

# A *YOUNGSTOWN* FOR THE ADMINISTRATIVE STATE

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*A chorus of “Chevron-skeptics” has emerged in the past few years among right-leaning legal thinkers. These skeptics couch their opposition to the thirty-year-old precedent in Marbury’s conception of judicial duty, often referring to it as a “counter-Marbury for the administrative state.” Yet this distrust of Chevron sits uneasily with broader conservative jurisprudence, especially as it has developed since the Reagan years. Early proponents of Chevron justified it as a suitable mode of judicial restraint—that is, a form of judicial deference to the unitary executive. Therefore, this Article offers a qualified response to Chevron-skeptics based on the Court’s broader separation of powers jurisprudence. In particular, I defend Chevron as an analogue to Youngstown and to other doctrines of judicial deference that restrict Article III courts to their appropriate institutional roles. This analogy provides a theoretical justification for Chevron deference within the Court’s separation of powers jurisprudence.*

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## INTRODUCTION

A chorus of “*Chevron*-skeptics” has emerged in the past few years among right-leaning legal academics, judges, practitioners, and even politicians.<sup>1</sup> These skeptics tend to frame their opposition to the thirty-year-old precedent in *Marbury's* conception of judicial duty: “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>2</sup> Jus-

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1. See, e.g., *De Niz Robles v. Lynch*, 803 F.3d 1165, 1167–68, 1179 (10th Cir. 2015); *The Administrative State and Congressional Abrogation of the Chevron Doctrine: Hearing Before the Comm. on the Judiciary*, 8, 11–12 (June 10, 2015) (statement of Charles J. Cooper); Jonathan H. Adler, *Restoring Chevron's Domain*, 81 MO. L. REV. 983, 983 (2017) (“*Chevron's* domain is under siege . . .”); Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1349 (2018) (“We note that *Chevron* has come under more academic and judicial attack recently, in large part linked to the stated opposition to the doctrine by newly confirmed Supreme Court Justice Gorsuch.”); Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1213 (2016) (arguing that *Chevron* represents the abandonment of judicial duty to bring independent judgment to bear); Jeffrey Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1075, 1089 (2016) (imagining a world without *Chevron*); Seth P. Waxman, *The State of Chevron: Fifteen Years After Mead*, 68 ADMIN. L. REV. ACCORD 1 (2016); see also Brent Owen, *US Congress Considers Law that Would Overturn Chevron Deference*, FRESHLAWBLOG (Aug. 11, 2016), <http://www.freshlawblog.com/2016/08/11/us-congress-considers-law-that-would-overturn-chevron-deference/>.

2. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803); see also Hamburger, *supra* note 1, at

tice Thomas has stated the objection most forcefully:

The judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws. Interpreting federal statutes—including ambiguous ones administered by an agency—calls for that exercise of independent judgment. *Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is the best reading of an ambiguous statute in favor of an agency’s construction. It thus wrests from Courts the ultimate interpretative authority to say what the law is and hands it over to the Executive.<sup>3</sup>

Because *Chevron* deference shifts interpretive authority from the courts to the Executive Branch, it violates the Founders’ decision to vest the judicial power in Article III courts.<sup>4</sup> Some of the skepticism of *Chevron* seems also to be driven by rising concern about the vast and seemingly unaccountable administrative state.<sup>5</sup> Dissenting in *City of Arlington v. FCC*,<sup>6</sup> for example, the Chief Justice wrote that “[t]he rise of the modern administrative state has not changed” the judicial duty to “say what the laws is.” Given these sorts of criticisms, it has become common to refer to *Chevron* as a “counter-*Marbury*” for the administrative state.<sup>7</sup>

The newest Justice on the Court shares these concerns with Justice Thomas and Chief Justice Roberts. Concurring in a Tenth Circuit opinion, then-Judge Gorsuch wrote of *Chevron*:

In this way, *Chevron* seems no less than a judge-made doctrine for the abdication of the

1187, 1227–31 (using *Marbury* to raise constitutional concerns about *Chevron*). *But see generally* Aditya Bamzai, *Marbury v. Madison and the Concept of Judicial Deference*, 81 MO. L. REV. 1057, 1057–59 (2016) (discussing the complex relationship between *Marbury* and *Chevron*); Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 498 (2004) (arguing that “*Marbury* is much closer in spirit to *Chevron* and the modern approach to the standard of review than has been commonly supposed”).

3. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (citations omitted); *see also* Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L.J. F. 94, 102 (2015) (describing Justice Thomas’s administrative jurisprudence).

4. *See, e.g.*, Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 39 (2017) (“The underlying impetus [for criticisms of *Chevron*] thus seems less about respecting the APA and more about reasserting judicial power over the executive branch. Further evidence of this comes from the repeated invocations of *Marbury*’s famous statement . . .”).

5. *See, e.g.*, Metzger, *supra* note 4, at 34, 36–37, 42; *cf.* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236, 1241, 1248–49 (1994).

6. 133 S.Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting).

7. *See* Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006); Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2637 (2003) (discussing the origins of the phrase).

judicial duty. Of course, some role remains for judges even under *Chevron*. At *Chevron* step one, judges decide whether the statute is “ambiguous,” and at step two they decide whether the agency’s view is “reasonable.” But where in all this does a court *interpret* the law and say what it *is*? When does a court independently decide what the statute means and whether it has or has not vested a legal right in a person? Where *Chevron* applies that job seems to have gone extinct.<sup>8</sup>

For the Court’s conservatives and many right-leaning academics, *Chevron* has a *Marbury* problem.<sup>9</sup>

On the Court at least, Justice Scalia was the conservative holdout against the wave of *Chevron*-skepticism. A staunch believer in the decision’s correctness, Justice Scalia defended the doctrine in a 1989 lecture at the Duke Law School.<sup>10</sup> Then, in his strident solo-dissent in *United States v. Mead Corp.*,<sup>11</sup> he castigated Justice Souter’s opinion for weakening *Chevron*. And despite rumors that he had begun to change his views about *Chevron* before his death,<sup>12</sup> he reiterated his support as late as 2015: “As I have described elsewhere, the rule of *Chevron*, if it did not comport with the APA, at least was in conformity with the long history of judicial review of executive action, where statutory ambiguities were left to reasonable resolution by the Executive.”<sup>13</sup> Justice Scalia’s death casts doubt on *Chevron*’s future at the Court and, more generally, within the conservative legal movement. Justice Gorsuch’s appointment could certainly be an inflection point in the Court’s treatment of the doctrine.

Nonetheless, *Chevron*-skepticism sits uneasily with broader conservative jurisprudence, at least since it has developed since the Reagan years.<sup>14</sup>

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8. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149, 1152, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).

9. See, e.g., Asher Steinberg, *Yes, Gorsuch Matters*, THE NARROWEST GROUNDS (Mar. 14, 2017), <https://narrowestgrounds.blogspot.com/2017/03/yes-gorsuch-matters.html> (discussing the implications of Justice Gorsuch’s confirmation for administrative law doctrine); Metzger, *supra* note 4, at 26–27.

10. He defended the emerging doctrine as compatible with the Court’s historical approach to judicial review. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 (1989).

11. 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

12. See Adam White, *Scalia and Chevron: Not Drawing Lines, But Resolving Tensions*, YALE J. ON REG.: NOTICE & COMMENT (Feb. 23, 2016), <http://yalejreg.com/nc/scalia-and-chevron-not-drawing-lines-but-resolving-tensions-by-adam-j-white/>.

13. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring) (internal quotation marks omitted) (quoting *Mead*, 533 U.S. at 243 (Scalia, J., dissenting)); see also Antonin Scalia, *Remarks by the Honorable Antonin Scalia for the 25th Anniversary of Chevron v. NRDC*, 66 ADMIN. L. REV. 243, 244 (2014) (defending *Chevron* and criticizing *Mead*).

14. See, e.g., Emily Bazelon & Eric Posner, *The Government Gorsuch Wants to Undo*, N.Y.

First, in the context of the administrative state, the emphasis on judicial duty might conflict with the institutional role many conservatives think the courts should play. This notion of an institutionally restrained judge has its constitutional roots in Article III's "cases and controversies" limitation.<sup>15</sup> Courts might know how to say what the law is, but generalist judges cannot as easily analyze complex and widespread social costs or benefits.<sup>16</sup>

Further, modern conservatives often embrace a view of executive power called the theory of the unitary executive.<sup>17</sup> This constitutional theory argues that the Constitution vests the President with the sole power to execute the laws through his or her subordinates—a power that can sometimes trump the expressed intent of Congress to transfer power to agencies.<sup>18</sup>

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TIMES (Apr. 1, 2017), <https://www.nytimes.com/2017/04/01/sunday-review/the-government-gorsuch-wants-to-undo.html> ("Chevron was not viewed as a left-leaning decision. The Supreme Court decided in favor of the Reagan administration, after all, voting 6 to 0 (three justices did not take part), and spanning the ideological spectrum.").

15. See U.S. CONST. art. III; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992) ("The province of the court,' as Chief Justice Marshall said in *Marbury v. Madison*, 'is, solely, to decide on the rights of individuals.' Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive."); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring) ("All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.").

16. See *Brown v. Plata*, 563 U.S. 493, 555 (2011) (Scalia, J., dissenting) (critiquing structural injunctions because "empirical predictions necessarily based in large part upon policy views" are "the sort of predictions regularly made by legislators and executive officials, but inappropriate for the Third Branch."); cf. Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 405–06 (1978) (discussing adjudication's relative incapacity to deal with "polycentric" problems).

17. See Julian E. Zelizer, *The Conservative Embrace of Presidential Power*, 88 B.U. L. REV. 499, 499–500 (2008); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165, 1167 (1992); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 544–46 (1994).

18. See, e.g., Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 44 ("The thesis of this article is that Congress may not constitutionally deny the President the power to remove a policy-making official who has refused an order of the President to take an action within the officer's statutory authority."). Academics and political-branch lawyers have asserted the theory. See Calabresi & Rhodes, *supra* note 17; Calabresi & Prakash, *supra* note 17; Larry L. Simms, *Proposed Executive Order Entitled "Federal Regulation,"* 5 Op. O.L.C. 59, 60–61 (1981).

This theory has its roots in early constitutional history and in the Court's landmark decision in *Myers v. United States*.<sup>19</sup> And since Justice Scalia's dissent in *Morrison v. Olson*,<sup>20</sup> unitary-executivist theory has been ascendant in the Court's removal jurisprudence, which has limited Congress's capacity to use for-cause removal provisions to insulate agency officials from presidential oversight.<sup>21</sup> In short, the Reagan-era conservative legal movement stridently embraced presidential control of the Executive Branch, and so it is no surprise that conservatives in the 1980s were often the fiercest defenders of *Chevron*.<sup>22</sup>

*Chevron*-skepticism begins to reject the Reagan-era vision of a powerful executive. The rise of this skepticism suggests a generational shift amongst right-leaning legal thinkers away from the deferential, executive-focused jurisprudence of the Reagan era.<sup>23</sup> But *Chevron*-skepticism's uneasy fit within a broader theoretical framework should raise concerns. Conservative at-

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19. See, e.g., *Myers v. United States*, 272 U.S. 52, 136 (1926) (“[The Decision of 1789] would come at once before the executive branch of the government for compliance, and might well be brought before the judicial branch for a test of its validity. As, we shall see, it was soon accepted as a final decision of the question by all branches of the government.”); AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 193 (2005) (discussing the decision of 1789); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836–37, 1839 (2016) (describing the precedential origins of removal power).

20. 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

21. See generally *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (limiting congressional power to prevent the President from removing officers); see also *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 20 (D.C. Cir. 2016) (“In addition, the independent counsel experiment ended with nearly universal consensus that the experiment had been a mistake and that Justice Scalia had been right back in 1988 to view the independent counsel system as an unconstitutional departure from historical practice and a serious threat to individual liberty.” (citing *Morrison v. Olson*, 487 U.S. 654 (1988))), *reh'g en banc granted, order vacated*, 881 F.3d 75 (D.C. Cir. 2018).

22. See Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986) (defending *Chevron*); Scalia, *supra* note 10; Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 275–83 (2014) (suggesting that *Chevron* might have become a “landmark” in part because it was favored by Republican appointees on the D.C. Circuit and aggressively promoted by Executive Branch lawyers). For an argument that various doctrines of judicial review should encourage “presidential administration,” see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2372–83 (2001).

