety.[235] Indeed, in the post-*Chevron* world, judges would likely replace the political choices of indirectly accountable agency officials with their own. Ambiguities would confront courts with a Rorschach test; what judges see would say a great deal more about their political preferences than congressional intent or statutory meaning.

None of this is to say that courts have no role in policing agency action. They do. But only in rigorously enforcing plain meaning at *Chevron* Step One, and undertaking a meaningful reasonableness inquiry at *Chevron* Step Two.[236] That sort of application preserves respect for executive discretion without entirely foreclosing judicial review. And, by getting judges out

235. *See* Silberman, *supra* note 6, at 823 ("The agencies—even the independent ones—have superior political standing to the life-tenured federal judiciary in performing [a] policymaking function.").

236. *See* Scalia, *supra* note 149, at 521 ("[T]here is a fairly close correlation between the degree to which a person is . . . a 'strict constructionist' of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One who finds *more* often . . . that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require [a textualist] to accept an interpretation which, though reasonable, [he or she] would not personally adopt.").

of policymaking it stands "if you will, for a little judiciary"—the hallmark of judicial restraint.[237]

237. Silberman, *supra* note 6, at 822.