

Chevron Debates and the Constitutional Transformation of Administrative Law

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Chevron v. NRDC is under attack. Chevron deference to agencies' statutory interpretation is a pillar of modern government that judges and bureaucrats have used almost every day for thirty years. Until recently, most observers dismissed efforts to overrule Chevron as impossible or absurd, yet one of Justice Anthony Kennedy's last acts on the Supreme Court suggested that Chevron deference might violate the separation of powers.

Constitutional threats to Chevron are surprisingly recent and grave. In 2015, Justice Clarence Thomas was the first judge in history to write that Chevron is unconstitutional. Anti-Chevron critiques by Justices Neil Gorsuch and Brett Kavanaugh were featured elements of their Supreme Court nominations. Justice Samuel Alito joined an opinion in 2019 that condemned all administrative deference. And even though Chief Justice John Roberts's concerns have been more nuanced, his ambivalence may be decisive. A landmark ruling seems imminent—one way or the other—and now is the time to analyze relevant arguments and consequences.

This Article examines the history and merit of Chevron's constitutional critiques. Reagan-era conservatives like Antonin Scalia used to celebrate Chevron as compatible with the separation of powers, and the Supreme Court viewed administrative deference as a perfectly ordinary practice for almost two hundred years. That historical evidence supports normative arguments that Chevron is consistent with basic structures of constitutional law. Overturning Chevron would be the most radical decision in modern history about constitutional structure, upsetting hundreds of precedents, thousands of statutory provisions, and countless agency decisions. Such a ruling would transform constitutional law itself, as judges apply newly aggressive theories to destroy established tools of democratic self-governance.

TABLE OF CONTENTS

INTRODUCTION	655
I. CHEVRON'S ORIGINAL MEANING AND DEFENDERS	661
A. Chevron in the 1980s	662

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<i>B. Chevron's Conservative Enthusiasts</i>	665
<i>C. Alternatives to Constitutional Reform</i>	672
II. LONG TRADITION(S) OF ADMINISTRATIVE DEFERENCE .	676
<i>A. Revising Historical Revisionism</i>	677
<i>B. Administrative Deference Versus Interpretive Canons</i>	681
<i>C. Deference in the 1940s</i>	686
III. MERITS OF CONSTITUTIONAL CRITIQUE	694
<i>A. Nondelegation</i>	694
1. Modern History of Judicial Critiques	695
2. Rebutting Nondelegation Critiques	705
<i>B. Marbury v. Madison</i>	712
<i>C. Due Process and Equal Protection</i>	716
<i>D. English History</i>	721
1. Colonial English History	722
2. Eighteenth-Century American History	724
3. Timeless History	729
CONCLUSION	732
APPENDIX	734

INTRODUCTION

One week before announcing his retirement, Justice Anthony Kennedy declared that, “[g]iven the concerns raised by some Members of this Court,” the Supreme Court should “reconsider . . . premises that underlie *Chevron*” based on “constitutional separation-of-powers principles and the function and province of the Judiciary.”¹ Until recently, most lawyers would have found Justice Kennedy’s constitutional objections hard to understand, and many experts believed that reversing *Chevron* on separation-of-powers grounds was unrealistic or absurd.²

¹ *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) (discussing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984)). The petition for certiorari, oral argument, and parties’ briefs did not question *Chevron*’s legal status, much less did they dispute its constitutional validity. See Petition for a Writ of Certiorari, *Pereira*, 138 S. Ct. 2105 (No. 17-459); Transcript of Oral Argument, *Pereira*, 138 S. Ct. 2105 (No. 17-459); Brief for Petitioner, *Pereira*, 138 S. Ct. 2105 (No. 17-459); Brief for the Respondent, *Pereira*, 138 S. Ct. 2105 (No. 17-459).

² E.g., ADRIAN VERMEULE, LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE 31 (2016) (“[T]here is no indication whatsoever that the Court as a body has any interest in overruling *Chevron*. The center holds.”); Thomas W. Merrill, *Step Zero After City of Arlington*, 83 FORDHAM L. REV. 753, 755 (2014) (“*Chevron* has now been invoked in far too many decisions to make overruling it a feasible option”); Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 24, 27, 39, 42 (2017) (describing constitutional objections as “implausible” because “only Justices Thomas and Gor-

By contrast, Kennedy implied that four other Justices wanted to revisit, not only specific applications of *Chevron*, but fundamental “premises that underlie” the doctrine itself.³ No Justice disagreed with Kennedy’s statement at the time, and Justice Brett Kavanaugh’s record of criticizing *Chevron* suggests that the current probability of overturning *Chevron* is higher than anyone could have imagined a few years ago.⁴

To overrule *Chevron* on constitutional grounds would be a massive shock to the legal system. *Chevron* has been a pillar of federal public law for more than three decades, and it is among the most cited Supreme Court decisions of all time.⁵ When *Chevron* was decided in

such” support such arguments and “[f]ar too many judicial decisions sustain administrative actions on deferential review”); see also Nicholas R. Bednar & Kristin E. Hickman, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1461 (2017) (similar); Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 938–39 (2018) (similar); cf. VERMEULE, *supra* note 2, at 13 (describing a “long-term trend of judicial deference to agency legal interpretations” and claiming that deference “would persist in *de facto* form even if *Chevron* were overruled”).

³ *Pereira*, 138 S. Ct. at 2121 (Kennedy, J., concurring) (citing *City of Arlington v. FCC*, 569 U.S. 290, 312–16 (2013) (Roberts, C.J., dissenting)); see also *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring). Justice Alito joined Chief Justice Roberts’s dissent in *City of Arlington v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting), and the year after *Pereira*, he also joined a Gorsuch opinion attacking administrative deference. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring in the judgment).

⁴ See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150–54 (2016) (book review) [hereinafter Kavanaugh, *Fixing Interpretation*]; Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1911–13 (2017); Brett Kavanaugh, *The Joseph Story Distinguished Lecture*, HERITAGE FOUND. (Oct. 25, 2017), <https://www.heritage.org/josephstory2017> [<https://perma.cc/X6VS-2VTP>]; Brett M. Kavanaugh, *HLS in the World: A Conversation with Federal Judges About Federal Courts*, HLS 200 (Oct. 27, 2017), <http://200.hls.harvard.edu/events/hls-in-the-world/conversation-federal-judges-federal-courts/> [<https://perma.cc/C93F-WFL4>]; cf. *Pereira*, 138 S. Ct. at 2129 (Alito, J., dissenting) (“In recent years, several Members of this Court have questioned *Chevron*’s foundations.”). This Article cannot predict what the Court will do. Instead, the more urgent goals are to describe the recent past and make normative suggestions about what the Court should do in the foreseeable future.

⁵ See Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 399–400, 399 n.2, 400 n.4 (Peter L. Strauss ed., 2006) (discussing the significance of *Chevron*); PETER L. STRAUSS ET AL., GELLHORN & BYSE’S ADMINISTRATIVE LAW 620 (9th ed. 1995) (“Now for you agency case lawyers. . . . In every case involving statutory interpretation, think *Chevron*.” (quoting Judge Patricia Wald, *Advocacy from the Viewpoint of an Appellate Judge* 9 (Oct. 28, 1994))); VERMEULE, *supra* note 2, at 200 (describing *Chevron* as “[t]he most famous doctrine in all of administrative law”); Jonathan H. Adler, *Restoring Chevron’s Domain*, 81 MO. L. REV. 983, 983 (2016) (discussing *Chevron*’s importance); Thomas W. Merrill, *Justice Stevens and the Chevron Puzzle*, 106 NW. U. L. REV. 551, 552–54 (2012) (characterizing *Chevron* as having “transsubstantive significance” as well as “transformative significance”); Siegel, *supra* note 2, at 938 n.2 (“[F]ederal courts of appeals have cited *Chevron*”);

1984, interpretive deference to agencies on statutory questions was not so controversial. Justice John Paul Stevens wrote for a unanimous Court, and conservative intellectuals like Justice Antonin Scalia endorsed the decision soon afterward.⁶ Examples of *Chevron* deference to administrative agencies have been omnipresent since that time, with courtroom litigation representing only a small fraction of the decision's impact.⁷ One scholar explained that “[i]t does not stretch the imagination to believe that, on every single working day of the year, there exists in the . . . federal government a judge, an executive officer, or a legislator who expressly invokes or formulates policy premised on *Chevron*.”⁸

Chevron has produced its share of controversies over the years, much like other iconic precedents.⁹ In the past, however, arguments about *Chevron* seldom crossed the line to become arguments against *Chevron*.¹⁰ Until recently, practical questions about applying *Chevron* have mostly overshadowed qualms about the decision's theoretical basis.¹¹ Times have changed as anti-*Chevron* arguments that were once

ron nearly five thousand times, as have federal district courts. Law review articles have cited the case more than eight thousand times. The Supreme Court itself has cited *Chevron* more than two hundred times.”); Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1615 (2019) [hereinafter Sunstein, *Chevron as Law*] (“[*Chevron*] has a strong claim to being the most important case in all of administrative law. It is now under siege. Almost thirty-five years old, it may not see the age of forty.”); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990) (“[T]he decision has established itself as one of the very few defining cases in the last twenty years of American public law.”).

⁶ See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 839 (1984); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521; *infra* Section I.B (discussing in detail conservative commentary from Scalia's generation).

⁷ See Metzger, *supra* note 2, at 24–25; Mila Sohoni, *A Bureaucracy—If You Can Keep It*, 131 HARV. L. REV. F. 13, 20–21 (2017).

⁸ Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 912 (2017).

⁹ See, e.g., Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1078 (2016) (describing *Chevron* as a “case that launched a thousand scholarly ships”); Steven J. Lindsay, *Timing Judicial Review of Agency Interpretations in Chevron's Shadow*, 127 YALE L.J. 2448 (2018); Metzger, *supra* note 2, at 3; Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1407–08 (2017). See generally Craig Green, *Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents*, 94 N.C. L. REV. 379, 426–49 (2016) (describing such interpretive conflicts as typical for iconic judicial precedents).

¹⁰ Even one of *Chevron*'s early skeptics expressed her conclusions with admirable caution: “If we are going to embark upon [*Chevron*'s] significant theoretical revision, the [magnitude] of the changes should be acknowledged and their consequences assessed far more candidly and carefully than the Court has done thus far.” Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) (emphasis added); see also *id.* at 457 n.21 (collecting authorities that criticized the scope of *Chevron* without advocating its abandonment).

¹¹ A few academics did puzzle over why courts should defer to agencies' statutory inter-

pretation, what kind of law authorized the practice, when administrative deference became normal, and how it cohered with broader principles regulating courts and agencies. *See, e.g.*, Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 *CORNELL L. REV.* 1101, 1114–17 (1988). For a particularly outstanding analysis of pre-*Chevron* deference, see Henry P. Monaghan, *Marbury and the Administrative State*, 83 *COLUM. L. REV.* 1 (1983).