23. Cf. Waxman, *supra* note 1, at 19 (“One irony of the Court's recent *Chevron* skepticism is that it has been led by Justices and applauded by supporters who have been critical of what they deem judicial activism.”).

tachment to a powerful executive and an institutionally limited judiciary did not arise just because George Bush and Ronald Reagan took the White House (at least one hopes).<sup>24</sup> The constitutional theory has its roots in rich textual, structural, historical, and functional analysis.<sup>25</sup> *Chevron*-skepticism must contend not only with the history of the Court's approach to statutory interpretation,<sup>26</sup> but also with the broader theories of structural constitutional law. And in this respect, the skeptics' invocation of *Marbury* strikes a note of irony: Chief Justice Marshall also claimed that some "important political powers" of the President can "never be examinable by the courts."<sup>27</sup>

This Article argues that *Chevron* fits within the Court's separation of powers jurisprudence. It defends *Chevron* as the statutory analogue to the Court's constitutional decision in *Youngstown*. Both cases concern the appropriate mode of analysis when the Court reviews the action of the Executive Branch.<sup>28</sup> First, the Court applies traditional judicial tools of statutory or constitutional interpretation. Second, it engages in limited, deferential review if those tools fail to yield a clear answer—that is, if true ambiguity remains.<sup>29</sup> This methodological analogue makes good sense because both *Youngstown* and *Chevron* further the same constitutional values and institutional concerns. Both cases respect the judiciary's limited institutional capacity, the comparative democratic accountability of the Executive Branch, and the value of an energetic and efficient execution of the laws that underlie *Youngstown* and *Chevron*. This analogy—I suggest—provides a theoretical justification for *Chevron* deference within the Court's separation of powers

24. *But see* Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 628–30 (1989) ("In support of this end [of deregulation], the [Reagan] administration and its supporters articulated a constitutionally based theory of a unitary executive . . ."); Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, 12 U. PA. J. CONST. L. 313, 313 (2010) (arguing that the unitary executive theory "fit into the political agendas of [the Reagan and Bush Administrations]").

25. *See generally* Calabresi & Prakash, *supra* note 17.

26. For the best analysis of *Chevron*'s historical justification within interpretive theory, see Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretations*, 126 YALE L.J. 908, 998–99, 1001 (2017).

27. *Marbury v. Madison*, 5 U.S. 137, 165–66 (1803); *see also* Merrill, *supra* note 22, at 498 (arguing that "*Marbury* is much closer in spirit to *Chevron* and the modern approach to the standard of review than has been commonly supposed").

28. *See infra* Part I.

29. *But cf.* Scalia, *supra* note 10, at 520 (describing the proper approach to the threshold determination of ambiguity as the "chink in *Chevron*'s armor"); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (noting that "it is so difficult to make those clarity versus ambiguity determinations in a coherent, evenhanded way").

jurisprudence.

Nonetheless, this Article does not ignore the complaints of the *Chevron*-skeptics. Indeed, as it has been applied, some empirical evidence suggests that *Chevron* has transferred some interpretive authority from the courts and sown distrust between them and the agencies that they oversee.<sup>30</sup> This Article therefore defends an old-guard vision of the case. First, the precedent counsels an appropriately deferential judiciary. This deference protects a vigorous executive, “permit[s] needed flexibility[] and appropriate political participation[] in the administrative process,”<sup>31</sup> and constrains the courts to their narrow institutional role. At the same time, however, it takes the criticisms of the *Chevron*-skeptics to heart. As *Chevron* has been articulated, it has allowed agencies to pursue aggressive policies when the traditional tools of statutory interpretation *could* guide the answer. Lower courts, in particular, have become increasingly deferential under the *Chevron* regime.<sup>32</sup>

But as Justice Scalia noted in his 1989 lecture, judges who “abhor[] a ‘plain meaning’ rule” will “more frequently find agency-liberating ambiguity[] and will discern a much broader range of ‘reasonable’ interpretation.”<sup>33</sup> This Article, therefore, favors the version of *Chevron* endorsed by Justice Scalia: “One who finds *more* often (as I do) 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 me to accept an interpretation which, though reasonable, I would not personally adopt.”<sup>34</sup> To articulate what this approach might look like in the *Chevron* context, I turn to the work of lower-court judges. Their work suggests an approach to *Chevron* that appropriately balances the “*Marbury* concern” (that the Court

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30. See *infra* Part III.

31. Scalia, *supra* note 10, at 517.

32. See *infra* Section III.B.

33. See Scalia, *supra* note 10, at 521.

34. See *id.* There is some evidence that Justice Gorsuch will take something like this approach when narrowing *Chevron*. In *Wisconsin Cent. Ltd. v. United States*, Justice Gorsuch’s majority opinion engaged in several pages of analysis at *Chevron* step one, then rejected the government’s reliance on *Chevron*: “But in light of all the textual and structural clues before us, we think [the statute is] clear enough . . . , leaving no ambiguity for the agency to fill.” 138 S. Ct. 2067, 2074 (2018). Commentators have rightly noted that this “muscular *Chevron* step one inquiry” resembles that of Justice Scalia. Chris Walker, *Gorsuch’s “Clear Enough” & Kennedy’s Anti-“Reflexive Deference”: Two Potential Limits on Chevron Deference (SCOTUS Term)*, PRAWFSBLAWG (June 22, 2018), <http://prawfsblawg.blogs.com/prawfsblawg/2018/06/gorsuchs-clear-enough-kennedys-anti-reflexive-deference-two-potential-limits-on-chevron-deference-sc.html>.

must say what the law is) against the “*Youngstown* concern” (that the Court has no business inserting itself into political questions without a clear rule of law).

Before proceeding further, a few clarifications are in order. First, this Article does not engage with the recent challenges to *Chevron*’s legitimacy as a canon of interpretation. Professor Bamzai’s article is the most persuasive recent example.<sup>35</sup> This Article characterizes *Chevron* not so much as a canon of interpretation, but rather as a precedent governing judicial review in separation of powers cases.<sup>36</sup> Of course, these two categories bleed into one another because questions of statutory interpretation always turn on an underlying constitutional theory.<sup>37</sup> But these two different ways of thinking about *Chevron* might lead to different results. Second, this Article does not claim that *Youngstown*’s reasoning somehow mandates the adoption of the *Chevron* framework. Instead, I hope to identify the structural analogy between these two distinct areas of law and show why the analogy lends some support to *Chevron*’s legitimacy.

This Article proceeds in three Parts. Part I articulates the basic analogy between *Youngstown* and *Chevron* and argues that the analogy provides theoretical and doctrinal support for *Chevron*. Part II buttresses this analogy by responding to three distinct counterarguments that suggest a disanalogy between the two cases: first, that *Chevron* concerns agency action while *Youngstown* concerns the President’s; second, that *Chevron* must be justified as a canon of interpretation—not as a separation of powers precedent; and third, that *Mead Corp.* forecloses the interpretation of *Chevron* that I advance. Turning away from the basic defense of *Chevron*, Part III takes seriously the concerns of the *Chevron*-skeptics. First, it explores the structural realities of judicial review of agency action to explain the causes of *Chevron*-skepticism. Having articulated these root causes, I attempt to describe a version of *Chevron* deference that responds to the concerns of judges and theorists. Finally, I argue that this version of *Chevron* is desirable because it defends the proper sphere of the judiciary’s “independent judgment” without requiring courts to engage in inappropriate review of agency policy decisions. A short conclusion follows.

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35. See Bamzai, *supra* note 26.

36. See *infra* Section II.B.

37. See Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) (“Any theory of statutory interpretation is at base a theory about constitutional law. It must at the very least assume a set of legitimate institutional roles and legitimate institutional procedures that inform interpretation.”).

## I. A *YOUNGSTOWN* FOR THE ADMINISTRATIVE STATE

This Part articulates the structural and normative analogy between *Youngstown* and *Chevron*. Structurally, both cases prescribe a two-step mode of analysis when the Court must determine the scope of the President's authority. First, the Court should employ traditional tools of statutory construction to determine the scope of the President—or the agency's—constitutional or statutory authority. Second, if those tools fail to yield a determinate answer—that is, if the scope of executive authority is uncertain or ambiguous—the second step of each case counsels judicial deference to executive action.<sup>38</sup> Normatively, the same constitutional values underlie and justify both *Youngstown* and *Chevron*. Both cases promote the political accountability of an energetic executive. For these reasons, *Chevron* has a justifying antecedent in the Court's separation of powers jurisprudence.

### A. *The Youngstown Framework*

In the midst of the Korean War, the United Steelworkers of America “gave notice of a nation-wide strike.”<sup>39</sup> Concerned that the war required a “continuing and uninterrupted supply of steel,” President Truman responded with Executive Order 10,340.<sup>40</sup> This Order directed the Secretary of Commerce to take possession of certain steel mills and provide for their management.<sup>41</sup> The companies sued, and the district court issued a preliminary injunction that restrained the Secretary from “continuing the seizure and possession of the plants . . . and from acting under the purported authority of Executive Order No. 10340.”<sup>42</sup>

The Supreme Court affirmed the judgment of the district court. Writing

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38. See Michael Stokes Paulsen, *Youngstown Goes To War*, 19 CONST. COMMENT. 215, 230 (2002) (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)) (“[*Youngstown*] is a rule of judicial deference, not terribly unlike other such rules of interpretive deference.”); see also William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1100, 1164 (2008) (“In the twilight zone, judges should be deferential to presidential interpretation even where there is no implicit delegation. Like presidential power, the validity of executive branch application depends on the ‘imperatives of events and contemporary imponderables rather than on abstract theories of law.’”).

39. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952). See generally MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* (1977).

40. Exec. Order No. 10,340, 17 Fed. Reg. 3139 (April 8, 1952) (to be codified at 3 C.F.R. 861); see also *Youngstown*, 343 U.S. at 590 (citing the Executive Order).

41. See *Youngstown*, 343 U.S. at 591.

42. *Id.* at 584.

for the majority, Justice Black succinctly and elegantly resolved the case. Because the “President’s power . . . must stem either from an act of Congress or from the Constitution itself,” and because the President had not asserted ‘statutory authorization for the seizure,’ the President must rely on some authority “in some provision of the Constitution.”<sup>43</sup> According to the Court, neither the Take Care Clause nor the Commander in Chief Clause justified the President’s order, and so “the seizure order [could not] stand.”<sup>44</sup>

Despite the logical force of Justice Black’s opinion,<sup>45</sup> Justice Jackson’s concurrence has come to establish the governing *Youngstown* paradigm.<sup>46</sup> This concurrence sets out a tri-partite framework for judicial review of executive action. In Category I, the President acts “pursuant to an express or implied authorization of Congress.”<sup>47</sup> Because here “his authority is at its maximum,” the action “would be supported by the strongest presumptions and the widest latitude of judicial interpretation.”<sup>48</sup> Category II constitutes a “zone of twilight” where constitutional authority is “concurrent” or the “distribution is uncertain,” and “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”<sup>49</sup> In Category III (where President Truman’s executive action fell), the President takes action “incompatible with the expressed or implied will of Congress,” and these assertions must be “scrutinized with caution.”<sup>50</sup>

43. *Id.* at 585–87.

44. *Id.* at 587–89.

45. See Paulsen, *supra* note 38, at 225 (“Justice Black’s opinion for the Court is straightforward, direct, and elegant—a masterpiece of textual and formal analysis. In its own, different way, it is as great a work of judicial art as Jackson’s concurrence.”).

46. See, e.g., *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (“Justice Jackson’s familiar tripartite scheme provides the accepted framework for evaluating executive action in this area.”); *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) (applying Justice Jackson’s concurrence); see also Harold H. Bruff, *Judicial Review and the President’s Statutory Powers*, 68 VA. L. REV. 1, 11–12 (1982) (“It is Justice Jackson’s famous concurring opinion in *Youngstown* that has most influenced subsequent analysis.”); Paulsen, *supra* note 38, at 224 (“It has become fashionable . . . to note the eclipse of Justice Hugo Black’s majority opinion by Justice Robert Jackson’s concurrence, in terms of influence in establishing the governing paradigm.”).

47. *Youngstown*, 343 U.S. at 635 (1952) (Jackson, J., concurring).

48. *Id.* at 635, 637.

49. *Id.* at 637.