Such questions did not occupy much space in post-*Chevron* casebooks, however, which somewhat indicates how future generations of law students were being taught in the classroom. I canvassed every edition of six casebook series from 1984 to the present in order to estimate the percentage of pages that mentioned constitutional issues within relevant discussions of administrative deference.

In *Administrative Law and Regulatory Policy*, constitutional issues were only referenced on one percent of the pages (1 out of 94) in the relevant discussions of administrative deference. *See* STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* (2d ed. 1985); STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* (3d ed. 1992); STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* (4th ed. 1998); STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* (5th ed. 2002); STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* (6th ed. 2006); STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* (7th ed. 2011); STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* (8th ed. 2017).

In *Administrative Law*, a casebook co-authored by Ronald Cass, constitutional issues were, on average, only referenced on 10% of the pages (3.4 out of 33) in the relevant discussions of administrative deference. *See* RONALD A. CASS & COLIN S. DIVER, *ADMINISTRATIVE LAW* (1st ed. 1987); RONALD A. CASS ET AL., *ADMINISTRATIVE LAW* (2d ed. 1994); RONALD A. CASS ET AL., *ADMINISTRATIVE LAW* (3d ed. 1998); RONALD A. CASS ET AL., *ADMINISTRATIVE LAW* (4th ed. 2002); RONALD A. CASS ET AL., *ADMINISTRATIVE LAW* (5th ed. 2006); RONALD A. CASS ET AL., *ADMINISTRATIVE LAW* (6th ed. 2011); RONALD A. CASS ET AL., *ADMINISTRATIVE LAW* (7th ed. 2016).

In *Administrative Procedure and Practice*, constitutional issues were, on average, only referenced on 13% of the pages (1.167 out of 8.83) in the relevant discussions of administrative deference. *See* WILLIAM F. FUNK ET AL., *ADMINISTRATIVE PROCEDURE AND PRACTICE* (1st ed. 1997); WILLIAM F. FUNK ET AL., *ADMINISTRATIVE PROCEDURE AND PRACTICE* (2d ed. 2001); WILLIAM F. FUNK ET AL., *ADMINISTRATIVE PROCEDURE AND PRACTICE* (3d ed. 2006); WILLIAM F. FUNK ET AL., *ADMINISTRATIVE PROCEDURE AND PRACTICE* (4th ed. 2010); WILLIAM F. FUNK ET AL., *ADMINISTRATIVE PROCEDURE AND PRACTICE* (5th ed. 2014); WILLIAM F. FUNK ET AL., *ADMINISTRATIVE PROCEDURE AND PRACTICE* (6th ed. 2018).

In *Administrative Law: The American Public Law System*, constitutional issues were referenced on none of the pages (0 out of 28) in the relevant discussions of administrative deference. *See* JERRY L. MASHAW & RICHARD A. MERRILL, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* (2d ed. 1985); JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* (3d ed. 1992); JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* (4th ed. 1998); JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* (5th ed. 2003); JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* (6th ed. 2009); JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* (7th ed. 2014).

In *Administrative Law*, a casebook co-authored by Bernard Schwartz, constitutional issues were, on average, only referenced on 2.4% of the pages (0.75 out of 31.4) in the relevant discussions of administrative deference. *See* BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* (2d ed. 1982); BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* (3d ed. 1988); BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* (4th ed. 1994); BERNARD SCHWARTZ & ROBERTO L. CORRADA, *ADMINIS-*

relegated to hardline think tanks and politically marginal scholars have taken the spotlight.¹² This Article responds with a doctrinal history of *Chevron*'s modern crisis and a rebuttal of the decision's constitutional critiques.¹³

The Article proceeds in three steps. Part I introduces what *Chevron* deference is, how it works, and why conservatives used to support it. In the decision's original Reagan-era context, *Chevron* articulated default presumptions about how congressional statutes create agencies and how that should affect judicial review.¹⁴ Many legal conservatives were enthusiastic about *Chevron* deference at the time, and those arguments illustrate how a majority of deregulatory conservatives shifted from anti-deference arguments in the 1930s to pro-deference arguments in the 1980s.¹⁵ As a normative matter, conservative arguments that supported *Chevron* during the Reagan era have now become counter-arguments that today's conservative critics must confront.

Before attempting to constitutionally uproot *Chevron*, one should analyze those roots' historical depth. Part II describes a long practice

TRATIVE LAW (5th ed. 2001); BERNARD SCHWARTZ ET AL., ADMINISTRATIVE LAW (6th ed. 2006); BERNARD SCHWARTZ ET AL., ADMINISTRATIVE LAW (7th ed. 2010); BERNARD SCHWARTZ ET AL., ADMINISTRATIVE LAW (8th ed. 2014).

In *Gellhorn and Byse's Administrative Law*, constitutional issues were, on average, only referenced on 2.4 percent of the pages (3 out of 127.6) in the relevant discussions of administrative deference. See WALTER GELLHORN ET AL., ADMINISTRATIVE LAW (8th ed. 1987); PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW (9th ed. 1995); PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW (10th ed. 2003); PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW (11th ed. 2011); PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW (12th ed. 2018).

Theoretical arguments about *Chevron* also did not draw much attention from lawyers and judges who were too busy for intellectual debates. For an important exception that proves the rule, see Kenneth W. Starr et al., *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 379 (1987) (including a panel discussion among Ronald M. Levin, Alan B. Morrison, Kenneth W. Starr, Cass R. Sunstein, and Richard K. Willard).

¹² See Siegel, *supra* note 2, at 940 n.19 (providing a catalog of modern critiques); Christopher J. Walker, *Toward a Context-Specific Chevron Deference*, 81 MO. L. REV. 1095, 1096 n.1 (2016) (participating in a symposium entitled "A Future Without the Administrative State?" while describing five other events that featured anti-*Chevron* critics); Adler, *supra* note 5, at 984 nn.9–10 (similar); cf. Symposium, *The History, Theory, and Practice of Administrative Constitutionalism*, 167 U. PA. L. REV. 1603 (2019) (presenting a wide range of academic analysis about the administrative state); *infra* Section III.B.

¹³ Political shifts provide context for the new legal arguments and events described herein. See Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. (forthcoming Mar. 2021).

¹⁴ See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984); *infra* Section I.A.

¹⁵ See *infra* Section I.B.

of administrative deference that only recently became controversial.¹⁶ The original *Chevron* decision was not clear about whether the Court was creating a new kind of administrative deference or clarifying earlier practice.¹⁷ One expert commentator explained that “the general proposition . . . that courts should accept reasonable agency interpretations of statutes they are charged with administering . . . was not in and of itself revolutionary. The Court had said something similar in previous decisions.”¹⁸ This Article has collected an original and extensive database of Supreme Court precedents that shows various forms of administrative deference as far back as 1827, with many more cases starting in the 1940s.¹⁹ Even though pre-*Chevron* cases were sometimes inconsistent and certain details changed over time, the concept of administrative deference has been routinely accepted as permissible since the earliest decades of administrative government.²⁰ That doctrinal history is a benchmark for measuring the modern transformation, and such evidence raises the normative burden of proof for anti-*Chevron* constitutional challenges.

Part III examines the constitutional merits of several anti-*Chevron* critiques. Some critics argue that *Chevron*'s emphasis on statutory “ambiguity” means that Congress unconstitutionally delegated legislative authority to agencies, leaving courts with the impermissible task of choosing how to fill statutory gaps that only Congress can address.²¹ Another group claims that *Chevron* and other kinds of administrative deference violate separation-of-powers principles under *Marbury v. Madison*.²² Because “[i]t is emphatically the province and duty of the judicial department to say what the law is,” they argue that the Constitution prohibits courts from deferring to anyone else, including statutory interpretations by federal agencies.²³ A third criticism, raised in

¹⁶ See Bamzai, *supra* note 8, at 912.

¹⁷ See *Chevron*, 467 U.S. at 843–44; Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 201–03 (2006).

¹⁸ Merrill, *supra* note 5, at 400; see also *id.* at 426 n.96 (describing Merrill's comedic title as “Deputy Solicitor General for *Chevron*” during the Reagan and Bush presidencies).

¹⁹ See *Chevron*, 467 U.S. at 844–45, 844 n.14 (citing *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 131 (1944); *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827)).

²⁰ See Monaghan, *supra* note 11, at 14–17.

²¹ See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *infra* Section III.A.

²² See, e.g., *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *infra* Section III.B.

²³ *Marbury*, 5 U.S. (1 Cranch) at 177; see also Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2584 (2006) (describing criticisms).

immigration cases, claims that administrative deference violates due process and equal protection.²⁴ Finally, one scholar has claimed that administrative deference violates rule-of-law doctrines from sixteenth-century England.²⁵ Due to space limitations, this Article identifies just a few problems with those arguments, including their potentially dire consequences for the administrative state as a whole.

As a matter of legal history, Gillian Metzger observed that judicially imposed constitutional limits on the administrative state were not helpful or successful in the 1930s.²⁶ *Chevron's* modern critics risk a similarly ill-advised adventure in judicial activism, seeking to permanently destroy policy instruments of the national government based on vague and historically incomplete ideas about lawful administration.²⁷ Whatever one's policy opinions might be about administrative government, the proper venue for most of those disputes is a ballot box, not a judge's chambers. The appropriate tools for changing the federal government's scope are statutes, executive orders, and agency interpretations, not bold judicial declarations about new constitutional principles. Standards for administrative deference should be determined—as they have been throughout American history—by agencies, judges, and Congress in accordance with democratic politics and interbranch cooperation instead of abstract theories and unyielding concepts of constitutional law.

I. CHEVRON'S ORIGINAL MEANING AND DEFENDERS

Modern *Chevron* debates have taken place along a diverse group of timelines, as some writers focus on the 1930s, others on Henry VIII.²⁸ Some experts describe deference as a solidly progressive trend, while others depict an endless and unchanging present.²⁹ In due course, this Article will consider all of those historical contexts, yet the story begins with the 1980s in order to explain why so many commen-

²⁴ See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring); *infra* Section III.C.

²⁵ PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014); see *infra* Section III.D.

²⁶ Metzger, *supra* note 2, at 51–62.

²⁷ For an explanation of the controversial term “judicial activism” in this context, see Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009).

²⁸ See Philip Hamburger, *Early Prerogative and Administrative Power: A Response to Paul Craig*, 81 MO. L. REV. 939, 943–44 (2016) (discussing Henry VIII); Metzger, *supra* note 2, at 51–62 (discussing the 1930s).