50. *Id.* at 637–38. These three categories do not delineate three formally distinct forms of presidential action. As Justice Jackson noted, these categories present “a somewhat oversimplified grouping.” *Id.* at 635. Instead, as *Dames & Moore* later glossed the opinion, “executive action in any particular instances falls, not neatly in one of three pigeonholes, but ra-

For our purposes, it is worth unpacking two central aspects of the *Youngstown* framework: (1) *Youngstown* requires the Court to proceed in two steps of analysis, creating what might be called “first order” and “second order” rules<sup>51</sup>; while the first-order rule requires the Court to employ the traditional tools of statutory interpretation to categorize the executive action, the second-order rule counsels a functional, deferential style of review; and (2) underlying constitutional values that support *Youngstown*’s approach include efficiency—or the “Energy in the Executive”<sup>52</sup>—and democratic accountability.<sup>53</sup>

### 1. *Youngstown*’s Two-Step Deference Regime

*Youngstown* articulates a two-step method of analysis. First, a court must engage in traditional statutory interpretation to categorize executive action. Justice Jackson’s framework distinguishes presidential action in three categories. But such a framework turns on the prior question of categorization. To apply the framework, then, the Court must first determine whether “the President acts pursuant to an express or implied authorization of Congress” or whether he has taken “measures incompatible” with that expressed will.<sup>54</sup> When making these determinations, the Court of course will rely upon the traditional tools of interpretation—like text, structure, legislative history, or whatever interpretive tools the Court applies.<sup>55</sup> Should the ques-

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ther at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.” 453 U.S. at 669. The three categories, then, represent the extremes (and the center point) of a “continuum of deference.” Cf. Eskridge & Baer, *supra* note 38, at 1096 (noting the varied deference regimes the Court applies). Under *Youngstown*, the more clearly presidential action falls within the zone of congressionally delegated authority, the more deferential the court should be in determining the act’s legality.

51. See Paulsen, *supra* note 38, at 230 (“[Category II] is [a] second-order [rule] in the sense that it is not a rule of direct constitutional interpretation, but a rule concerning what to do where inquiry under first-order principles of interpretation (such as consideration of the Constitution’s text, structure and historical evidence of original meaning) fails to yield a sufficiently determinate answer . . .”).

52. THE FEDERALIST NO. 70, at 402 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

53. Cf. Kagan, *supra* note 22, at 2331–32 (noting that all “models of administration” must address both “how to make administration accountable to the public and how to make administration efficient” and further arguing that the new model of “presidential administration” supports both values).

54. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

55. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012) (codifying canons of interpretation); WILLIAM N. ESKRIDGE JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE*

tion fall easily into Category I or Category III, all that remains is to forbid or permit the activity.

But not all legal questions can be resolved with these traditional tools.<sup>56</sup> Sometimes, even for the strictest originalist, the first-order analysis will “fail[] to yield a sufficiently determinate answer, or yield[] a range of legitimate answers none of which is sufficiently preferable . . . [to] be called the ‘right answer.’”<sup>57</sup> In other words, the traditional modes of constitutional and statutory interpretation—or, at least, the reliance on mere text or structure—might not yield a clear answer.<sup>58</sup> Using Justice Jackson’s language, the “abstract theories of law” might not always resolve the question.<sup>59</sup> Then, the question falls into Category II’s “zone of twilight,” and the framework requires the Court to look beyond “abstract theories of law” to decide the case.<sup>60</sup>

In Category II, the Court reaches beyond its traditional tools of statutory or constitutional interpretation. This second-order reasoning, I shall argue, represents a functional, deferential analysis of the President’s actions. Because President Truman in *Youngstown* never bothered to assert a specific statutory authorization,<sup>61</sup> Justice Jackson’s concurrence barely mentions

CONSTITUTION (2016) (same). *But cf.* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1761 (2010) (“[T]he U.S. Supreme Court still is divided over which interpretive tools, in what order, should be used to resolve statutory questions.”).

56. Constitutional theorists often recognize this reality, though interpreters will differ about the determinacy of the text. *See, e.g.*, Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 120–21 (2010) (noting that, in some situations, “the Constitution as written cannot in good faith be said to provide a determinate answer to a given question.”); JACK M. BALKIN, *LIVING ORIGINALISM* 14–15 (2011) (explaining that “many other materials gloss text and principles” when the text does not state a “concrete and specific rule”).

57. Paulsen, *supra* note 38, at 230. *But cf.* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 859 (1992) (noting that Anglo-American law has failed to theorize when an interpretation meets its burden of proof, or when it’s “time to declare epistemological victory and move on”); Kavanaugh, *supra* note 29, at 2121 (stating that “it is so difficult to make those clarity versus ambiguity determinations in a coherent, evenhanded way”); Scalia, *supra* note 10, at 520 (describing the proper approach to the threshold determination of ambiguity as the “chink in *Chevron*’s armor”).

58. *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 424–32 (2012) (discussing when historical practice should be used to clarify the Constitution’s meaning under different theories of interpretation).

59. *Youngstown*, 343 U.S. at 637.

60. *Id.*

61. *See id.* at 591 (“Now, therefore, by virtue of the authority vested in me by the Con-

how a Court should approach the questions in Category II. Nonetheless, he does mention in passing the “imperatives of events and contemporary imponderables”<sup>62</sup> and “congressional inertia, indifference or quiescence.”<sup>63</sup> These factors suggest that the Court should employ a functional mode of review in Category II.

This functional approach in Category II constitutes a deference regime. As Professors Eskridge and Baer note, “in the twilight zone, judges should be *deferential* to presidential interpretation even where there is no implicit delegation.”<sup>64</sup> In areas where the distribution of overlapping constitutional powers is “uncertain,” the Court cannot clearly say one way or another that the activity of the President is *unlawful*.<sup>65</sup> As Professor Paulsen writes, “Only if it can be said, with a sufficient degree of confidence . . . , that the president’s action is *unconstitutional*—unconstitutional irrespective of whatever Congress thinks—should a court invalidate it.”<sup>66</sup> This reasoning, according to Paulsen, flows from the basic theory of judicial review in *Marbury v. Madison* and *Federalist No. 78*. Though the Court must supply the Constitution’s “higher law” instead of a contrary executive order, the Constitution must first supply a rule of law by which the Court could claim that the executive’s action is *unconstitutional*.<sup>67</sup> In the absence of such a rule, the Court

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stitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered as follows . . .” (quoting Exec. Order No. 10,340, 17 Fed. Reg. 3139 (to be codified at 3 C.F.R. 861) (April 8, 1952))).

62. *Id.* at 637.

63. *See id.*; *id.* at 610–11 (Frankfurter, J., concurring) (arguing that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned” should inform interpretation of the “Executive Power” vested in the President); *see also* NLRB v. Noel Canning, 134 S. Ct. 2550, 2560 (2014) (“But it is equally true that the longstanding ‘practice of the government’ can inform our determination of ‘what the law is.’” (quoting *McCulloch* and *Marbury*)); Bruff, *supra* note 46, at 35 (“The courts should be willing to regard some presidential practices as having so ripened into implied constitutional power that Congress must legislate explicitly to restrict them.”).

64. Eskridge & Baer, *supra* note 38, at 1164 (emphasis added); *see also, e.g.*, Paulsen, *supra* note 38, at 230 (“[*Youngstown*] is a rule of deference not terribly unlike other such rules of interpretive deference” (citing *Chevron*)). Though support for this claim in the case law might seem thin, that is because the Court has so rarely addressed it. *See* Jack Goldsmith, Zivotovsky II as Precedent in the Executive Branch, 129 HARV. L. REV. 112, 115 (2015) (“For all the sanctification this framework has received in law reviews and public discourse, the Court prior to *Zivotovsky II* had deployed it in only four cases . . .”).

65. *See* Paulsen, *supra* note 38, at 232.

66. *Id.* at 231.

67. *See id.* at 231 n.52.

should “not [be] prepared to say that the President lacks the power.”<sup>68</sup>

Precedent affirms this reading of *Youngstown* Category II as a deference regime. In *Dames & Moore v. Regan*,<sup>69</sup> the Court applied this two-step approach to another separation of powers question. In the case, the Court considered two distinct legal claims; each rested on distinct statutory or constitutional authority. Pursuant to an agreement with Iran, Presidents Carter and Reagan issued executive orders that (1) nullified all non-Iranian interests in Iranian assets and (2) suspended claims against Iranian citizens such that they would have “no legal effect in any action now pending in any court of the United States.”<sup>70</sup> The Court engaged in careful analysis of the International Emergency Economic Powers Act (IEEPA),<sup>71</sup> and it concluded that the plain text contemplated the nullification of the attachments.<sup>72</sup> Because the President’s *first* legal action was “taken pursuant to specific congressional authorization,” the Court sustained the action under *Youngstown*’s Category I.<sup>73</sup>

But “although the IEEPA authorized the nullification of the attachments,” it could not be read to “authorize the suspension of the claims.”<sup>74</sup> It also rejected the argument that the Hostage Act could be construed as “specific authorization of the President’s action.”<sup>75</sup> Therefore, the Court then proceeded to analyze the question under Category II.<sup>76</sup> Once there,

68. *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981) (applying Category II).

69. 453 U.S. 654, 654 (1981). Notably, Justice Rehnquist wrote the majority opinion in *Dames & Moore* and served as the law clerk to Justice Jackson while he wrote his concurrence in *Youngstown*. Jay S. Bybee & Tuan N. Samahon, *William Rehnquist, the Separation of Powers, and the Riddle of the Sphinx*, 58 STAN. L. REV. 1735, 1737–41 (2006).

70. See Exec. Order No. 12,294, 46 Fed. Reg. 14111 (Feb. 26, 1981); see also *Dames & Moore*, 453 U.S. at 666.

71. Pub. L. No. 95-223, 91 Stat. 1626 (1977); see also 50 U.S.C. § 1702(a)(1) (1976 ed., Supp. IV).

72. See *Dames & Moore*, 453 U.S. at 669–74.

73. *Id.* at 674 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

74. *Id.* at 675.

75. *Id.* at 677.

76. *Medellin v. Texas*, another case that addresses *Youngstown* Category II, makes clear that the kind of reasoning proper to step two does not belong at step one. 552 U.S. 491 (2008). First, the Court reasoned that a non-self-executing treaty, by its own terms, could never provide congressional authorization that would place presidential action in Category I or even Category II. See *id.* at 527. Then, the Court considered whether “congressional ‘acquiescence’” could nonetheless justify the President’s Category III action. It reasoned: “Under the *Youngstown* tripartite framework, congressional acquiescence is pertinent when the President’s action falls within the second category.” *Id.* at 528. The *Medellin* line of reason-

the Court engaged in freewheeling functional analysis based on “contemporary imponderables” and “congressional . . . quiescence.”<sup>77</sup> First, the Court noted the importance of international claim settlements for peaceful international relationships. Because “outstanding claims by nationals of one country against the government of another country are ‘sources of friction’ between the two sovereigns,”<sup>78</sup> the Court noted, the President has often “sett[ed] such claims by executive agreement without the advice and consent of the Senate.”<sup>79</sup> Congress never expressed disapproval of this practice and often legislated with the assumption that it would continue. It therefore “implicitly approved the practice of claim settlement by executive agreement.”<sup>80</sup> Second, the Court noted that the President had “some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate.”<sup>81</sup> And third, the Court relied on the functional argument that the “means chosen by the President to settle the claims of American nationals” were particularly suitable.<sup>82</sup> Because the citizens whose claims were suspended received “access to an international tribunal before which they may well recover something on their claims,” these citizens “receiv[ed] something in return for the suspension of their claims.”<sup>83</sup> These three factors together justified the Court’s ruling in favor of the Reagan administration.

*Dames & Moore* confirms that Category II represents a deference regime for at least two reasons. First, the Court never found that any particular legal source ever authorized the President’s action. Of course, this would violate Justice Black’s straightforward reasoning in *Youngstown*: “President’s power . . . must stem either from an act of Congress or from the Constitution itself.”<sup>84</sup> Instead, Justice Rehnquist—the law clerk to Justice Jackson when the Court decided *Youngstown*<sup>85</sup>—claimed that the congressional ac-

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ing makes sense: When the standard tools of constitutional interpretation provide a clear answer to whether the President can justify her claims of authority, the Court need not resort to its second-order rules for resolving the conflict.

77. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

78. *Dames & Moore*, 453 U.S. at 679.

79. *Id.*

80. *Id.* at 680.

81. *Id.* at 682.

82. *Id.* at 686–87.

83. *Id.* at 687.

84. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–86 (1952).

85. *Bybee & Samahon*, *supra* note 69, at 1737.

quiescence should be treated as a “gloss on ‘the Executive Power.’”<sup>86</sup> But the Court also never explicitly stated that the power to settle claims fell within the inherent power of Article II. Throughout, the Court hedged on its conclusions, “We are not *prepared to say*,” the Court stated, “that the President lacks the power.”<sup>87</sup> Likewise, the Court stated elsewhere, “we cannot say that [this] action exceeded the President’s powers.”<sup>88</sup> The best reading of *Dames & Moore* is not that the Court found an affirmative “gloss” on Article II that justified the President’s action, but rather that the Court was “not prepared to say” that the action was *unlawful*.<sup>89</sup>

Second, the Court’s emphasis on congressional “acquiescence” itself incorporates a rule of deference. Justice Scalia’s concurrence in *NLRB v. Noel Canning*<sup>90</sup> advanced a related argument. If the Court defers to executive practice and congressional acquiescence, the doctrine will “systematically favor the expansion of executive power at the expense of Congress.”<sup>91</sup> He continued, “staking out a position and defending it over time is far easier for the Executive Branch.”<sup>92</sup> Hindrances to congressional action include congressional “veto-gates” like committee systems, collective action problems, incentive misalignment between each member’s interest and the institution’s collective interest, party loyalties that could discourage members of Congress from challenging a same-party President, and more.<sup>93</sup> All of these

86. *Dames & Moore*, 453 U.S. at 686 (quoting *Youngstown*, 343 U.S. at 610–11); *see also* Bruff, *supra* note 46, at 38 (“*Dames & Moore* was a gloss on the President’s implied constitutional powers . . .”).

87. *Dames & Moore*, 453 U.S. at 688 (emphasis added).

88. *Id.* at 686.

89. *See supra* notes 64–68 and accompanying text (rooting this approach to judicial review in *Marbury*).

90. 134 S. Ct. 2550, 2592 (2014) (Scalia, J., concurring). The disagreement between the majority and the dissent in *Noel Canning* turned on how historical practice interacts with textual ambiguity. *See generally* Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 37 (2014). Both Justices Breyer and Scalia agreed that historical practice should be relevant to the interpretive question presented. But while Justice Breyer’s majority opinion found textual ambiguity *because* of the “extratextual considerations,” *id.* at 36, Justice Scalia argued that historical practice “does not relieve us of our duty to interpret the Constitution in light of its text, structure, and original understanding.” *Noel Canning*, 134 S. Ct. at 2594. Notably, the majority’s approach in *Noel Canning* seems somewhat in tension with the refusal to consider “acquiescence” at step one in *Medellin*, but the point stands. *See supra* note 76 and accompanying text.

91. *Noel Canning*, 134 S. Ct. at 2605 (Scalia, J., concurring).

92. *Id.*

93. *See generally* Bradley & Morrison, *supra* note 58, at 438–47.

factors conspire to make Congress sluggish. In theory, these limitations make Congress an adequate deliberative body or prevent the tyrannical exercise of legislative power.<sup>94</sup> But these institutional limitations also mean that standard of judicial review that incorporates congressional acquiescence will be a de facto rule of judicial deference.

*Youngstown* Category II, then, is a deference regime.<sup>95</sup> In this regime, the Court applies a two-step mode of analysis. The first step applies the traditional tools of statutory interpretation to categorize presidential action. If these tools fail to resolve issue, the Court engages in light, functional review of the President's action. Under this standard of review, the Court will only rebuke the President if it finds the action to be affirmatively unlawful. Uncertain cases, as *Dames & Moore* shows, should be resolved in favor of the President. What's more, because the standard looks to congressional acquiescence, the rule incorporates a de facto regime of deference to the President. The next Section explicates the underlying values that this deference regime serves.

## 2. *Justifying Category II Deference*

This rule of deference in Category II respects the limited institutional competence of the judiciary within our constitutional system. A restrained judiciary protects a number of constitutional and normative values. First, it respects the greater democratic legitimacy of the political branches of government—thereby limiting or avoiding the “countermajoritarian difficulty.”<sup>96</sup> Second, the judiciary is not competent to make complex policy determinations.<sup>97</sup> These questions fall outside the legitimate scope of the judicial power to determine and adjudicate.<sup>98</sup>

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94. *See id.* at 440.

95. *Accord* Eskridge & Baer, *supra* note 38, at 1164 (“In the twilight zone, judges should be deferential to presidential interpretation even where there is no implicit delegation.”); Paulsen, *supra* note 38, at 230 (“[*Youngstown*] is a rule of judicial deference, not terribly unlike other such rules of interpretive deference.”).

96. *See generally* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962) (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”); *see also* Barry Friedman, *The History of Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998).

97. *See* Starr, *supra* note 22, at 312 (noting that policy is “not the natural province of courts”).

98. *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 678, 723 (2006) (Thomas, J., dissenting) (“The plurality’s evident belief that *it* is qualified to pass on the ‘military necessity’ of the Commander in Chief’s decision to employ a particular form of force against our enemies is

Arguments about the limited judicial role have deep roots in the constitutional tradition.<sup>99</sup> In *Marbury v. Madison*, for example, the Court noted that some “mere political act[s]” belong only “to the Executive department.”<sup>100</sup> For some powers, the President may exercise them in “his own discretion,” “accountable only to his country in his political character, and to his own conscience.”<sup>101</sup> In these situations, the question of the action’s legality “can never be examinable by the courts.”<sup>102</sup> These constitutional concerns surface again in the political question doctrine. In that line of cases, the Court will find a controversy nonjusticiable if there is, among other things, a “textually demonstrable commitment of the issue to a coordinate political department.”<sup>103</sup> And this determination is related to the “lack of judicially discoverable and manageable standards.”<sup>104</sup> Some have argued that “dismissals on political question grounds can be understood as a form of judicial underenforcement of the Constitution.”<sup>105</sup> These doctrines leave certain important political questions to the political branches—thus blunting concerns about the countermajoritarian difficulty.<sup>106</sup>

Judges often rely on these same considerations when articulating administrative law doctrine. Dissenting in *Webster v. Doe*,<sup>107</sup> for instance, Justice Scalia interpreted the meaning of the Administrative Procedure Act (APA) § 706(a)(2), which excludes review of questions “committed to agency discretion *by law*”:

[The clause] was intended to refer to the “common law” of judicial review of agency action—a body of jurisprudence that had marked out, with more or less precision, certain issues and certain areas that were beyond the range of judicial review. That jurisprudence included principles ranging from the “political question” doctrine, to sovereign immunity (including doctrines determining when a suit against an officer would be deemed to be a suit against the sovereign), to official immunity, to prudential limitations upon the courts’ equitable powers, to what can be described no

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so antithetical to our constitutional structure that it simply cannot go unanswered.”).

99. See generally Bamzai, *supra* note 1.

100. *Marbury v. Madison*, 5 U.S. 137, 164 (1803).

101. See *id.* at 166.

102. See *id.*

103. *Baker v. Carr*, 369 U.S. 186, 217 (1962); see also *Nixon v. United States*, 506 U.S. 224, 228 (1993).

104. *Baker*, 369 U.S. at 217.

105. *Bradley & Morrison*, *supra* note 58, at 430; see also *id.* at 429 (noting that “historical practice arguments are connected to the political question doctrine and other justiciability limitations”).

106. Cf. *id.* at 428–29 (“Judicial deference to the political branches’ longstanding practices can blunt those concerns [about the legitimacy of judicial review]”).

107. 486 U.S. 592, 608–09 (1988) (Scalia, J., dissenting).

more precisely than *a traditional respect for the functions of the other branches . . .*.<sup>108</sup>

In support of this point, Justice Scalia quoted *Marbury v. Madison*'s claim that any effort for the "court to control" certain kinds of "executive discretion" would be "rejected without hesitation."<sup>109</sup>

Modern theories of the administrative state can quite easily supply the theoretical justification for such a deferential jurisprudential attitude: efficiency and political accountability. As then-Professor Kagan argued, all "models of administration" must address both "how to make administration accountable to the public and how to make administration efficient."<sup>110</sup> When courts arrogate the responsibility to make these policy decisions (e.g., by engaging in aggressive hard-look review), they remove policy decisions from the political branches. Aggressive judicial review of administrative action may reduce both efficiency and accountability.<sup>111</sup> And the Founders were concerned with just these two values. Justifying Article II, for example, Alexander Hamilton wrote: "Energy in the Executive is a leading character in the definition of good government."<sup>112</sup> This energy secured not only domestic security against foreign attacks, but also to "the steady administration of the laws."<sup>113</sup> What's more, a plural executive, he argues, would "tend[] to conceal faults and destroy responsibility."<sup>114</sup> This is an argument from accountability.<sup>115</sup> Concern with efficiency and accountability thus drove the Founders' design of Article II.<sup>116</sup> Likewise, judicial deference leaves political questions to the political branches.

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108. *Id.* (emphasis added).

109. *See id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 170–71 (1803)).

110. Kagan, *supra* note 22, at 2331.

111. *See id.* at 2383 (noting that defenders of hard look review are becoming "ever harder to locate").

112. THE FEDERALIST NO. 70, at 402 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

113. *Id.* at 402. *See generally* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 37–42 (1995) (discussing the Framers' reliance on energy). *Cf.* Bruff, *supra* note 46, at 13 (noting the President's "special capacity to respond to emergencies").

114. THE FEDERALIST NO. 70, *supra* note 112, at 405; *see* Bruff, *supra* note 46, at 13; *see also* Calabresi, *supra* note 113, at 42–45.

115. *See also, e.g.*, Bruff, *supra* note 46, at 32 ("The President has a better claim to deference than an agency head, because of his special political and constitutional status.").

116. *Cf.* *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 884 (1991) ("The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people.").

### B. Chevron as a Statutory Youngstown

Shifting away from the common refrain that *Chevron* is a counter-*Marbury*,<sup>117</sup> this Section argues that *Chevron* should be conceived as a *Youngstown* for the administrative state. This Section proceeds in two parts. First, I argue that the “mode of analysis” that the Court describes in *Chevron* mirrors the vision of *Youngstown* articulated above.<sup>118</sup> Like *Youngstown*, *Chevron* requires the Court to apply a second-order rule when the traditional tools of judicial interpretation fail to provide a clear answer. Second, I argue that the constitutional values that justify *Youngstown* also accord with some articulated justifications for *Chevron*.

#### 1. The Methodological Analogy

By now, repetition of *Chevron*’s framework has become rote. The Court in *Chevron* prescribed a method of analysis for courts reviewing agency constructions of statutes.<sup>119</sup> As in *Youngstown*, the Court articulates two distinct questions: “First, always, is the question [of] whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.”<sup>120</sup> At *Chevron* step one,<sup>121</sup> the Court should employ all the “traditional tools of statutory construction” to determine the statute’s meaning, as the judiciary is the “final authority on issues of statutory construction.”<sup>122</sup> But if these traditional tools fail to yield a determinative result, if the statute is “silent or ambiguous with respect to the specific issue,” the Court should only ask whether the administrative interpretation is “permissible.”<sup>123</sup>

Like *Youngstown*, then, *Chevron* should be interpreted to delineate three categories of executive authority to administer laws: (I) express delegations,

117. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 969 (1992); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990).

118. Cf. Bybee & Samahon, *supra* note 69, at 1739 (describing *Youngstown* as a mode of analysis in separation of powers cases).

119. 467 U.S. 837, 842–44 (1984).

120. *Id.* at 842.

121. Of course, many have become critical of *Chevron*’s two-step framework. See generally Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009). But see Kenneth A. Bamberger & Peter L. Strauss, *Chevron’s Two Steps*, 95 VA. L. REV. 611 (2009) (disagreeing with Vermeule and Stephenson).

122. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

123. *Id.* at 843.

(II) implied delegations, and (III) refusals to delegate. In Categories I or III, the Court uses “traditional tools of statutory construction” to determine that the “intent of Congress is clear.”<sup>124</sup> If so, the Court allows the agency’s interpretation (Category I) or sets it aside (Category III). But if the statute is “silent or ambiguous,” then the Court must move on to the second step (Category II).<sup>125</sup> In this way, *Chevron* follows analogously from *Youngstown*’s Category II rule of deference. Like *Youngstown*, *Chevron* requires the Court to apply first-order and second-order rules to agency implementations of statutory interpretation. Step one requires a court to employ the “traditional tools of statutory construction” to determine whether Congress has “directly spoken to the precise question at issue.”<sup>126</sup> Sometimes, however, the statute does not provide a clear answer—*Chevron*’s Category II. Within this “zone of twilight,” the Court should apply second-order principles of review. Unless the Court can determine that the agencies implementation activity is affirmatively *illegal*—either because no plausible reading of the statute grants the power, or because the implementation otherwise violates the APA<sup>127</sup>—it should be struck down. This is *Chevron*’s step two, and it corresponds neatly with *Youngstown*’s Category II.