²⁹ See VERMEULE, *supra* note 2, at 213 (“[T]he law works itself steadily pure—meaning more deferential—over time, once the first steps have been taken.”); Siegel, *supra* note 2, at 940 (applying modern doctrine).

tators thought *Chevron* was acceptable for such a long time. Modern anti-*Chevron* critics are legal conservatives like the Federalist Society and Justice Neil Gorsuch, but the opposite was true thirty-five years ago, when an earlier generation of deregulatory conservatives consistently praised administrative deference.³⁰ Constitutional arguments from the 1980s demonstrate the novelty of anti-*Chevron* critiques, and Part III will rely on the following historical groundwork to complete that intergenerational comparison.

A. *Chevron in the 1980s*

Before *Chevron* was famous, it looked like just another skirmish in the Reagan Revolution. Then-Judge Ruth Bader Ginsburg was only two years into her D.C. Circuit career when she defended prior judicial interpretations of the Clean Air Act against the new deregulatory strategy of Reagan's pro-business EPA Administrator, Anne Gorsuch.³¹ The technical question in *NRDC v. Gorsuch* was whether air polluters could offset emissions in one part of an industrial plant by reducing emissions in another part.³² An earlier regulation from the Carter Administration rejected offsets for "nonattainment" states with unsatisfactory air quality.³³ Various Clean Air Act provisions regulated each "stationary source" of pollution, and the Carter Administration applied "source" to each component at an industrial facility—such as an individual smokestack or chimney.³⁴ The Carter-era interpretation forbade pollution offsets from one component to another, thus more rigorously commanding industrial facilities to limit emissions from each component separately.³⁵

Reagan's EPA officials reversed course, issuing a regulation that allowed emission offsets.³⁶ The new rule interpreted "source" to govern industrial facilities as a whole, rather than specific components therein.³⁷ Unlike the Carter EPA's view that component-based regulation was "an important tool in the drive towards attainment of . . . air

³⁰ Compare Pojanowski, *supra* note 9, at 1091 (collecting modern examples), with 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. 1083, 1087 (2008) ("Almost immediately, Reagan Administration officials and appointees proclaimed a '*Chevron* Revolution.'").

³¹ See *NRDC v. Gorsuch*, 685 F.2d 718, 719–22 (D.C. Cir. 1982).

³² *Id.*

³³ *Id.* at 723.

³⁴ *Id.*

³⁵ See *id.*

³⁶ See *id.* at 724.

³⁷ See *id.*

quality standards,”³⁸ the Reagan regime’s facility-wide approach hoped to reduce “burdens and complexities” and give states “greater flexibility” to regulate pollution as they saw fit.³⁹

Before that Reagan-era shift, the D.C. Circuit had previously adjudicated two cases about whether the statutory term “source” regulated industrial facilities or specific polluting components. One of those decisions concerned states with satisfactory air quality, and the D.C. Circuit held that “source” governed entire facilities, not individual components.⁴⁰ The second case concerned statutory provisions that aimed to “improve air quality” instead of “maintain[ing] existing air quality.”⁴¹ The D.C. Circuit was more stringent in this context, applying “source” to each polluting component separately and disallowing offsets.⁴²

In *Gorsuch v. NRDC*, Ginsburg tried to reconcile those two precedents, explaining that “source” required component-based regulation instead of facility-based regulation for nonattainment states—but not clean air states—because “[t]he nonattainment program’s *raison d’être* is to ameliorate the air’s quality.”⁴³ In deciding the *Gorsuch* case, Ginsburg concluded that earlier precedents’ attention to legislative purpose “comfortably places [this case] on the ‘improving’ side of the line,” thereby invalidating the EPA’s permissive facility-wide approach.⁴⁴

Recaptioning the case *Chevron U.S.A. Inc. v. NRDC*, the Supreme Court unanimously reversed.⁴⁵ Contrary to modern political preferences, conservative amici Pacific Legal Foundation and Mid-America Legal Foundation supported the EPA’s discretion to change its interpretation of “source,” while Democratic officials like Joseph Lieberman and James Tierney opposed agency flexibility.⁴⁶ The Supreme Court sided with Reaganite policymakers and advocates. Justice Stevens wrote that the D.C. Circuit had overstepped its role interpreting statutes that involve agencies: “The basic legal error of

³⁸ *Id.* at 723 (quoting 45 Fed. Reg. 52,676, 52,697 (Aug. 7, 1980)).

³⁹ *Id.* at 723–24 (quoting 46 Fed. Reg. 16, 280, 16,281 (Mar. 12, 1981); *id.* at 50,766, 50,767 (Oct. 14, 1981)).

⁴⁰ *Id.* at 723–25 (citing *Ala. Power Co. v. Costle*, 636 F.2d 323, 401–02 (D.C. Cir. 1979)).

⁴¹ *Id.* at 725–26 (quoting *ASARCO, Inc. v. EPA*, 578 F.2d 319, 327 (D.C. Cir. 1978)).

⁴² *Id.* (citing *ASARCO*, 578 F.2d at 327–28).

⁴³ *Id.* at 726.

⁴⁴ *Id.* at 727.

⁴⁵ *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842 (1984).

⁴⁶ *Id.* at 839–42; see also JEFFERSON DECKER, *THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT* 1–11 (2016) (discussing those organizations’ institutional origins).

the Court of Appeals was to adopt a static judicial definition of the term ‘stationary source’ when . . . Congress itself had not commanded that definition.”⁴⁷

When agencies are not involved, courts always try to create a “static judicial definition” for vague statutory terms, yet the Supreme Court imposed a different approach “[w]hen a court reviews an agency’s construction of the statute which it administers.”⁴⁸ Courts must always “give effect to the unambiguously expressed intent of Congress,” but when Congress has created an agency without addressing “the precise question at issue, the court does not simply impose its own construction on the statute.”⁴⁹ “[I]f the statute is silent or ambiguous with respect to the specific issue,” courts should determine only “whether the agency’s answer is based on a permissible construction of the statute.”⁵⁰ And the agency’s interpretation should prevail even if it is not “the reading the court would have reached” on its own.⁵¹ Whenever Congress has delegated “authority to the agency to elucidate a specific provision of the statute by regulation”—even if that delegation was only implicit—“a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”⁵²

Justice Stevens’s opinion continued for twenty pages, but the result was already clear. The Clean Air Act’s text and legislative history did not specify whether “source” should govern industrial facilities or individual components.⁵³ That congressional ambiguity, combined with the EPA’s general rulemaking authority, meant that the agency should be responsible for interpreting vague statutory terminology instead of the courts. Because of Congress’s statutory choices concerning governmental structure, the Court granted the EPA deference about the meaning of “source” even though the agency’s interpretations had changed dramatically from one presidency to the next.⁵⁴

The Court mentioned that the Clean Air Act was “technical and complex” and that the agency offered a “detailed and reasoned” explanation to “reconcil[e] conflicting policies.”⁵⁵ But the Court’s rea-

⁴⁷ *Chevron*, 467 U.S. at 842.

⁴⁸ *Id.*

⁴⁹ *Id.* at 842–43.

⁵⁰ *Id.* at 843.

⁵¹ *Id.* at 843 n.11.

⁵² *Id.* at 843–44.

⁵³ *Id.* at 851.

⁵⁴ *Id.* at 863–64.

⁵⁵ *Id.* at 865.

soning was notably categorical: “Perhaps [Congress] consciously desired the Administrator to strike the balance . . . , thinking that those with great expertise . . . would be in a better position to do so; perhaps it simply did not consider the question . . . ; and perhaps Congress was unable to forge a coalition”⁵⁶ The Court declared, “[f]or judicial purposes, it matters not which of these things occurred.”⁵⁷

Agencies’ substantive expertise might vary in different contexts, but that was not important. *Chevron*’s presumption of deference was justified by democratic theory itself because “federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”⁵⁸ If Congress had never created the EPA to administer the Clean Air Act, then courts by default would have prescribed a singular and “static” interpretation of the vague statutory term “source.” By contrast, once Congress granted the agency legal tools to interpret and implement its statutory scheme, courts were only supposed to enforce unambiguous statutory provisions, leaving the EPA free to fill all other interpretive gaps.

B. *Chevron’s Conservative Enthusiasts*

The Supreme Court appointment of Antonin Scalia was arguably one of President Reagan’s great policy achievements.⁵⁹ Given Scalia’s background as Assistant Attorney General, D.C. Circuit judge, and administrative law professor, he had special credibility in summarizing conservative enthusiasm for *Chevron* deference.⁶⁰ Scalia presented a lecture, *Judicial Deference to Administrative Interpretations of Law*, which described *Chevron*’s practical consequences and its “theoretical

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 866.

⁵⁹ See generally Hugh Hecla, *The Mixed Legacies of Ronald Reagan*, in *THE ENDURING REAGAN* 13, 27 (Charles W. Dunn ed., 2009) (“By the end of his two terms, Ronald Reagan had appointed almost half of all federal judges (as well as three Supreme Court justices). . . . These almost four hundred judges in the federal district and appeals courts will be with us for some years to come.”); SIDNEY M. MILKIS & MICHAEL NELSON, *THE AMERICAN PRESIDENCY* 472 (2019) (“Reagan’s effect on the federal judiciary is perhaps the best example of both the force and the limitations of the Reagan Revolution.”); David M. O’Brien, *Federal Judgeships in Retrospect*, in *THE REAGAN PRESIDENCY* 327, 331 (W. Elliot Brownlee & Hugh Davis Graham eds., 2003) (describing Reagan appointees’ “sense of being in the vanguard of a new conservative legal movement” that sought to define an activist conservative judicial position on economic and social issues).

⁶⁰ See Joan Biskupic, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 85, 127–28, 159–60 (2009).

underpinnings.”⁶¹ His strong support for *Chevron* was directly opposite to the next generation of legal conservatives.

Scalia insisted as a historical matter that *Chevron* deference was not “entirely new law,” except for “the clarity and the seemingly categorical nature of its expression.”⁶² Scalia acknowledged that some lawyers might misread the Administrative Procedure Act (“APA”) as implying that “questions of law would always be decided de novo by the courts.”⁶³ But he observed with emphasis, “[t]hat is not true today, and it was not categorically true in 1945.”⁶⁴ Scalia quoted the Attorney General’s Committee on Administrative Procedure from 1941—which “formed the basis” of the APA—as proof that “the administrative interpretation [of a statute] is to be given weight . . . as the opinion of the body especially familiar with . . . the duty of enforcing it.”⁶⁵ Consistent with that approach, one academic in 1950 explained the conventional wisdom of his era: “The proposition that the courts substitute [their] judgment on all questions or parts of questions that are analytically questions of law . . . is not and never has been the law”⁶⁶ Scalia also quoted the thesis of a prominent judge that some “[l]eading cases” required “great deference . . . to the decisions of an administrative agency applying a statute,” while other Supreme Court decisions applied no deference at all.⁶⁷ Scalia believed that *Chevron* “essentially chose between these two conflicting lines of decision,” establishing presumptive deference to agencies across a wide range of statutory contexts.⁶⁸

As a normative matter, Scalia thought *Chevron* deference could not be justified by any particular agency’s “expertise” or “relative competence.”⁶⁹ On the contrary, he claimed that “the theoretical justi-

⁶¹ Scalia, *supra* note 6, at 512.

⁶² *Id.*

⁶³ *Id.* at 514.

⁶⁴ *Id.* The APA’s text states: “To the extent necessary to decision . . . , the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706 (2018); see also *infra* Section II.C (discussing that text’s meaning when the APA was enacted).

⁶⁵ Scalia, *supra* note 6, at 512–13 (quoting FINAL REPORT OF ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77–8, at 90–91 (1941) [hereinafter FINAL REPORT]).

⁶⁶ Kenneth Culp Davis, *Scope of Review of Federal Administrative Action*, 50 COLUM. L. REV. 559, 609–10 (1950).

⁶⁷ Scalia, *supra* note 6, at 513 (quoting *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976), *aff’d sub nom. Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977)).

⁶⁸ *Id.*

⁶⁹ *Id.* at 514.

fication for *Chevron* is no different from the theoretical justification for those pre-*Chevron* cases that sometimes deferred to agency legal determinations.⁷⁰ Both before and after *Chevron*, the decisive focus was congressional intent and statutory structure.⁷¹ Echoing the *Chevron* majority, Scalia observed that Congress sometimes writes ambiguous statutes, and those ambiguities might emerge by design, accident, or a mix of the two.⁷² In contexts without administrative agencies, courts are institutionally responsible for providing clear answers when Congress is vague. In such circumstances, judges have a “duty . . . to say what the law is” even when Congress has said nothing useful on the subject.⁷³ As one jurist explained, “federal judges [are] ‘firefighters.’ They do not ignite the conflagrations that produce litigation but, if their authority is properly invoked, they ‘must respond to all calls.’”⁷⁴ Congress implicitly approved those judicial decisions when Congress created both statutory ambiguities and the interpretive entity charged with resolving them.⁷⁵

Scalia saw categorically different circumstances when Congress grants administrative agencies regulatory and interpretive authority. Under that scenario, if “Congress had no particular intent” with respect to a particular statutory ambiguity, Congress should be understood “to leave its resolution to the agency.”⁷⁶ Scalia explained that “what we have is the conferral of discretion upon the agency, and the only question of law presented to the courts is whether the agency has acted within the scope of its discretion—i.e., whether its resolution of the ambiguity is reasonable.”⁷⁷ Administrative deference does not eliminate courts’ responsibility to decide what the law is, but it does require courts to apply the federal law creating the agency, and that is exactly what *Chevron* prescribed. If Congress wants courts to resolve statutory ambiguities, it can always say so, or it could decline to create an administrative agency in the first place. Using the Court’s own interpretation of statutory structure, *Chevron* described a broad presumption that Congress creates regulatory agencies for the vital

⁷⁰ *Id.* at 516.

⁷¹ *See id.*

⁷² *Id.* at 516–17.

⁷³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁷⁴ Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 1001 (1987) (footnote omitted).

⁷⁵ *See* Scalia, *supra* note 6, at 517.

⁷⁶ *Id.* at 516.

⁷⁷ *Id.*

purpose of filling interpretive gaps that would otherwise be filled by judges.

Scalia explicitly dismissed constitutional concerns with that institutional arrangement. Insisting that “there is no one more fond of our system of separation of powers than I am,”⁷⁸ Scalia denied that administrative deference was an “abdication of judicial responsibility.”⁷⁹ Instead, he chided *Chevron* skeptics in his era for their “stubborn refusal . . . to admit that courts ever accept executive interpretation,” based on a regrettably uninformed and “deep-rooted feeling that it is the judges who must say what the law is.”⁸⁰ One could argue that judicial and administrative gap-filling both entail saying what the law is, insofar as judges or bureaucrats prescribe statutory clarifications that—by hypothesis—did not come from Congress. Or perhaps neither one counts as lawmaking because statutory ambiguities in both circumstances come from a congressionally prescribed system of legal interpretation. Under either characterization, federal courts have episodically deferred to agency interpretations for at least 150 years, and Scalia noted that courts have regularly applied administrative deference after the New Deal.⁸¹

Throughout United States history, federal courts prescribed diverse rules for determining when and how deference is appropriate, and judges have not referred to constitutional constraints in doing so. Scalia understood *Chevron* deference as part of a very long story, and he viewed the Court’s new doctrine as an improvement on the past. Scalia explained that “any rule adopted in this field represents merely a fictional, presumed intent, . . . a background rule of law against which Congress can legislate.”⁸² But “[i]f the *Chevron* rule is not a 100% accurate estimation of modern congressional intent, the prior case-by-case evaluation was not so either.”⁸³

Scalia highlighted a few of *Chevron*’s self-conscious deviations from prior practice, especially in its deference to agencies that alter their statutory interpretation over time. He explained that *Chevron*’s “capacity . . . to accept changes in agency interpretation *ungrudgingly* seems to me one of the strongest indications that the *Chevron* ap-

⁷⁸ *Id.* at 515.

⁷⁹ *Id.* at 514.

⁸⁰ *Id.*

⁸¹ See *id.* (discussing “old and new” cases, including judicial doctrines that predated 1945); *infra* Appendix (describing a longer history of administrative deference).

⁸² Scalia, *supra* note 6, at 517.

⁸³ *Id.*

proach is correct.”⁸⁴ *Chevron* makes the legislative process less like “a sporting event” where political rivals “gamble” on whether courts treat agency interpretations as authoritative.⁸⁵ Yet Scalia’s argument for *Chevron* went beyond mere pragmatism. He also believed as a strictly legal matter that categorical deference “more accurately reflects the reality of government,” including legal presumptions about statutory structure and purpose.⁸⁶

Justice Scalia’s enthusiasm for *Chevron* drew especially broad attention, yet his arguments stood shoulder to shoulder with other Reagan-era commentaries. Judge Kenneth Starr of the D.C. Circuit—who would later be Solicitor General, a short-list nominee for the Supreme Court, and the Independent Counsel who investigated President Clinton—described *Chevron* as “one of a small number of cases that every judge bears in mind when reviewing agency decisions.”⁸⁷ Starr described *Chevron* as “an application of long-standing Supreme Court precedent” requiring courts at least sometimes “to defer to administrative interpretations.”⁸⁸ Starr viewed *Chevron* as renouncing a “supervisory paradigm” of judging, under which courts micromanage agencies’ conduct.⁸⁹ Instead, *Chevron* applied a “checking and balancing paradigm” that was a narrow “bulwark against abuses of agency power.”⁹⁰ Starr acknowledged that “judicial review . . . should not be toothless.”⁹¹ Yet he insisted that “administrative agencies are not subordinate to the federal courts in the organizational structure established by the Constitution” because agencies themselves are also created by congressional power.⁹²

From Starr’s perspective, “*Chevron* reflects a more self-effacing . . . judicial philosophy than that embodied in earlier decisions laying claim to broader reviewing authority.”⁹³ Moreover, “*Chevron* accomplished this shift in thinking without violating the principles of judicial

⁸⁴ *Id.* at 518.

⁸⁵ *Id.* at 517.

⁸⁶ *Id.* at 521.

⁸⁷ Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 284, 312 (1986); see also Michael Winerip, *Ken Starr Would Not Be Denied*, N.Y. TIMES MAG. (Sept. 6, 1998), <https://www.nytimes.com/1998/09/06/magazine/ken-starr-would-not-be-denied.html> [<https://perma.cc/8JTW-LC77>].

⁸⁸ Starr, *supra* note 87, at 292 (“*Chevron* not only reaffirmed the deference principle but buttressed it . . . [by making] the longevity of an agency’s interpretation irrelevant.”).

⁸⁹ *Id.* at 300–01.

⁹⁰ *Id.*

⁹¹ *Id.* at 308.

⁹² *Id.*

⁹³ *Id.*

review enunciated in *Marbury*.⁹⁴ All of these arguments reflected typical Reagan-era conservatism, and Starr reminded federal courts that their function “is not to supervise; that role is allotted to the political branches.”⁹⁵ “Unelected judges should leave the executive branch free to pursue . . . what it perceives to be the will of the people. If Congress disagrees . . . , the proper response lies . . . in drafting clearer laws and amending vague ones.”⁹⁶

Douglas Kmiec was another prominent conservative supporter of *Chevron*, and he held various leadership positions in Reagan’s Justice Department.⁹⁷ Kmiec argued that *Chevron*’s categorical deference was an appropriate “coalescing of the separation of powers and the judicial acceptance of broad legislative delegations to the executive.”⁹⁸ With respect to ambiguous congressional statutes, no one should ask whether courts had a “judicial *duty*” to manufacture clarity.⁹⁹ Instead, the question was whether courts had the “judicial *right*” to upset policy choices that were located inside a congressionally created range of ambiguity.¹⁰⁰ According to Kmiec, “[i]f expansively worded delegations of legislative authority are permissible, interpretations made in pursuit of that authority merit judicial deference.”¹⁰¹

One could elaborate the Reagan-era political landscape by analyzing other examples of pro-*Chevron* conservatives like Judge Laurence Silberman, Judge Ralph Winter, Jr., and Assistant Attorney General Richard Willard, or by describing liberal skeptics of *Chevron* like Cass Sunstein, Judge Abner Mikva, then-Judge Stephen Breyer, and Public Citizen’s co-founder Alan Morrison.¹⁰² However, in order

⁹⁴ *Id.*

⁹⁵ *Id.* at 309.

⁹⁶ *Id.* at 312.

⁹⁷ See Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988).

⁹⁸ *Id.* at 269.

⁹⁹ *Id.* at 277.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 286.