This analogy makes good sense because *Chevron* and *Youngstown* both govern the Court’s role in disputes about the proper scope of executive power. Because the power of agencies to “execute” federal statutes stems from Article II just as the President’s power does,<sup>128</sup> the Court should often treat agency execution of ambiguous statutory schemes as they would presidential execution of ambiguous constitutional power.<sup>129</sup> *Youngstown*’s mode of analysis can therefore buttress the legitimacy of *Chevron*.<sup>130</sup>

But this conceptual unity casts doubt on *Chevron*-skepticism on the right. The problem, according to skeptics, is that the “judicial power” requires courts to “exercise its independent judgment in interpreting and expound-

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124. *Id.* at 842–43.

125. *Id.* at 843.

126. *Id.* at 842–43.

127. *See* 5 U.S.C. § 706 (2012).

128. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (“Conversely, agents acting within the terms of such a statutory grant are exercising executive power, not legislative power.”).

129. *Cf.* David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 201–02, 206 (arguing that the strength of *Chevron* deference should turn on the extent of subdelegation within the Executive Branch).

130. This argument turns on the claim that agency implementation constitutes internally delegated presidential power—a unitary-executivist claim. For a stronger defense of this claim, see *infra* Section II.A.

ing upon the laws.”<sup>131</sup> If so, *Chevron* violates the Constitution because it “wrests from Courts the ultimate interpretative authority to say what the law is and hands it over to the Executive.”<sup>132</sup> Despite this articulation of the *Marbury*-problem, though, *Chevron* has its justification in a different articulation of the nature of judicial power. Even if the Court must “say what the law is,” it should only do so when it can say so with sufficient confidence that the other branch’s legitimate action is unlawful.<sup>133</sup> Therefore, the doctrine institutes a regime of judicial restraint that mirrors *Youngstown*’s deference to presidential action in Category II. When the “traditional tools of statutory interpretation” fail to provide a clear answer, courts should only strike down the law when they can say that the action is clearly *illegal*. This analogy to *Youngstown*, then, responds in part to recent criticisms that suggest that *Chevron* has no historical basis as a canon of interpretation.<sup>134</sup> Instead, *Chevron* has its pedigree as a standard of review for executive action.<sup>135</sup>

## 2. *The Normative Analogy*

Besides the structural analogy between *Youngstown* and *Chevron*, they also share similar normative foundations. First, *Chevron* follows from basic principles of separation of powers. “Because federal judges are not directly accountable to any electorate,” Professor Starr argues, “they have a duty voluntarily to exercise ‘judicial restraint,’ that is, to avoid intrusions not clearly mandated by Congress or the Constitution into the processes and decisions of any other branch.”<sup>136</sup> This Constitution does not vest “supervisory oversight” over the agencies in the courts,<sup>137</sup> but rather gives that responsibility to the President. Therefore, *Chevron* “affirms [the] fundamental allocation of responsibility” within the Constitution,<sup>138</sup> and it does so “without violat-

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131. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

132. *Id.*; see also Lipshutz, *supra* note 3, at 102 (describing Justice Thomas’s administrative jurisprudence).

133. See *supra* text accompanying notes 64–70.

134. See Bamzai, *supra* note 26, at 908.

135. See Lawson, *supra* note 57, at 884 (characterizing *Chevron* as a standard of review).

136. See Starr, *supra* note 22, at 308.

137. See *id.* at 309.

138. See *id.* Kenn Starr therefore thinks that *Chevron* rests in part on generalizable separation of powers principles. See Barron & Kagan, *supra* note 129, at 213 (suggesting that Starr argued that “*Chevron* arose from separation-of-powers principles”). Not all scholars agree that these separation of powers principles—rooted in Article II—serve as the theoretical basis for *Chevron*. See, e.g., Eskirdge & Baer, *supra* note 38, at 1100 (“*Curtiss-Wright* deference is distinguishable from *Chevron* deference. Because it rests in part upon the President’s

ing the principles of judicial review enunciated in *Marbury*.<sup>139</sup> These separation of powers principles also serve the values of efficiency and political accountability. For example, Justice Kagan has noted that *Chevron* can be justified based on the “functional consideration[]” that “agencies [have] a link, through the President, to a public ‘constituency.’”<sup>140</sup> Deference makes sense because “agency officials have links to political institutions . . . that the judiciary does not.”<sup>141</sup> *Chevron* itself even reasoned that “judges are not experts in the field[] and are not part of either political branch of the Government.”<sup>142</sup> Therefore, judges should not assess the wisdom of policy decisions.<sup>143</sup> “Our Constitution,” the Court concluded, “vests such responsibilities in the political branches.”<sup>144</sup>

*Chevron* thus falls within a broader category of forms of judicial deference. Consider Judge Bork’s attempt to cluster together a set of disparate doctrines that serve these values: “All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”<sup>145</sup> Judge Bork might have mentioned many other doctrine or theories of judicial review. For instance, broad remedies like structural injunctions have been historically disfavored out of concern for institutional incompetency.<sup>146</sup> Relatedly,

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Article II powers, rather than just on Congress’s Article I authority, *Curtiss-Wright* deference does *not* depend upon a statutory delegation of lawmaking responsibilities.”); Scalia, *supra* note 10, at 515 (rejecting the separation of powers justification for *Chevron*).

139. Starr, *supra* note 22, at 308. See generally Merrill, *supra* note 2, at 498 (arguing that “*Marbury* is much closer in spirit to *Chevron* and the modern approach to the standard of review than has been commonly supposed”).

140. Barron & Kagan, *supra* note 129, at 213.

141. *Id.* at 242. Professors Barron and Kagan argue that lower level agencies *are not* accountable and so should not be granted deference. See *id.* Nonetheless, the unitary-executivist theory to which many conservatives subscribe would likely not draw distinctions between agency action performed by lower level officials, so long as the action is “authoritative.” See *infra* Section II.C (discussing Scalia’s view that the Court should treat all *authoritative* decisions by administrative agencies in the same way).

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

143. See *id.*

144. *Id.* at 866.

145. *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring).

146. See, e.g., *Brown v. Plata*, 563 U.S. 493, 550 (2011) (Scalia, J., dissenting). Nonetheless, they have become much more common and popular, especially because of their role in

academics often speak of Thayerian deference or Bickel's passive virtues.<sup>147</sup> These theories of review counsel rational-basis review of congressional statutes—at least when they do not implicate the rights of “discrete and insular minorities.”<sup>148</sup>

These doctrines, then, implement the “idea” that an “unelected, unrepresentative judiciary” has a narrow set of institutional competencies.<sup>149</sup> The independence of Article III judges allows them to serve as “bulwarks of a limited Constitution against legislative encroachment[],” and they can “guard the Constitution and the rights of individuals” against “serious oppressions of the minor party in the community.”<sup>150</sup> But these same strengths do not make them experts in propounding policy,<sup>151</sup> and they instead insulate them (by design) from democratic accountability. These considerations counsel in favor of deference to the institutional competencies of the Executive Branch—even in the administrative state. Rather than a counter-*Marbury*, *Chevron* can be viewed as a *Youngstown* for the administrative state.

## II. THREE APPARENT DISANALOGIES

In Part I, I argued that *Youngstown* and *Chevron* are analogous cases. Both prescribe a two-step mode of analysis that requires courts to (1) apply traditional tools of construction and, if these fail to yield a clear answer, (2) apply deferential second-order rules. Further, the same constitutional values that drive the *Youngstown* approach apply in the *Chevron* framework.<sup>152</sup> *Youngs-*

civil rights litigation. See generally John Minor Wisdom, *Rethinking Injunctions*, 89 YALE L.J. 825 (1980) (reviewing OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978)).

147. See generally Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519 (2012); see also *supra* notes 89–106 and accompanying text.

148. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 740 (1985).

149. *Vander Jagt*, 699 F.2d at 1178–79 (Bork, J., concurring).

150. THE FEDERALIST NO. 78, at 436–42 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

151. Cf. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 354 (1978) (“By speaking of the *limits* of adjudication I mean to raise such questions as the following: What kinds of social tasks can properly be assigned to courts and other adjudicative agencies? What are the lines of division that separate such tasks from those that require an exercise of executive power or that must be entrusted to planning boards or public corporations?”).

152. Compare *supra* Section I.B (discussing the constitutional values that *Chevron* serves), with *supra* Section I.A.ii (discussing the constitutional values that *Youngstown* serves).

town, therefore, is an analogous decision that provides a justification for *Chevron* within the Court's separation of powers case law. This Part buttresses the basic claim advanced in Part I. Here, I address three counterarguments that *Youngstown* and *Chevron* are disanalogous.

#### A. Agency and Presidential Action

The first disanalogy is that *Youngstown* concerns presidential power, while *Chevron* concerns agency action under the APA. The analogy might raise two concerns. First, the President is exempted from the APA entirely.<sup>153</sup> Because the APA represents an explicit attempt to impose tighter controls on agencies than the President, the standard of review of presidential action might be irrelevant. Second, when the President operates in *Youngstown* Categories II and III, she takes some of her power from the Constitution itself; agencies, on the other hand, draw their authority exclusively from congressional statutes.

This Section relies on unitary-executivist jurisprudence to respond to this objection. In particular, this Section depends on two distinct claims. First, statutory interpretation is the exercise of "executive power." Second, all executive power is the President's. Therefore, all authoritative administrative action constitutes internally delegated presidential power.<sup>154</sup> Because all authoritative administrative action is internally delegated power, the separation of powers principles that apply in *Youngstown* should apply also to *Chevron*.

First, there is nothing special about agency interpretations of statutes: They are straightforward exercises of executive power. In other words, the authoritative interpretation of a statute implements the statutory scheme the agency has been tasked with enforcing.<sup>155</sup> And these implementations

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153. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements.").

154. See Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 583 (briefly discussing the implications).

155. This of course brackets the kind of informal interpretation that agencies must do to go about their business. For example, a police officer on the beat will need guidance from superiors to determine whom to arrest, and this guidance will be based on the agency head's best view of what the law allows (or at least what the agency can get away with). But this interpretation does not constitute an *authoritative* agency interpretation as when a statute gives an agency the authority to promulgate rules or formulate policy through adjudication. For an attempt to disentangle informal and authoritative interpretation (or, to distinguish between "interpretation" and "specification"), see Ilan Wurman, *The Specification Power* (August 6, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3226964](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3226964).

are simply delegated presidential power. To see this point, consider first the central case of executive power: the President's. Her power flows entirely from the Constitution itself.<sup>156</sup> Besides the grant of certain discrete powers (e.g., to veto legislation, to appoint officers, to make treaties),<sup>157</sup> the "essential meaning" of the Vesting Clause gives the President power to "execute" the laws passed by Congress.<sup>158</sup> More still, unitary executives—like Justice Scalia and many other notable conservative scholars—argue that the Executive Power Clause vests the *entire* power of law execution with the President.<sup>159</sup> The Necessary and Proper Clause allows Congress to tinker

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156. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 587 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. . . . In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); *see also* Paulsen, *supra* note 38, at 225 ("Justice Jackson's opinion is more comprehensive, possesses greater subtlety, and has broader explanatory power than does Justice Black's majority opinion. But it is a mistake to suggest (as some do) that Justice Jackson's concurrence and Justice Black's majority opinion are inconsistent with one another. The two opinions are perfectly harmonious: Jackson's analytic approach is right—and so is Black's.").

157. *See* Saikrishna Bangalore Prakash, *A Taxonomy of Presidential Powers*, 88 B.U. L. REV. 327, 339 (2008).

158. *See* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 706–07 (outlining three possible views).