¹⁰² For conservative supporters, see, e.g., *Church of Scientology v. IRS*, 792 F.2d 153, 164–65 (D.C. Cir. 1986) (Silberman, J., concurring); LAWRENCE E. WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP 247–50 (1997) (describing Silberman’s conservatism); Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990); Starr et al., *supra* note 11, at 372–73 (quoting Willard: “I am constantly irritated at hearing the epigram from *Marbury v. Madison* used to say that it is the province of the courts to decide what the law is. I do not think that’s what *Marbury* means. . . . [I]t is not that the Framers thought the judges were going to be smarter in interpreting statutes than people in the Executive Branch; it’s simply that they have the last say. . . . *Chevron* is a very helpful test and a helpful way of corraling the open-ended judicial arrogance that is so richly characterized by the

to understand *Chevron*'s original meaning, it is more illuminating to consider Henry Monaghan's prominent and apolitical article *Marbury and the Administrative State*, which provided intellectual support for authors like Scalia, Starr, and Kmiec who dismissed constitutional objections to *Chevron* without a second thought.¹⁰³

Echoing judges and practitioners since 1944, Monaghan claimed that "the only judicial task [concerning administrative deference] is to determine what statutory authority has been conferred upon the administrative agency."¹⁰⁴ Once that is done, the court has faithfully "discharged its duty to say what the law is."¹⁰⁵ Judges' constitutional responsibility "does not demand an independent judgment rule; it is in fact quite consistent with a clear-mistake standard."¹⁰⁶

Monaghan noted as a historical matter that, "whatever the logic of the *Marbury* argument or the wisdom of strong judicial control of administrative law-making, the Marshall court itself gave early sanction to deference principles."¹⁰⁷ And although the Court's long string of precedents might seem uneven or inconsistent, Monaghan de-

D.C. Circuit's jurisprudence for the past 20 or 30 years."); Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 68 ("To the extent that the [NLRB] is engaged in 'fleshing out' the statute . . . the courts' principal function initially would be not to determine the correct result . . . but merely to locate the outer boundaries of the legislative power delegated to the Board. And within those boundaries, the Board should be permitted to exercise choice freely.").

For liberal skeptics, see, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372–82 (1986); Abner J. Mikva, *How Should the Courts Treat Administrative Agencies*, 36 AM. U. L. REV. 1, 4–9 (1986); Starr et al., *supra* note 11, at 366–71; Starr et al., *supra* note 11, at 373 (documenting Morrison's criticism); Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 287–92 (1986). Cf. *Chem. Mfrs. Ass'n v. NRDC.*, 470 U.S. 116, 148 (1985) (Marshall, J., dissenting) (applying *Chevron* narrowly).

Not all conservatives agreed with Scalia, and then-Justice William Rehnquist once went so far as to invoke the nondelegation doctrine to undermine the administrative state as a whole. See *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 671–88 (1980) (Rehnquist, J., concurring).

¹⁰³ See Monaghan, *supra* note 11. Monaghan's work was cited by Kmiec and Starr in the 1980s—Scalia cited it much later—and the article is still widely discussed today. See *City of Arlington v. FCC*, 569 U.S. 290, 299 (2013) (Scalia, J., majority opinion); Kmiec, *supra* note 97, at 269 n.1, 278 nn.42–43, 286 & n.99; Starr, *supra* note 87, at 283 n.3, 292 n.68, 308 & n.144, 309 n.146; Aditya Bamzai, *Marbury v. Madison and the Concept of Judicial Deference*, 81 MO. L. REV. 1057, 1058 n.7 (2016); Metzger, *supra* note 2, at 39, 93–94; Sunstein, *Chevron as Law*, *supra* note 5, at 1639–40.

¹⁰⁴ Monaghan, *supra* note 11, at 27.

¹⁰⁵ *Id.*; see also Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 106 (1944).

¹⁰⁶ Monaghan, *supra* note 11, at 9.

¹⁰⁷ *Id.* at 14.

scribed an unbroken history “squarely against the wide assertion . . . that [A]rticle III courts can never yield to administrative constructions of law.”¹⁰⁸ Having shown that administrative deference is *constitutionally permissible*, Monaghan set aside complex policy questions of exactly when courts should defer, how to develop practical standards, and whether Congress should take action.¹⁰⁹ Conservative officials like Scalia, Starr, and Kmiec all agreed with Monaghan that administrative deference did not violate the separation of powers, and that constitutional judgment is very different from the opinion of legal conservatives today.

C. *Alternatives to Constitutional Reform*

Following Monaghan’s example, this Article will analyze *Chevron*’s constitutional status without exploring its practical desirability or implementation. To appreciate that difference, this Section considers various mechanisms that could reform *Chevron* without constitutional adjudication. Such materials illustrate that practically criticizing and constitutionally invalidating *Chevron* are very different projects. History shows that there has always been room for the former without attempting the latter.

From the beginning, debates about *Chevron*’s practical application did not threaten *Chevron*’s constitutional validity. For example, deciding to uphold the EPA’s interpretation of “source” through notice and comment regulations did not resolve whether similar deference should apply to litigation briefs, opinion letters, or press releases.¹¹⁰ *Chevron* likewise did not consider whether agencies could adopt statutory interpretations that contradict existing judicial decisions.¹¹¹ The Court did not determine whether courts should defer to an agency’s interpretation of regulations,¹¹² what it meant for agencies to “administer” particular statutes,¹¹³ or what circumstances are sufficient to defeat *Chevron*’s presumption of deference.¹¹⁴

¹⁰⁸ *Id.* at 17.

¹⁰⁹ *Id.* at 31 (describing other matters as “a subject for another day”).

¹¹⁰ See *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).

¹¹¹ See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1018 (2005) (Scalia, J., dissenting).

¹¹² See *Auer v. Robbins*, 519 U.S. 452, 457–58 (1997).

¹¹³ *Cf.* *Gonzales v. Oregon*, 546 U.S. 243, 254–69 (2006) (discussing when *Chevron* deference is applicable); Merrill, *supra* note 2, at 758–61; Sunstein, *supra* note 17, at 207–11.

¹¹⁴ See *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

Partly due to those unresolved details, *Chevron* sparked academic discussion that has continued onward for decades.¹¹⁵ Late-twentieth-century confusion about *Chevron* also happened to coincide with broader disputes about methods of statutory interpretation.¹¹⁶ Every *Chevron* case requires courts to interpret legislation, and one hallmark of modern conservatism was a newfound preference for “plain meaning” textualism as opposed to legislative history and statutory purpose.¹¹⁷ As federal courts waded through hundreds of cases, dutifully citing *Chevron* along the way, it is hard to tell in particular cases whether disagreements and inconsistencies resulted from *Chevron*, general methods of statutory interpretation, policy preferences, or a mixture of those things.¹¹⁸ The fact that some cases citing *Chevron* were proxy wars about other legal issues does not have constitutional implications for *Chevron* itself.¹¹⁹

¹¹⁵ See *supra* note 9 (listing sources). Some professors have defended *Chevron* as beneficial, while others decried it as counterproductive. Compare Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 303 (1988) (describing *Chevron* as “a dramatic improvement”), with Pojanowski, *supra* note 9, at 1091 (criticizing *Chevron* as “doctrinal deadweight loss”). Some have viewed *Chevron* as almost immortal, while others claimed that it was very nearly dead. Compare VERMEULE, *supra* note 2, at 30 (finding no evidence that the Court will overrule *Chevron*), with Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867 (2015). Academics have even disagreed about whether *Chevron* should have two steps, three steps, five steps, or perhaps only one. See Kenneth A. Bamberger & Peter L. Strauss, *Chevron’s Two Steps*, 95 VA. L. REV. 611 (2009); Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1240–49 (2016) (describing five steps); Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017); Merrill, *supra* note 2, at 755–56 (three steps); Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 599 (2009); Sunstein, *supra* note 17, at 191 (three steps).

¹¹⁶ See generally Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 891–903 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)) (tracing the dynamic history of textualism and originalism in the 1980s).

¹¹⁷ See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990) (describing “new textualism” as “the most interesting development in the Court’s jurisprudence . . .” and emphasizing Scalia’s personal role in producing such changes).

¹¹⁸ See, e.g., Kent Barnett et al., *Administrative Law’s Political Dynamics*, 71 VAND. L. REV. 1463, 1468–69 (2018) (finding that despite *Chevron*’s constraining effect, appellate courts reveal “modest ideological behavior” in cases of administrative law); Kent Barnett et al., *The Politics of Selecting Chevron Deference*, 15 J. EMPIRICAL LEGAL STUD. 597, 614–17 (2018) (discussing quantitative research about the influence of judicial political preferences on deference); Natalie Salmanowitz & Holger Spamann, *Does the Supreme Court Really Not Apply Chevron When It Should?*, 57 INT’L REV. L. & ECON. 81, 82 (2019) (disputing an earlier study’s argument that the Supreme Court has failed to apply *Chevron* in many cases); Siegel, *supra* note 2, at 946 nn.51 & 53 (citing quantitative studies and critics).

¹¹⁹ But cf. Kavanaugh, *Fixing Interpretation*, *supra* note 4, at 2150–54 (documenting Kavanaugh’s frustration with evaluating statutory ambiguity under *Chevron*).

From a different perspective, quantitative scholars have debated whether *Chevron* has had any practical effect on agency activities.¹²⁰ However, those statistics must be integrated with the practical experience reality of lawyers and judges who have struggled over *Chevron* for decades as though it did make some difference—just like many other judicial precedents.¹²¹ The fact that lawyers and professors have fought to determine *Chevron*'s meaning does not show that the decision is irrelevant, much less that it is dysfunctional, inoperative, or unconstitutional.¹²²

Congress has also participated in subconstitutional debates about *Chevron*. The House of Representatives passed the Separation of Powers Restoration Act of 2016 and the Regulatory Accountability Act of 2017, but both proposals died in the Senate.¹²³ Those failed statutes would have required courts to “decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies.”¹²⁴ Congress has nearly infinite power to limit agency discretion.¹²⁵ With respect to *Chevron* itself, Congress could have prescribed a facility-based or component-based definition of “source,” thus annihilating EPA authority to make that interpretive choice.¹²⁶ Congress also could have limited the EPA's power to issue regulations, or it could have prohib-

¹²⁰ See Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 *FORDHAM L. REV.* 703, 704 (2014); *supra* note 118 (collecting sources).

¹²¹ Compare Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 *COLUM. L. REV.* 771, 780–81 (1975) (“[T]he rules governing judicial review have no more substance at the core than a seedless grape . . .”), with Monaghan, *supra* note 11, at 3 n.18 (“Some modern-day writers would . . . dismiss such an issue as simply masking . . . acceptability of result. . . [But] in reducing the judicial role to that of another political organ, [that argument] does not tell us what judges should do if they are to be faithful to their commissions as judges.”).

¹²² Similar objections could be made about *Brown v. Board of Education*, 347 U.S. 483 (1954). Compare Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959), with Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 *U. PA. L. REV.* 1 (1959). Likewise with respect to older debates about *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Compare John Hart Ely, *The Irrepressible Myth of Erie*, 87 *HARV. L. REV.* 693 (1974), and John Hart Ely, Comment, *The Necklace*, 87 *HARV. L. REV.* 753 (1974), with Abram Chayes, Comment, *The Bead Game*, 87 *HARV. L. REV.* 741 (1974). See generally Green, *supra* note 9, at 426–49 (describing conflict as a characteristic feature of iconic judicial precedents).

¹²³ Siegel, *supra* note 2, at 940–52; see also Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. § 202 (2017); Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. (2016).

¹²⁴ H.R. 5, 115th Cong. § 202(1)(B) (2017); H.R. 4768, 114th Cong. § 2(3) (2016).

¹²⁵ See Siegel, *supra* note 2, at 945 & n.48, 972–73.

¹²⁶ See *id.* at 972–73 (discussing a similar hypothetical about *Chevron* and congressional delegation).

ited the agency's regulations from affecting federal courts' statutory interpretation. As an extreme measure, Congress could have rescinded the Clean Air Act or eliminated the EPA altogether.

From 1975 to 1983, Democratic Senator Dale Bumpers of Arkansas sought to restrict administrative deference.¹²⁷ One version of the "Bumpers Amendment" would have required a "reviewing court [to] de novo decide all relevant questions of law, [and] interpret constitutional and statutory provisions" regardless of the agency's opinion.¹²⁸ Relying on institutional as well as political arguments, then-Professor Scalia objected that: "[i]t would be bad enough . . . if Bumpers merely eliminated the Reagan administration's authority to give content to relatively meaningless laws. Worse still, however, Bumpers does *not* eliminate that authority—but merely transfers it to federal courts which . . . will be dominated by liberal Democrats for the foreseeable future!"¹²⁹

Scalia lamented that "[Republicans] in the Congress seem per-
versely unaware that the accursed 'unelected officials' downtown are now *their* unelected officials, presumably seeking to move things in *their* desired direction; and that every curtailment of desirable agency discretion obstructs (principally) departure from a Democrat-produced, pro-regulatory status quo."¹³⁰ Using especially memorable language, Scalia wrote that "[r]egulatory reformers who . . . continue to support the unmodified proposals of the past as though the fundamental game had not been altered, will be scoring points for the other team."¹³¹

Like Monaghan's commentary long ago, this Article does not offer policy opinions about the usefulness of statutory reforms, the optimal scope of deference, or the proper size of administrative

¹²⁷ See Ronald M. Levin, Comment, *Review of "Jurisdictional" Issues Under the Bumpers Amendment*, 1983 DUKE L.J. 355, 355–56; see also *Oral History Project: Chuck Ludlam*, SENATE HIST. OFF. (Dec. 10, 2003), https://www.senate.gov/artandhistory/history/resources/pdf/Ludlam_Interview2.pdf [<https://perma.cc/FL3H-XBUN>] (quoting Senator Bumpers after the fact: "You did a rather good job of killing my proposal. Maybe it wasn't the best idea I ever had."). Although Bumpers is not particularly well known today, he "was deemed one of the ten best senators by the national press and seriously mentioned as a likely presidential candidate for both the 1980 and 1984 contests, with columnist Mary McGrory describing him as the 'Senate's premier orator.'" Diane D. Blair, *The Big Three of Late Twentieth-Century Arkansas Politics: Dale Bumpers, Bill Clinton, and David Pryor*, 54 ARK. HIST. Q. 53, 60 (1995).

¹²⁸ S. 2408, 94th Cong. (1975) (proposing to amend § 706 of the APA).

¹²⁹ Antonin Scalia, *Regulatory Reform—The Game Has Changed*, REG., Jan.–Feb. 1981, at 13, 13.

¹³⁰ *Id.*

¹³¹ *Id.* at 14.

government.¹³² On the contrary, this Part has simply described how and why *Chevron* appeared in the 1980s, why so many lawyers thought *Chevron* was constitutionally valid, and how the scope of administrative deference could be contested and revised in modern contexts without resorting to constitutional judicial decision-making. Like most administrative law issues, *Chevron* is subject to legislative amendment or repeal, but only if critics are able to prompt Congress and American voters to act. Current circumstances make statutory reform unlikely, and that is another reason that the most important threat to *Chevron* is overturning it on constitutional grounds. This Article is closely focused on the latter possibility.

II. LONG TRADITION(S) OF ADMINISTRATIVE DEFERENCE

This Part considers a question that Scalia's generation mostly took for granted: how and when did doctrines of administrative deference emerge? Proof that administrative deference has a long history weakens arguments that deference violates foundational precepts of constitutional law. To a certain degree, the Constitution is as the Constitution does.¹³³

The point here is not to resolve whether *Chevron* matched existing precedents well or poorly as a matter of stare decisis.¹³⁴ On those latter questions, *Chevron* explicitly reformulated and extended prior practice instead of simply restating it.¹³⁵ On the other hand, after three decades of widespread application, *Chevron* today should have stronger protection under stare decisis than it did in 1984.¹³⁶ Insofar as the Court's presumptive deference was derived from federal statutes creating administrative agencies, "stare decisis has been considered

¹³² For useful discussion of some of those topics, see Metzger, *supra* note 2, and sources cited therein.

¹³³ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law . . . to disregard the gloss which life has written upon [constitutional text].").

¹³⁴ See, e.g., Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019 (2018) (describing such debates); Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607 (2014) (similar).

¹³⁵ See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844–45 (1984).

¹³⁶ This Article does not mean to take sides in well-traveled technical disputes about precisely what aspects of *Chevron* should be considered precedential. See generally Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1595 (2014) ("There may be great value . . . in using stare decisis to protect the reliance interests . . . of third-order legal rules such as *Chevron* . . ."); Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2226 (1997) (characterizing *Chevron* and stare decisis itself as "meta-principles . . . that govern large classes of cases").

virtually sacrosanct in statutory cases, so that the responsibility for correcting judicial mistakes will be understood as lying solely with Congress.”¹³⁷ Yet none of those issues of stare decisis resolves deeper issues about *Chevron*’s constitutional status.

Regardless of whether *Chevron*’s standard of deference was properly derived from pre-*Chevron* cases as a matter of precedent, the crucial point is that many forms of administrative deference before *Chevron* were accepted as constitutionally permissible. This Article ultimately concludes that the proper scope of administrative deference is something that agencies, Congress, and courts should resolve according to policy and pragmatism, not newly discovered constitutional principles. This Part supports that argument by analyzing an original and extensive collection of judicial opinions that endorsed various kinds of deference across a period of almost 200 years, thereby deflecting any suggestion that administrative deference is legally new or suspicious.

A. *Revising Historical Revisionism*

To start with common ground, every commentator agrees that federal courts have deferred to agency statutory interpretation from the 1940s until recently.¹³⁸ Dominant legal practice, scholarship, and culture have accepted administrative deference as constitutionally permissible for nearly 70 years.¹³⁹ Many readers might think that seven decades is enough to prove *Chevron*’s constitutional validity, but a few scholars have launched historical critiques that stretch across much longer timelines.¹⁴⁰

One example is Aditya Bamzai’s article, *The Origins of Judicial Deference to Executive Interpretation*, which deliberately challenged

¹³⁷ Eskridge & Baer, *supra* note 30, at 1198. *But see* Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 841–43 (2010); 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, 1751–94 (2010).

¹³⁸ *See* Bamzai, *supra* note 8, at 965, 976, 1000.

¹³⁹ *See supra* note 2 (collecting sources); Bamzai, *supra* note 8, at 974 (“[T]he dominant approach within the academy—and the Roosevelt executive branch—embraced administrative discretion.”).

¹⁴⁰ *Compare* Metzger, *supra* note 2, at 87–95 (anchoring the administrative state’s legitimacy in legal practice dating from the 1940s), *and* Siegel, *supra* note 2, at 955–63 (similar), *with* Bamzai, *supra* note 8, at 927–28 (claiming that inattention to nineteenth-century case law is “serious”). As discussed *infra*, Bamzai focused tightly on older pre-*Chevron* “jurisprudential tradition[s]” in part because he disregarded the “tradition” created between 1944 and 1984, as well as the “tradition” from *Chevron* to the present. Bamzai, *supra* note 8, at 927.

conventional understandings about pre-New Deal history. Bamzai explained that, prior to his research, “[c]ourts and commentators tend[ed] to agree on at least one issue: prior to *Chevron*, there was widespread confusion over the proper scope of review.”¹⁴¹ For example, Scalia and other early commentators painted grim pictures of pre-*Chevron* chaos in order to characterize *Chevron* as a doctrinal savior.¹⁴² Bamzai claimed that the widely accepted “charge of . . . [pre-*Chevron*] disarray is mistaken.”¹⁴³ On the contrary, he viewed non-*mandamus* cases before the 1940s as a stable and uniform “tradition” under which “the Court’s interpretive role was essentially *de novo*.”¹⁴⁴ Bamzai explained that there were a few “cracks in the glass” after 1900, but he insisted that courts “generally hewed to the traditional interpretive formulations” until 1940.¹⁴⁵

¹⁴¹ Bamzai, *supra* note 8, at 915.

¹⁴² *See id.* at 915–16.

¹⁴³ *Id.* at 916.

¹⁴⁴ *Id.* at 948, 952, 958, 969; *see also id. passim* (describing “traditional” interpretative methods before the 1940s). Everyone should understand that the Court *at least sometimes* applied *de novo* review to legal questions. *See* *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936); *Comm’r v. Harmel*, 287 U.S. 103 (1932); *United States v. Dickson*, 40 U.S. (15 Pet.) 141, 161–62 (1841). Some Justices during this era also wished that the Court would choose to defer less frequently and broadly than it did. *See* *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 135–36 (1944) (Roberts, J., dissenting); *Gray v. Powell*, 314 U.S. 402, 420–21 (1941) (Roberts, J., dissenting). Nevertheless, Bamzai’s account of “the traditional interpretive approach” relies on generalizations that do not fit the full range of judicial decisions from this period. Bamzai, *supra* note 8, at 916.

In addition to non-*mandamus* cases that are discussed in the text and the Appendix, Bamzai’s research acknowledged that deference to agencies occurred in cases that sought *mandamus* relief, but he defended those cases as “relaxing the standard for issuing the writs of *mandamus* and *injunction*, rather than by altering proper interpretive methodology.” *Id.* at 953 n.186. Without disputing Bamzai’s technical characterization, *mandamus* cases are one more field where federal courts had no constitutional problem granting deference to administrators’ legal conclusions. Regardless of judicial labels and procedural issues about the writ of *mandamus*, the bare historical fact of administrative deference remains an undisputed reality even for Bamzai himself. For constitutional purposes, administrative deference that was applied through the technical standards for *mandamus* should still count as a form of deference—created by courts to suit particular contexts much like other examples of deference.