159. Because this Article attempts to defend *Chevron* within right-leaning legal thinking, I bracket other possible positions on executive power. For example, others argue that the Necessary and Proper Clause sometimes trumps the Executive Power Clause. Under this theory, Congress, unlike the President, has the residual authority to structure the government and determine the means of "carrying into execution . . . all other powers vested by this Constitution in the Government of the United States." U.S. CONST. art. I, § 8. Accordingly, it can delegate authority directly to agents who execute the laws on behalf of telling the Director of the Consumer Financial Protection Bureau (CFPB) to "issue rules, orders, and guidance implementing Federal consumer financial law," and it is the CFPB and not the President who has exclusive legal authority to promulgate them for the United States. *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 41 (1994) ("A second understanding does not turn on clear *categorical* understandings of these powers, but rather on a more ambiguous and undeveloped conception of what these powers could be. It understands the framers to believe that some powers fall clearly within the domain of 'the executive' (and these they constitutionalized), but the balance (what we would roughly call administrative) they believed would be assigned pragmatically, according to the values or functions of the particular power at issue."). *But see* Calabresi & Prakash, *supra* note 17, at 581 ("The [Executive Power] Clause thus should not be read the way most opponents of the unitary Executive would read it: Section 1. The executive Power of the United States shall be vested in one President, and in such inferior entities as the Congress may from time to time ordain and establish.").

with the administrative state, but only to channel and direct the exercise of presidential power. Congress may not “revoke or abridge the president’s power to execute the law or his authority to control the law execution of other federal officials.”<sup>160</sup> No matter how vast and complex the administrative state grows, all of its agents exercise purely executive power on behalf of the President herself. Therefore, any enforcement of a statute constitutes the exercise of presidential power internally delegated to one of her agents.

Although many administrative functions look similar to legislative and judicial power, the similarity is functional but not constitutional. The delegation of some power to the President to implement a statute carries with it the incidental powers to bring that plan to fruition.<sup>161</sup> And statutory schemes often require the executive to make quasi-adjudicative determinations or quasi-legislative pronouncements. For example, a scheme directing an administrative agency to pay funds only to individuals who meet a set of criteria requires the agency to engage in something like adjudication. A scheme that asks an agency to promulgate rules governing a particular regulatory field requires quasi-legislative promulgations of rules. The implementation of these statutory schemes, though, still constitutes purely executive power.<sup>162</sup>

These two unitary-executivist claims about statutory implementation—that it is all executive power and that all executive power is the President’s—lead to the conclusion that all administrative action constitutes internally delegated presidential power.<sup>163</sup> So, when Congress passes a statute that creates a special prosecutor to investigate misdeeds within the Executive Branch, that special prosecutor exercises the internally delegated authority of the President.<sup>164</sup> The Securities and Exchange Commission (SEC) Administrative Law Judge and the SEC’s enforcement arm all represent internally delegated presidential power. For the unitary executivist, agency “interpretations” of statutes also constitute straightforward exercises of presidential authority.<sup>165</sup>

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160. Prakash, *supra* note 158, at 707.

161. *Cf.* Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 *YALE L.J.* 2280, 2309 (2006) (arguing that the President has a “completion power”); Wurman, *supra* note 155 (arguing that the President has a “specification power”).

162. *See also* Posner & Vermeule, *supra* note 128, at 1725–26 (“Creating rules pursuant to valid statutory authority isn’t lawmaking, but law execution.”).

163. *See* Kevin M. Stack, *The Statutory President*, 90 *IOWA L. REV.* 539, 583 (briefly discussing the implications).

164. *But see* *Morrison v. Olson*, 487 U.S. 654, 695 (1988).

165. *See* Posner & Vermeule, *supra* note 128; Calabresi & Prakash, *supra* note 17, at 595 (“Under the Constitution, executive officers can act only in the President’s stead, since it is

This theoretical link between the President and the agencies justifies the analogy between *Youngstown* and *Chevron*. *Chevron*-skeptics claim that the doctrine unconstitutionally allows the Executive Branch to “say what the law is.”<sup>166</sup> But Congress can already give Article II officers power to make determinations about the force and effect of the law itself. In *Crowell v. Benson*,<sup>167</sup> for instance, the Court allowed an administrative agent to make findings of fact that would be binding on Article III courts.<sup>168</sup> Therefore, *Chevron* does not necessarily violate *Marbury*’s mandate because the Constitution (sometimes) allows Congress to make the actions of the Executive Branch binding on the courts or private parties.<sup>169</sup> And there’s nothing special about agency rules or adjudications that purport to interpret the statute.

### B. *Chevron as a Standard of Review, not a Canon*<sup>170</sup>

*Chevron* scholarship often tries to situate the case within the constellation of judicial canons.<sup>171</sup> The *Chevron*-as-canon perspective states, in brief,

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the President and the President alone who can delegate to them the constitutional power that they must have if they are to execute laws.”).

166. See *supra* notes 2–9 and accompanying text.

167. 285 U.S. 22 (1932).

168. See, e.g., *Stern v. Marshall*, 564 U.S. 462, 489 n.6 (2011).

169. Of course, Congress may not allow non-Article III tribunals to adjudicate so-called private rights. See, e.g., *id.* at 503. In those cases, perhaps the Court must exercise its independent judgment. If so, the question of whether or not *Chevron* violates Article III might turn on whether we think agency interpretations of statutes can be analogized to agency fact-finding under *Crowell v. Benson*. On the one hand, agency interpretations can be based on judgments about complex factual issues. See, e.g., Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 96–97 (2008). On the other hand, those same interpretations rely in part on traditional tools of statutory interpretation, too. See, e.g., Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015). This is an extremely interesting question, but one that falls beyond the narrow scope of this Article.

170. Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1734 (2010) (“The Justices treat deference regimes like *canons* of statutory construction, rather than as *precedents* formally binding on future courts.”).

171. See ESKRIDGE, *supra* note 55, at 417–18 (characterizing *Chevron* as an “extrinsic source canon”); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329 (2000); Raso & Eskridge, Jr., *supra* note 170, at 1734 (“The Justices treat deference regimes like *canons* of statutory construction, rather than as *precedents* formally binding on future courts.”); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 902 (2013) (including *Chevron* in its survey of canons); Kavanaugh, *supra* note 57, at 2135 (2016). *But see*

“*Chevron* establishes a novel canon of construction: In the face of ambiguity, statutes mean what the relevant agency takes them to mean.”<sup>172</sup> The articulation of the case is true enough, and in many ways, it is the most logical approach. *Chevron* itself spoke of “reasonable interpretation[s] made by the administrator of an agency” and of “the principle of deference to administrative interpretations,” and it counseled courts to employ “traditional tools of statutory interpretation.”<sup>173</sup> Further, *Chevron* resembles other canons because it tells courts what the legal effect of a statute is. The case instructs judges interacting with a statute in how to reason about Congress’s intent, and so it fits neatly with other substantive canons like the rule of lenity or the presumption against federal preemption.<sup>174</sup>

Its canonization also fits within a broader project. In recent years, commentators, doubtless responding in part to Karl Llewellyn’s attack on the canons,<sup>175</sup> have sought to organize and rationalize the Court’s approach to statutory interpretation.<sup>176</sup> Suits that implicate statutes governing administrative agencies form much of federal-court practice,<sup>177</sup> so canonizing *Chevron* helps to situate it within a comprehensive framework of interpretive rules. This framework, in turn, helps to systematize and regularize the judicial approach to Congress’s handiwork.

But whether or not *Chevron* is a canon matters for the kinds of theoretical and historical arguments that can be advanced in its favor. For example, if *Chevron* is primarily a canon of interpretation, then *Youngstown* and other principles of separation of powers provide an ill-fitting justification. Instead, *Chevron* must be justified as a traditional tool of statutory interpretation. And the case has recently come under assault for its lack of historical foundation as an interpretive tool. For example, Professor Aditya Bamzai’s

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SCALIA & GARNER, *supra* note 55 (excluding *Chevron* from its comprehensive list of canons).

172. Sunstein, *supra* note 171.

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

174. See SCALIA & GARNER, *supra* note 55, at 290, 296; ESKRIDGE, *supra* note 55, at 427, 430; Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898 (2011).

175. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950). Doubtless, Karl Llewellyn remains unconvinced.

176. See, e.g., Gluck, *supra* note 174, at 1901. See generally SCALIA & GARNER, *supra* note 55; ESKRIDGE, *supra* note 55.

177. Almost one quarter of all pending cases in U.S. Courts of Appeals are administrative appeals. See FEDERAL JUDICIAL CASELOAD STATISTICS 2015 TABLES (Mar. 31, 2015), <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015-tables>.

important new work argues that *Chevron*'s "modern doctrine finds no true historical antecedent . . . in the cases applying traditional canons of construction."<sup>178</sup> On an increasingly textualist and originalist Court, *Chevron* loses some its legitimacy if it cannot be grounded in the "theory and practice of interpretation that prevailed in American courts throughout the nineteenth century."<sup>179</sup> Put simply, if *Chevron* is a canon, then *Youngstown* is irrelevant.<sup>180</sup>

But the treatment of *Chevron* as a canon is not practically or theoretically justified. First, as a practical matter, judges consider *Chevron* to be binding precedent that governs their institutional responsibility with regard to the Executive Branch – not simply a judicially created canon of interpretation, or a rule of thumb for discerning the meaning of legal texts. A new study by Professor Abbe Gluck and Judge Posner makes this point.<sup>181</sup> In a continuation of Professors Gluck and Bressman's work on congressional drafting practices,<sup>182</sup> Professor Gluck worked with Judge Posner to interview 42 federal judges about their approach to statutory interpretation. Most of these judges expressed doubts that the Court's interpretive methodology could be binding, but nonetheless agreed that *Chevron* was binding precedent.<sup>183</sup> As one judge noted, "*Chevron* isn't just a throwaway canon[:] it is basic law."<sup>184</sup> This difference is important because it suggests that *Chevron* is different in kind than the Court's canons of interpretation.

Neither is the *Chevron*-as-canon perspective sufficiently theoretically justified. The most basic *Chevron*-as-canon statement—that "statutes mean what the relevant agency takes them to mean"<sup>185</sup>—equivocates on the use of "mean." Courts exist to render final judgment in particular cases and controversies,<sup>186</sup> but agencies execute policy-oriented statutory schemes.<sup>187</sup> In

178. Bamzai, *supra* note 26, at 1000.

179. *Id.* at 919.

180. And if Professor Bamzai is correct, then *Chevron* is lawless.

181. See Gluck & Posner, *supra* note 1.

182. See generally Gluck & Bressman, *supra* note 171.

183. See Gluck & Posner, *supra* note 1, at 1302 ("Virtually all expressed doubt that the Supreme Court's interpretive methodology binds the lower courts, except that all consider *Chevron* — itself an interpretive rule — binding on them."); see also *id.* at 1332 ("Many of these same judges later told us that the Supreme Court could *not* control lower-court interpretive methodology when we asked that question.").

184. Gluck & Posner, *supra* note 1, at 1348.

185. Sunstein, *supra* note 171, at 329.

186. See U.S. CONST. art. III. See generally William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1812 (2008).

187. See U.S. CONST. art. II.

exercising these unique institutional powers, agencies and courts both “interpret” statutes in certain respects. But the nature of their interpretations differ in kind—and so a statute interpreted by a court and a statute interpreted by an agency “mean” in fundamentally different ways.<sup>188</sup> This difference explains why *National Cable & Telecommunications Ass’n v. Brand X Internet Services*<sup>189</sup> does not, as Justice Scalia protested, make “judicial decisions subject to reversal by executive officers.” When a court decides a case under *Chevron* step two, it merely decides that the “agency remains the authoritative interpreter” of the statute.<sup>190</sup> This decision does not say that the statute “means” (in the judicial sense) whatever the agency says it means. Instead, it determines that the statute “means” that the statute’s effect is just not up to the judge. Therefore, the rule of law that governs that case is whatever the agency says it is (subject, of course, to the constraints of the APA).

Rather than a canon of interpretation, then, *Chevron* supplies a mode of analysis<sup>191</sup> or a “meta-rule”<sup>192</sup> for the courts. Instead of simply assisting with the meaning of the words, *Chevron* supplies a rule of decision for situations when the statute yields no clear answer. In those situations, according to *Chevron*, the Court should allow the agency’s action to go into effect. That is, the “traditional tools of statutory construction” leave the Court without a clear answer.<sup>193</sup> This meta-rule is rooted in an assumed “set of legitimate institutional roles and legitimate institutional procedures”<sup>194</sup> that tell the Court that it sometimes does not have the final say about the effect of the law.<sup>195</sup> This is not an ordinary canon of interpretation, but a rule

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188. See also BRIAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 277 (2016) (“American courts don’t consider [nonjudicial decisions] legal precedents, and in no sense are they recognized to be controlling authority of the same character as binding judicial decisions.”).

189. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1016 (2005) (Scalia, J., dissenting).

190. *Id.* at 983.

191. Cf. Bybee & Samahon, *supra* note 69, at 1739 (describing *Youngstown* as a mode of analysis in separation of powers cases).

192. Cf. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598–99 (1992).

193. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

194. Jerry Mashaw, *supra* note 37; see also John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1916 (2015) (“No one can identify ‘congressional intent’ or the ‘legislative deal’ as a matter of fact, unfiltered by normative, institutional considerations that tell interpreters . . .”).

195. Not all legal questions *must* be determined by the Court. See *Webster v. Doe*, 486

that tells a court how to find legal effect. In this way, *Chevron* is not a canon, but a precedent much like a standard of review.<sup>196</sup> For these reasons, perhaps, Justice Scalia and Bryan Garner excluded *Chevron* from their definite list of canons in *Reading Law*.<sup>197</sup>

### C. Responding to Mead Corporation

Undoubtedly, this conception of *Chevron* sides with Justice Scalia's solo dissent in *United States v. Mead Corp.* The majority opinion dictated the now-infamous "*Chevron* Step Zero," which required the reviewing court to "tailor deference to [the] variety" of executive action.<sup>198</sup> The opinion stated that the Court should defer only when Congress intended the agency to "speak with the force of law."<sup>199</sup> Accordingly, courts should assume that "Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."<sup>200</sup> In particular, notice-and-comment rulemaking and formal adjudications should usually trigger deference.<sup>201</sup> Other administrative actions might be the agency speaking with the force of law, but the Court did not clarify what those might be.

Justice Scalia argued that the majority opinion boiled down to an assumption about the background rule of congressional intent: "ambiguity in legislative instructions to agencies is to be resolved not by the agencies but by the judges."<sup>202</sup> Justice Scalia assaulted this assumption, with characteristic vigor, for a series of reasons. This background rule, for one, "is contradicted by the origins of judicial review of administrative action [in the writ of mandamus]."<sup>203</sup> It also struck Justice Scalia as an implausible assump-

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U.S. 592, 613 (1988) (Scalia, J., dissenting) ("In sum, it is simply untenable that there must be a judicial remedy for every constitutional violation. Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are."); *Crowell v. Benson*, 285 U.S. 22 (1932).

196. See also Lawson, *supra* note 57, at 884–85 (characterizing *Chevron* as a standard of review).

197. See generally SCALIA & GARNER, *supra* note 55; see also GARNER ET AL., *supra* note 188, at 285–89 (including *Chevron* in its book on the LAW OF JUDICIAL PRECEDENT).

198. 533 U.S. 218, 236 (2001).

199. *Id.* at 229.

200. *Id.* at 230.

201. *Id.* at 229.

202. *Id.* at 243 (Scalia, J., dissenting).

203. *Id.*

tion. He noted that there “is no necessary connection between the formality of procedure and the power of the entity administering the procedure to resolve authoritatively questions of law.”<sup>204</sup>

For Justice Scalia, *Chevron* should apply regardless of the methods or procedures by which the administrative agency acts, so long as it represents the “authoritative agency interpretation[.]”<sup>205</sup> Notably, Justice Scalia argued that the “legal presumption” of judicial deference was “important to the division of powers between the Second and Third Branches.”<sup>206</sup> This accords with a broadly unitary-executivist notion of executive power.<sup>207</sup> The President’s authority to execute the laws extends downwards even to the lowest levels of the administrative state, for even there the officials possess executive power on behalf of the President. Under this unitary-executivist theory, the Executive Power Clause and the Take Care Clause<sup>208</sup>—which vest *all* executive power in the President and give her the *sole* responsibility to execute it—bely any theory of deference that draws nice distinctions between forms of administrative action.

### III. DOCTRINAL AND NORMATIVE IMPLICATIONS

#### A. Defending Chevron

With this analogy between *Youngstown* and *Chevron* in place, *Chevron* deference begins to implicate the Court’s broader separation of powers and executive-power jurisprudence. This shift in emphasis, I hope, shows why the court-centric “*Marbury* problem” should fade in importance. Indeed, a court that rejects *Chevron* might not really be reasserting responsibility to “say what the law is,” but might instead be wresting control over presidential determinations that should “never be examinable by a Court.”<sup>209</sup>

But despite *Chevron*’s pedigree in the Court’s executive-power jurisprudence, the *Marbury*-problem will doubtless persist in the minds of many skeptics. *Chevron* requires that courts must accept any plausible reading of the statute—even when the agency pursues a poor reading for policy reasons. Further, agencies will inevitably engage in policy-oriented reasoning

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204. *Id.*

205. *Id.* at 241.

206. *Id.*

207. *See supra* Section II.A.

208. *See* U.S. CONST. art. II, § 1, cl. 1 (Executive Power Clause); *id.* at § 3, cl. 1 (Take Care Clause).

209. *Marbury v. Madison*, 5 U.S. 137, 166, 177 (1803); *see also* Merrill, *supra* note 2, at 498 (arguing that “*Marbury* is much closer in spirit to *Chevron* and the modern approach to the standard of review than has been commonly supposed”).

when choosing how to pursue their statutory mandates.<sup>210</sup> To the extent that there is a disconnect between reasons given and a political agenda, judges might begin to distrust agency behavior. *This* kind of deference can leave external observers, or judges themselves, with concern.<sup>211</sup> As Judge Kavanaugh noted:

My colleague Judge Tatel has lamented that agencies in both Republican and Democratic administrations too often pursue policy at the expense of law. He makes a good point. As I see it, however, that will always happen because Presidents run for office on policy agendas and it is often difficult to get those agendas through Congress.<sup>212</sup>

Professor Gluck and Judge Posner's recent article affirms this explanation. Except for the judges on the D.C. Circuit, most judges were "decidedly anti-*Chevron*."<sup>213</sup> This *Chevron*-skepticism "divide[d] equally among liberals and conservatives."<sup>214</sup> One judge expressed his or her discomfort this way: "They don't know more about the meaning of statutes than I do. It's my job to interpret statutes."<sup>215</sup> Judges do seem to think that agencies get to say what the law is.

This Part attempts to present a version of *Chevron* that responds to these concerns. It argues that courts should enforce a rigorous step one analysis, employing all the "traditional rules of statutory construction" to reduce ambiguity before deferring to agency implementation. But in step two, the Court should employ regular arbitrary and capricious review to determine

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210. See Jerry Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 890 (2007) ("Although the EPA—the agency involved in the now iconic *Chevron* case—constantly invoked *Chevron* and emphasized the 'reasonableness' of its interpretations, both the EPA and HHS based much of their agency interpretation on past agency practice, technical or scientific understandings of statutory terms, and on legislative history."); cf. *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.").

211. See Kavanaugh, *supra* note 29, at 2153 ("In certain major *Chevron* cases, different judges will reach different results even though they may actually agree on what is the best reading of the statutory text . . . This state of affairs is unsettling.").

212. Kavanaugh, *supra* note 181, at 2150–51; see also E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts, and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 10–12 (2005) (noting that *Chevron* allowed the Environmental Protection Agency (EPA) to be more aggressive pushing policy in the courts).

213. See Gluck & Posner, *supra* note 181, at 1348.

214. *Id.*

215. *Id.*

whether the agency *action* (rather than its legal interpretation) was legitimate.<sup>216</sup> With this notion of *Chevron*, the courts respect the President's enforcement authority without abdicating judicial duty.<sup>217</sup>

### 1. *Respecting Marbury at Step One*

According to Justice Scalia, the “chink” in *Chevron*'s armor is the requirement that the Court determine whether or not the statute is ambiguous.<sup>218</sup> Because much of the *Chevron* analysis turns on the initial determination of ambiguity, the precedent's effect on a court's analysis can turn on each judge's tolerance for uncertainty. In a recent essay, Judge Kavanaugh picks up on this criticism. In it, he questions the propriety of ambiguity-triggered canons because they introduce tremendous uncertainty into the judicial process.<sup>219</sup> He notes that “there is no good or predictable way for judges to determine whether statutory text contains ‘enough’ ambiguity” and that the question itself “plays right into what many consider to be the worst of our professional training [because lawyers] are indoctrinated from the first days of law school to find ambiguity in even the clearest of pronouncements.”<sup>220</sup> Worse still, this ambiguity-trigger allows purposive agencies to exploit judicial indeterminacy. Judge Kavanaugh writes: “I can confidently say that *Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints.”<sup>221</sup> This agency aggression is not necessarily a bad thing. Aggressive execution of policy platforms might be desirable so long as the President remains accountable. But this efficiency cannot come at the expense of the rule of law.

Nonetheless, courts have the means to resolve supposedly ambiguous statutes. In *Carter v. Welles-Bowen Realty, Inc.*,<sup>222</sup> for instance, the Sixth Circuit interpreted the Real Estate Settlement Procedures Act in light of a Department of Housing and Urban Development (HUD) policy statement

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216. A similar approach has recently been suggested by Professor Sharkey. See Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 2359 (2018) (suggesting that the Court should apply *State Farm*-style arbitrary and capricious review in step two).

217. See Starr, *supra* note 22, at 308 (“*Chevron* accomplished this shift in thinking without violating the principles of judicial review enunciated in *Marbury*.”).

218. Scalia, *supra* note 10, at 520.

219. See Kavanaugh, *supra* note 29, at 2135–36, 2140.

220. *Id.* at 2136, 2139.

221. See *id.* at 2150.

222. 736 F.3d 722 (6th Cir. 2013).

purporting to interpret the act.<sup>223</sup> In a concurring opinion later cited favorably by Justices Scalia and Thomas in an opinion accompanying a denial of certiorari,<sup>224</sup> Judge Sutton addressed the relationship between the rule of lenity and *Chevron*.<sup>225</sup> He argues, “Deference comes into play only if a statutory ambiguity lingers after deployment of *all pertinent interpretive principles*.”<sup>226</sup> For Judge Sutton, this clearly includes the substantive canon of the rule of lenity.<sup>227</sup> But he also cites Court precedent that suggests that “all manner of presumptions, substantive canons[,] and clear-statement rules” should be used to reduce ambiguity before determining the case. These include *at least* the presumption against preemption, presumption against retroactivity, the presumption against implied causes of action, the federalism canons, and the avoidance of constitutional doubt.<sup>228</sup>

## 2. Executive Discretion at Step Two

Given this range of tools for the textualist, only a select set of cases should reach *Chevron* step two.<sup>229</sup> For instance, Judge Kavanaugh argued that *Chevron* should apply only “in cases involving statutes using broad and open-ended terms like ‘reasonable,’ ‘appropriate,’ ‘feasible,’ or ‘practicable.’”<sup>230</sup> For these kinds of cases, the Court does not have the institutional capacity or the traditional statutory tools to determine what they mean.<sup>231</sup>

223. *See id.* at 724; 12 U.S.C. § 2607(a) (2012).

224. *See Whitman v. United States*, 135 S. Ct. 352 (2014).

225. *See Carter*, 736 F.3d at 729.

226. *See id.* at 731 (emphasis added).

227. *See* SCALIA & GARNER, *supra* note 55, at 41 (including the rule of lenity as a substantive canon).

228. *See Carter*, 736 F.3d at 731 (citing *Wyeth v. Levine*, 555 U.S. 555, 576 (2009); *Immigration & Naturalization Servs. v. St. Cyr*, 533 U.S. 289, 320 (2001); *Alexander v. Sandoval*, 532 U.S. 275, 288–91 (2001); *SWANCC v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 173 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). This argument cuts against some who have argued that the Court should not apply substantive canons in its step one analysis. *See* Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of Law: A Brand X Doctrine of Constitutional Avoidance*, 64 ADMIN. L. REV. 139, 177 (2012).

229. In a recent lecture, Judge Kethledge of the Sixth Circuit advanced a version of this claim. *See* Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 220 (2017) (“In my own opinions as a judge, I have never yet had occasion to find a statute ambiguous.”).

230. Kavanaugh, *supra* note 29, at 2153.

231. *Cf.* *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283–84 (6th Cir. 1898) (Taft, J.) (refusing to “set sail on a sea of doubt” by adopting “so shifting, vague, and inde-

Instead, the terms suggest a textual commitment of the determination to the agencies themselves. Just as, for example, the political question doctrine would counsel the Court to respect a “textually demonstrable commitment of the issue to a coordinate political department,”<sup>232</sup> this language in an agency’s authorizing statute would commit the policy determinations to the agency itself.<sup>233</sup> Such a commitment would mean that the “traditional tools of statutory construction” cannot yield a clear answer.