¹⁴⁵ Bamzai, *supra* note 8, at 965–66, 969. Bamzai offered no quantitative support for the adverb “generally,” and, in any event, pertinent data would be hard to analyze, given definitional problems about which cases are “real deference” as opposed to “traditional interpretation.” *See infra* Section II.B. For example, Bamzai characterized *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902), as a “canonical” example of “*de novo*” review. Bamzai, *supra* note 8, at 956, 967. Yet the Court’s language could easily be read to include principles of deference: “[T]he case is not one which . . . is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination . . . is a clear mistake of law . . . , and the courts, therefore, must have power in a proper proceeding to grant relief.” *McAnnulty*, 187 U.S. at 109–10 (emphasis added).

Bamzai's article represents the most important historical argument against *Chevron* and administrative deference in more than fifty years. If his doctrinal narrative were correct, then anti-*Chevron* critics could claim that the past seventy years were a constitutional aberration that should be pulled up by the roots. On the other side, this Article presents an extensive rebuttal of Bamzai's thesis to boost arguments that favor *Chevron's* constitutional validity. Given the long history and unbroken constitutional acceptance of administrative deference, modern critics cannot claim that they are reclaiming doctrinal purity from a bygone era. On the contrary, constitutional objections to deference represent nothing less than a modern legal revolution.

The radical character of Bamzai's argument becomes clear by comparison to critiques of *Chevron* from the 1990s, including Ann Woolhandler's *Judicial Deference to Administrative Action—A Revisionist History*.¹⁴⁶ Flatly contradicting Bamzai's conclusions, Woolhandler criticized *Chevron's* enthusiasts for their oversimplified assumption "that the first hundred years were an age of judicial deference to agencies."¹⁴⁷ Discussing exactly the same period where Bamzai saw a uniform de novo standard of review, Woolhandler emphasized that "the nineteenth century cannot be viewed as a monolithic age," and she described a historical ebb and flow among various overlapping approaches to deference.¹⁴⁸

This Article cannot resolve whether pre-New Deal deference was in fact as chaotic as Scalia claimed, or whether Woolhandler accurately perceived a revolving sequence of standards.¹⁴⁹ The point instead is that there were instances of judicial deference to administrative decision-making before the 1940s, and the outer limits of such administrative deference were almost never described by reference to constitutional law. The Supreme Court regularly tried to reconcile cases that deferred to administrative agencies with cases that did not, yet it invoked statutory details and judicial pragmatism instead of constitutional theory. To be sure, administrative deference was more widely practiced after 1940 than in previous decades, but that did not represent a clean break from some kind of uniformly

¹⁴⁶ Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197 (1991).

¹⁴⁷ *Id.* at 199 (emphasis added).

¹⁴⁸ *Id.* at 230, 244–45 ("In the nineteenth century, as in the twentieth, the interaction of statutes and precedent with political and economic theory changed the degree of judicial review of agency action," and "one cannot conclude that there is one ideal and elegant allocation of power between court and agency where administrative law will necessarily have to rest.").

¹⁴⁹ Compare Scalia, *supra* note 6, at 517, with Woolhandler, *supra* note 146, at 199.

nondeferential past. Nor was *Chevron* a constitutionally significant departure from the kind of administrative deference that was applied beforehand. From the perspective of constitutional law, all of those messy and incremental changes were matters of degree.

The foregoing thesis is directly supported by this Article's Appendix of Supreme Court cases from 1827 to 1952, with operative quotations from each.¹⁵⁰ That database indicates that: (1) the Supreme Court did sometimes defer to agencies, even though it used different language in different contexts; (2) the Court almost never imposed limits on such deference by citing constitutional law; and (3) neither the 1940s, nor any other particular moment, reveals a dramatic constitutional shift in the quantity of judicial deference granted to administrative agencies.¹⁵¹

For example, in a case involving state statutes, *Edwards' Lessee v. Darby* declared that for "the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."¹⁵² Fifty years later, the Court wrote that "[t]he construction given to a statute by those charged with the duty of executing it is *always entitled* to the most respectful consideration, and ought not to be overruled without cogent reasons."¹⁵³ The Court quoted those words "always entitled" several times in the decades to follow, and many other expressions of administrative deference appear throughout nineteenth- and twentieth-century case law.¹⁵⁴

Overeager proponents of *Chevron* might characterize pre-1940 cases as a doctrinal prototype for modern administrative deference. For this Article's purpose, however, that is beside the point. Woolhan-

¹⁵⁰ The Appendix includes cases cited in *Chevron* itself, cases that those cases cited, and other decisions drawn from textual and KeyCite searches. By contrast, Bamzai's analysis focused tightly on cases that were directly cited in *Chevron*, and especially the seven that predated 1940. Bamzai, *supra* note 8, at 998–99, 998 n.383 (citing seven cases with the conclusory declaration that "[e]ach of those cases is consistent with the model of the traditional canons of statutory construction"); *cf. id.* at 944 n.147 (citing other Supreme Court cases with the conclusory declaration that they applied judicial deference "to uphold a continuous and longstanding practice").

¹⁵¹ To be clear, only (1) and (3) are relevant to Bamzai's thesis because his constitutional arguments are mostly implicit. See Bamzai, *supra* note 8, at 1000 (focusing on *Chevron*'s stare decisis credentials and concluding that "the modern doctrine finds no true historical antecedent in the nineteenth century"). All three are immensely important to this Article's conclusions.

¹⁵² 25 U.S. (12 Wheat.) 206, 210 (1827).

¹⁵³ *United States v. Moore*, 95 U.S. 760, 763 (1877) (emphasis added).

¹⁵⁴ See, e.g., *Fairbank v. United States*, 181 U.S. 283, 307–11 (1901); *Webster v. Luther*, 163 U.S. 331, 342 (1896); *Heath v. Wallace*, 138 U.S. 573, 582 (1891); *Hastings & Dakota R.R. v. Whitney*, 132 U.S. 357, 366 (1889).

dlers demonstrated that the historical record is complex.¹⁵⁵ Sometimes the Court's early decisions refused to accept substantive changes in an agency's interpretation, for example, and the Court sometimes rejected administrative deference altogether without discussing pro-deference precedents.¹⁵⁶ Historical evidence shows that pre-New Deal precedents did not use *Chevron's* analytical framework, and many cases were less deferential than *Chevron*.¹⁵⁷ Yet the point is that the Court *regularly did defer* to administrative officials on questions of statutory interpretation. Many of those precedents showed no concern for, or reliance on, constitutional limits in determining the appropriate scope of deference.¹⁵⁸

B. *Administrative Deference Versus Interpretive Canons*

Deference to agencies' statutory interpretation clearly predates the 1940s, and for some readers that is enough to establish its constitutional legitimacy. On the other hand, to engage with Bamzai's sophisticated argument requires more detail. For example, it is important to know that Bamzai did not literally deny the existence of pre-New Deal cases deferring to administrative officials.¹⁵⁹ Instead, he counter-intuitively recharacterized examples of deference as "essentially de novo," claiming that such decisions did not represent "a form of judicial deference, as it has come to be understood in the post-*Chevron* era," nor as it was understood in the 1940s.¹⁶⁰ Bamzai argued that many examples of deference are not as they seem and that most are not examples of deference at all. Pre-New Deal cases should not count as administrative deference because, according to Bamzai, they incorporated two nondeferential canons of statutory interpretation—(1) contemporaneous understanding and (2) customary understanding—along with episodic attention to public reliance and social disrup-

¹⁵⁵ See Woolhandler, *supra* note 146, at 245.

¹⁵⁶ Compare *United States v. Ala. Great S. R.R.*, 142 U.S. 615, 621 (1892) ("[T]his [C]ourt . . . will look with disfavor upon any sudden change . . ."), with *United States v. Dickson*, 40 U.S. (15 Pet.) 141, 161–62 (1841) (setting aside principles of deference in pursuit of judges' "solemn duty to interpret the laws").

¹⁵⁷ Compare *supra* note 144 (citing pre-1940 cases that accepted the existence of de novo review), with Appendix (collecting opinions that did not endorse de novo review).

¹⁵⁸ But see *Dickson*, 40 U.S. at 161–62 (mentioning the Constitution alongside claims that "ours is a government of laws, and not of men").

¹⁵⁹ See Bamzai, *supra* note 8, at 968 n.253, 969 nn.254–56 (citing a few of these cases).

¹⁶⁰ *Id.* at 916, 948; see *id.* at 943–47 (describing several precedents from that perspective). Bamzai paradoxically described his two canons as "central to the development of judicial deference," *id.* at 931, 933 (emphasis added), but presumably he meant that such canons were central to understanding the absence of judicial deference before 1940.

tion.¹⁶¹ This Section and the next will analyze Bamzai’s approach in detail because his influential arguments deserve close attention from the legal community.¹⁶²

Bamzai traced his two interpretive canons—contemporaneity and custom—from fifteenth-century England and third-century Rome, implying that those doctrines spanned the centuries and crossed the Atlantic without much alteration until the 1940s.¹⁶³ According to Bamzai, various declarations from nineteenth-century American courts that “executive interpretations . . . should receive ‘respect’” were in reality “applications of the . . . [two] canons, not of judicial deference to the executive as such.”¹⁶⁴ He explained that “[i]t was the pedigree [as custom] and contemporaneity of the interpretation” that mattered; “the fact that the interpretation had been articulated by an actor within the executive branch was relevant, but incidental.”¹⁶⁵ Most radical of all, Bamzai concluded that, until the 1940s, “a court would ‘respect’—or . . . ‘defer to’—an agency’s interpretation of a statute *if and only if* that interpretation reflected a customary or contemporaneous practice under the statute.”¹⁶⁶

Bamzai’s analysis of interpretive canons is interesting on its own terms. But two problems arise in using such canons to displace, reframe, or swallow early deference jurisprudence. First, the Court’s decisions do not match Bamzai’s thesis. For example, Bamzai wrote with lawyerly skill that the pre-1940 cases cited by *Chevron* were “*consistent with* the . . . traditional canons of statutory construction,” and he might make similar arguments about some cases in this Article’s Appendix.¹⁶⁷ However, none of the cases cited in *Chevron* actually mentioned Bamzai’s canons, nor were such canons mentioned in the cases that those cases cited.

To repeat an earlier point, the Court’s early deference decisions were not the same as *Chevron*—they were less systematic and sometimes less deferential. As a matter of precedent, however, pre-1940 cases were also distinct from decisions that applied Bamzai’s interpretive canons. In fact, the main judicial decision that Bamzai quoted

¹⁶¹ *Id.* at 930.

¹⁶² For evidence of Bamzai’s influence on recent Supreme Court decisions, see *Kisor v. Wilkie*, 139 S. Ct. 2400, 2426 nn.5–6, 2433 n.49, 2436 n.66, 2437 n.69 (2019) (Gorsuch, J., concurring) (citing Bamzai, *supra* note 8, at 930–47, 962, 985, 990–91, 988–89).