This approach to *Chevron* finds its defense in the case itself. As Justice Stevens’ footnote stated, the “judiciary is the final authority on issues of statutory construction.”<sup>234</sup> Thus the courts should bring all of their tools to bear to reduce the ambiguity of the statute. Reduced in this way, courts set the bounds of statutory authority according to their background statutory practices: “No matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*.”<sup>235</sup> Because the judiciary remains the “final authority” on issues of statutory authority, this analysis logically precedes any attempt by the agency to exercise its power. The judiciary does not defer to agency interpretations of the statute as if they were judicial interpretations; it defers to agency policymaking determinations within the bounds of the statutory authority that the judiciary determines it has.<sup>236</sup>

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terminate a standard” as whether a restraint of trade is “in the public interest”), *aff’d as modified*, 175 U.S. 211 (1899).

232. *Nixon v. United States*, 506 U.S. 224, 228–29 (1993).

233. Justice Scalia notes, however, that the traditional tools of construction include the “consideration of policy consequences.” Scalia, *supra* note 10, at 515. Nonetheless, in an age of statutes, policy decisions should be left to Congress, and the policy considerations that might guide common law courts become less legitimate. This Article brackets the difficult question of common law statutes—like the Sherman Act—where Congress delegated authority to the Court to engage in common-law like articulation of the statute’s meaning. *See* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“From the beginning the Court has treated the Sherman Act as a common-law statute. . . . In antitrust, the federal courts . . . act more as common-law courts than in other areas governed by federal statute.”). This delegation can be grounded, however, in congressional intent at the time. Because the United States had not developed the governmental infrastructure to execute a nationwide policy program, it chose the ill-fitting but best-available vehicle: the federal courts. Today, with the availability of the administrative state, Congress has chosen to delegate the authority to the more-suitable Executive Branch.

234. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, n.9 (1984).

235. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

236. *See also* Peter L. Strauss, “*Deference*” *Is Too Confusing—Let’s Call Them* “*Chevron*

### B. Implications for Lower Courts

This argument also has implications for lower courts applying *Chevron* deference. A recent study by Professors Kent Barnett and Christopher Walker provides the first comprehensive review of lower-court treatment of *Chevron*.<sup>237</sup> This study builds upon two previous studies that examined *Chevron*'s applications in the Supreme Court.<sup>238</sup> The previous studies suggested that *Chevron* did not much affect the Court's practices of deferring to agency action. The Court has always been generally deferential to many kinds of agency action, and *Chevron* did not "sweep the field after 1984," but coexisted among other kinds of deference regimes.<sup>239</sup> Indeed, when reviewing agency action, the Court regularly did not apply *any* deference regime, but proceeded in its normal ad hoc method of statutory interpretation.<sup>240</sup>

Despite these findings at the Court, many thought that *Chevron* made a difference in the courts of appeals. An early article by Professors Peter Schuck and Donald Elliott suggested that *Chevron* was making those courts more deferential,<sup>241</sup> which was confirmed by Professor Elliott's impressionistic assessment of shifts in Environmental Protection Agency (EPA) practices.<sup>242</sup> Barnett and Walker conclude from their extensive empirical study that Professors Elliott and Schuck are mostly right: "Many of these findings

*Space*" and "Skidmore Weight," 112 COLUM. L. REV. 1143, 1165, 1169 (2012).

237. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 9, 11 (2017); see also Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3082641](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082641).

238. See Merrill, *supra* note 117, at 969–70; Eskridge & Baer, *supra* note 38, at 1085.

239. See Eskridge & Baer, *supra* note 38, at 1121.

240. See *id.* at 1090 ("Indeed, our most striking finding is that in the majority of cases—53.6% of them—the Court does not apply any deference regime at all. Instead, it relies on ad hoc judicial reasoning of the sort that typifies the Court's methodology in regular statutory interpretation cases.").

241. See Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 987 (1991). This empirical study does have its limits, as Barnett and Walker note: "Although the Schuck and Elliott study is important and comprehensive, its more-than-thirty-year-old data fails to address contemporary appellate practice after *Skidmore* and the Court's inconsistent use of its deference doctrines. Moreover, the decisions, too, included all administrative decisions, not just those concerning statutory interpretation, and the study did not identify the number of agency interpretations upheld or reversed because it considered only remand rates." Barnett & Walker, *supra* note 237, at 5 n.17.

242. See Elliot, *supra* note 212, at 11–12 (noting that *Chevron* allowed the EPA to be more aggressive pushing policy in the courts).

suggest, with some caveats, that there may be a *Chevron* Supreme and a *Chevron* Regular: whereas the choice to apply *Chevron* deference may not matter that much at the Supreme Court, it seems to matter in the circuit courts.”<sup>243</sup>

For our purposes, one of their findings is particularly relevant. Barnett and Walker find that the circuit courts were much *less* likely to resolve the *Chevron* issue at step one than the Court was. While the circuit courts decided the case at step one 30 percent of the time, the Court (according to Professor Merrill) decided cases at step one 56 percent of the time.<sup>244</sup> This distinction might suggest that courts move too quickly to step two reasonableness review.<sup>245</sup> As the authors note, this does have an impact on the regulatory landscape, because step one decisions mean that “subsequent presidential administrations will not be able to change positions” under *Brand X*.<sup>246</sup> If circuit courts really are under-enforcing step one determinations, then it might be the case that they are applying an insufficiently strong version of step one to resolve textual ambiguities.

### C. Other Normative Benefits

The primary normative benefit of this conceptualization of *Chevron* is that it simplifies the practice of judicial review. *Chevron*'s two steps would correspond to two practices that the Court regularly engages in. Step one would require the Court to determine the metes and bounds of statutory authority by employing the “traditional tools of statutory implementation.” Whenever an agency brings a challenge before a court, it will have to first justify its exercise of authority as within the *judicial* meaning of the statute itself, relying entirely on arguments about statutory interpretation. But once it satisfied that, the implementation of a “reasonable” or “appropriate” policy

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243. *Id.* at 6.

244. Compare Barnett & Walker, *supra* note 237, at 33, 34, with Merrill, *supra* note 117, at 981 tbl.1. This comparison has limitations that should not be understated. First, the kinds of cases that reach the Court might be sufficiently different that the comparison is useless. For example, it might just be that clearer statutes allow for step one decisions, and the Court does not tend to waste its time with them. Second, the data set that Merrill used only dealt with thirty-two cases from 1984–1990. This sample is neither complete nor representative of the Court's current practice.

245. Barnett & Walker, *supra* note 237, at 6 (“This difference may suggest that, given the higher likelihood of circuit-court review than Supreme Court review, agencies should give closer attention to the statutory language but that their step-two explanations are largely sufficient.”); see also Walker, *supra* note 34 (noting Justice Kennedy's concerns about “reflexive deference”).

246. Barnett & Walker, *supra* note 237 at 34.

would be reviewed lightly with arbitrary and capricious review. The courts have developed the tools to engage in this review. *Chevron* step two would apply *State Farm*.<sup>247</sup>

Commentators have already suggested that this might make sense. Professor Levin has argued that “step two should be regarded as equivalent to arbitrariness review.”<sup>248</sup> And Judge Kavanaugh has suggested this explicitly:

Courts should defer to the agency [in step two], just as they do when conducting deferential arbitrary and capricious review under the related reasoned decisionmaking principle of *State Farm*. This very important principle sometimes gets lost: a judge can engage in appropriately rigorous scrutiny of an agency’s statutory interpretation and simultaneously be very deferential to an agency’s policy choices within the discretion granted to it by the statute.<sup>249</sup>

Importantly, the modern version of this review gives broad discretion to the agency’s choice among relevant policies.

Applying a rigorous two-step framework also changes the way we talk about the practice of regulation in the administrative state. Professor Pojanowski explores this advantage. In an Article discussing what the Court’s jurisprudence would be like without *Chevron* deference, he argues that this would “pull apart the overlap between review of interpretation and policymaking.”<sup>250</sup> The Court would engage in robust statutory analysis from “text, structure, interpretive canons, background purpose, [and] legislative history” to determine the meaning of the statute.<sup>251</sup> But agencies would still regulate under statutes that tell them to prescribe “reasonable” or “appropriate” rules, which “turn on facts about the world, non-legal, technical expertise, and judgments about policy priorities and likely outcomes.”<sup>252</sup> The same thing would occur in a world with an aggressive step one and a highly deferential step two.

Finally, continuing to rely on *Chevron* step two would achieve many of the normative benefits that unitary-executivists advance: efficiency and accountability.<sup>253</sup> In the era of presidential administration, this means that presidential candidates can effectively control bureaucrats, promulgate rules, and articulate policy that is more democratically legitimate than if the

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247. See *Motor Vehicle Mfrs. Ass’n v. State Farm*, 463 U.S. 29 (1983).

248. Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1285 (1997); see also Lawson, *supra* note 5, at 1379; Sharkey, *supra* note 216.

249. Kavanaugh, *supra* note 57, at 2154.

250. Pojanowski, *supra* note 1, at 1086.

251. *Id.*

252. *Id.* at 1086–87.

253. See generally Calabresi, *supra* note 113, at 37.

courts were heavily involved.<sup>254</sup> At the same time, the rigorous step one analysis would preserve the unique institutional capacity of the judiciary to “say what the law is.” These capacities, together, preserve the institutional advantages of the Article II and III branches.

### CONCLUSION

In the 1980s, President Reagan imposed novel forms of political control on a seemingly vast, unaccountable, and ineffectually managed administrative state.<sup>255</sup> At the same time, the control that Article III judges did assert ossified agency rulemaking and imposed a costly status quo bias on agency action—a bias that hampered both regulation and *deregulation*.<sup>256</sup> Against this backdrop, legal thinkers resuscitated and improved the constitutional theory of the unitary executive and asserted control over the administrative state.<sup>257</sup> Critics might insinuate that this emerging theory simply provided legal cover for President Reagan’s deregulatory agenda.<sup>258</sup> But a more charitable interpretation is that this approach restored the original constitutional design. The Founders crafted a government with a powerful presidential figure at its head to ensure accountability, efficiency, and rationality in the execution of the laws.<sup>259</sup> *Chevron* deference fits neatly within this constitutional framework. Like other doctrines of judicial restraint, *Chevron* requires judges to remain within their spheres of institutional competence.<sup>260</sup> *Chevron*-skepticism begins to tack away from this vision, and it reasserts the primacy of the courts in the administration and execution of the laws.<sup>261</sup>

Nevertheless, the Court should not tack too far away from this deference regime. Instead, a restatement and clarification of the doctrine responds to

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254. See generally Kagan, *supra* note 22, at 2379.

255. See, e.g., Metzger, *supra* note 4, at 14 (discussing President Reagan’s attempt to curtail the expanse of the administrative state); Kagan, *supra* note 22 (discussing forms of political control in the Reagan Administration).

256. See Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60, 94 (1995).

257. See Rosenberg, *supra* note 24, at 628–30; cf. Metzger, *supra* note 4, at 15 (“It was the Reagan Administration’s deregulatory efforts that produced the *Chevron* doctrine and deference to an agency’s reasonable interpretation of ambiguous statutes that it implements. It was also the Reagan Administration that developed centralized regulatory review and pushed for recognition of constitutionally protected presidential control of administration.”).

258. See, e.g., Tushnet, *supra* note 24.

259. See AMAR, *supra* note 19, at 177–204.

260. See *supra* Section I.B.ii.

261. See Waxman, *supra* note 1, at 17–22 (suggesting that the criticisms of *Chevron* might reflect a broader trend toward “judicial supremacy”).

the legitimate concerns of the *Chevron*-skeptics without undermining the proper role of the judiciary.<sup>262</sup> The solution advanced in this Article is to rigorously employ the “traditional tools of statutory interpretation” at step one, but to employ light arbitrary and capricious review at step two. This strikes the right institutional balance. Although the judiciary should say what the law is, the Executive Branch should enforce it.<sup>263</sup>

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262. See *supra* Section III.A.

263. See Starr, *supra* note 22, at 309 (“Thus, when fully appreciated, *Chevron* vindicates the appropriate and traditional function of judicial review. It confirms the judiciary’s historic role of declaring what the law is, but prevents the judiciary from going beyond that venerable, legitimate role and straying into the forbidden ground of overseeing administrative agencies.”).