¹⁶³ See Bamzai, *supra* note 8, at 933–41.

¹⁶⁴ *Id.* at 941.

¹⁶⁵ *Id.* at 916.

¹⁶⁶ *Id.* at 987 (emphasis added).

¹⁶⁷ *Id.* at 998 & n.383 (emphasis added).

from this period involved the jurisdiction of Puerto Rico's territorial courts, which is not at all the same as administrative deference.¹⁶⁸ It is hard to believe that the Supreme Court was routinely and secretly applying Bamzai's two interpretive canons, when in fact those canons were almost never explicitly mentioned.

Some opinions cited by Bamzai and this Article's Appendix did mention "contemporaneous" or longstanding agency interpretations as part of their analysis of administrative deference. Yet the Court's decisions were still very different from Bamzai's canons because the Court emphasized *only the actions of administrative actors*, not the legal community in general. The canon of contemporaneity relied on the legal public as a whole, and Bamzai himself explained that the canon of contemporary interpretation focused on all individuals "who 'were mooste neerest [sic] the statute,'" ¹⁶⁹ especially including "sages of the law, who lived about the time."¹⁷⁰ By contrast, the Court's opinions about administrative deference focused mainly on governmental officials "who were called upon to act under the law," on usage by departments of government, or on the activities of other federal officers.¹⁷¹ There are undeniable similarities among doctrines about official deference, contemporaneous understanding, custom, and reliance. But it would be a serious mistake to read any of those principles as overshadowing or extinguishing the rest. Judicial deference to administrative officials represented one part of the legal landscape before 1940—and so did Bamzai's canons—yet they were never one and the same.

The operative facts of early deference cases also complicate Bamzai's thesis. For example, the administrative interpretation in *Edwards' Lessee* appeared two years after the original statute.¹⁷² Did that two-year delay still qualify as "cotemporaneous" evidence of the statute's original meaning when the legislature passed it? Or perhaps the Court used "cotemporaneous" in reference to *the date of administrative enforcement*, which would make the agency much more important

¹⁶⁸ See *id.* at 946–47.

¹⁶⁹ *Id.* at 934 (quoting A DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES WITH SIR THOMAS EGERTON'S ADDITIONS 152 (Samuel E. Thorne ed., 1942)).

¹⁷⁰ *Id.* (quoting 2 FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES 562 (2d ed. 1848)); see also *id.* at 934–35 (quoting "contemporary practice" without any expressed focus on the activity of governmental officials).

¹⁷¹ *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827).

¹⁷² *Id.* at 207–08.

than the legislature.¹⁷³ The word “contemporaneous” can mean different things in different contexts. Even though this Article cannot pursue fine-grained details with respect to every judicial decision, it is obvious that the Court’s early deference opinions did not pay conceptual attention to defining “contemporaneous” or “custom” with the kind of care and detail that Bamzai’s thesis would have required.

In fact, the Court’s pre-1940 deference cases were not simply applying Bamzai’s canons of yore. The historical record contains ample complexities that might support Woolhandler’s thesis that administrative deference varied over time, or perhaps even Scalia’s view of pre-*Chevron* chaos. Either way, diverse forms of administrative deference have existed for a very long time, and those legal practices were widely accepted before the 1940s as constitutionally permissible.

A second problem for Bamzai’s historical argument is that, even if all of the Supreme Court’s discussion of deference could somehow be pressed to fit his canon-shaped traditions, that still would not prove that such decisions were “essentially de novo.”¹⁷⁴ The presence of canons does not imply an absence of deference, and there is no reason to believe that pertinent Supreme Court decisions must be either/or. The Court might use canons and deference in the same case, and indeed it is technically possible to have an interpretive canon that itself allows or requires deference to administrative agencies.¹⁷⁵ Interpretive canons also might be used to provide supplemental justification for doctrines granting judicial deference to administrative agencies.¹⁷⁶ Evidence of one doctrine is not counter-evidence of the other.

173 See *SEC v. Chenery Corp.*, 318 U.S. 80, 94–95 (1943) (rejecting post hoc rationalizations of an agency’s action, in a context where “post hoc” meant post-enforcement).

174 Bamzai, *supra* note 8, at 948.

175 See *Raso & Eskridge*, *supra* note 137, at 1800–04.

176 Although Bamzai argued that “the *contemporanea expositio* and *interpretes consuetudo* canons were considered part and parcel of de novo review,” Bamzai, *supra* note 8, at 988, his article did not cite sources saying that, nor did he analyze the term “de novo” sufficiently to clarify his logic on this point. One might just as plausibly describe some applications of Bamzai’s canons as instances where a court voluntary “deferred” to contemporary “legal sages” or customary interpreters as opposed to having judges freshly decide legal questions on their own. Compare *De Novo*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “de novo” as “[a]new”), and *De Novo*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining de novo as “anew, afresh, over again from the beginning”), with *Deference*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“1. Conduct showing respect for somebody or something; courteous or complaisant regard for another. 2. A polite and respectful attitude or approach, esp. toward an important person or venerable institution whose action, proposal, opinion, or judgment should be presumptively accepted.”), and *Deference*, THE OXFORD ENGLISH DICTIONARY (2d. ed. 1989) (defining “deference” as “[s]ubmission to the acknowledged superior claims, skill, judgement, or other qualities, of another”).

Bamzai seemed to argue that interpretive canons are categorically separate from deference because only the former seek to recover original legislative meaning. Thus, Bamzai described canons as “neutral rules . . . that approximate[] . . . the legislature’s ‘intentions at the time when the law was made.’”¹⁷⁷ But that oversimplifies the historical functions of interpretive canons and deference as well. On one hand, canons often respond to pragmatism and reliance just as much as they incorporate legislative drafters’ original intentions and meanings. Disputes about vague statutes often require a contextual understanding of legislative institutions and enforcement, which are much more than merely “rules of thumb for good English.”¹⁷⁸ A governmental system is more likely to fail if one misreads a statute than if one misreads a poem. Robert Cover therefore wrote that the embedded understanding of “political text in institutional modes of action [is what] distinguishes *legal* interpretation from the interpretation of literature, from political philosophy, and from constitutional criticism.”¹⁷⁹ Interpretive canons are part of the complex legislative and enforcement mechanisms that produce law in practice. They are not intellectual abstractions about original meaning that operate above the fray of institutional choice.¹⁸⁰

On the other hand, deference to administrative agencies can claim to “approximate[] . . . the legislature’s ‘intentions’”¹⁸¹ just as much as canons, in part because administrative deference gives full meaning to the statute that created the agency. That is why deference to administrative agencies does not represent a timeless puzzle that traveled smoothly from medieval England to now.¹⁸² Problems of administrative deference became salient only after legislatures created agencies that were equipped and expected to produce legal interpreta-

There are potentially deep questions lurking within efforts to distinguish “de novo” review from “deference.” Cf. Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1153–73 (2012) (suggesting a large shift in vocabulary). Regardless of those underlying theoretical problems, it is enough for present purposes to know that: (1) various examples of Bamzai’s interpretive canons could be argued as either “deference” or “de novo,” see, e.g., Woolhandler, *supra* note 146, at 200–01 (discussing one example); and (2) the cases cited in the Appendix include many examples of deference, *not de novo* review, and some of those examples are unmistakably clear.

¹⁷⁷ Bamzai, *supra* note 8, at 933 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *59).

¹⁷⁸ *Id.*

¹⁷⁹ Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1606 (1986).

¹⁸⁰ Cf. *id.* at 1601 (“Legal interpretation takes place in a field of pain and death.” (footnote omitted)).

¹⁸¹ Bamzai, *supra* note 8, at 933.

¹⁸² *But see id.* at 930.

tions. In American legal history, Congress manufactured more “legally interpretive agencies” during the late-nineteenth century and twentieth century than ever before.¹⁸³ In turn, that unique historical development is what pressured courts to respect agencies’ efforts at statutory interpretation.¹⁸⁴ Judicial deference emerged and developed to approximate legislative “intentions” at an institutional level, much like interpretive canons in other contexts.

The complex and developmental judicial responses to dynamics of institutional history do not fit Bamzai’s story of a post-1940 fall from grace. And as a legal matter, the Court’s opinions about administrative deference do not require Bamzai’s nontextual reinterpretation. Judicial decisions from the past were not always clear or consistent, and they were never as systematically deferential as *Chevron*. But there is nothing to be gained by relabeling cases of overt deference as “de novo,” insisting that every use of “contemporaneous” is shorthand for “*contemporanea expositio*,” or inventing clean jurisprudential breaks to hide messy historical shifts.

One academic offered a particularly elegant summary: “What is now often regarded as the leading [administrative deference] case came in 1941 And yet it did no more than to apply what had already been unequivocally established . . . two years earlier and what in another form had been developed as early as the second decade of the century.”¹⁸⁵ The Supreme Court has explicitly and repeatedly endorsed deference to administrative agencies, especially during the decades when Congress created agencies with interpretive regulatory tools.¹⁸⁶ And of course, debates about the limits of administrative deference occurred for more than a century without much reference to constitutional principles.

C. Deference in the 1940s

The last step in Bamzai’s argument was to claim that, by enacting the APA in 1946, Congress implicitly rejected deference to adminis-

¹⁸³ See Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 MICH. ST. L. REV. 7, 8–9.

¹⁸⁴ See *id.* at 24–32.

¹⁸⁵ Davis, *supra* note 66, at 571 (referring to *Gray v. Powell*, 314 U.S. 402 (1941)); see also Reginald Parker, *Separation of Powers Revisited: Its Meaning to Administrative Law*, 49 MICH. L. REV. 1009, 1021 & nn.67–69 (1951) (discussing doctrinal shifts and contradictions from the 1930s to 1950s without identifying any chronological break, referencing interpretive legislative canons, or reconciling contradictory lines of precedent). *But see* Bamzai, *supra* note 8, at 977 (“The opinion in *Gray v. Powell* [referenced by Davis *supra*] heralded a new era . . .”).

¹⁸⁶ See Parker, *supra* note 185.

trative agencies in favor of the canon-based traditions discussed *supra*.¹⁸⁷ Bamzai did not specifically argue that administrative deference violates the Constitution—a vital distinction for purposes of this Article—yet his statutory arguments might have constitutional implications in practice. If the past seventy years secretly violated the statutory charter of administrative law, perhaps it might seem less troublesome for judges to reject that deviant tradition on constitutional grounds.¹⁸⁸ This Section examines the modest evidence supporting Bamzai’s statutory arguments, and it also confirms the widely perceived constitutional validity of administrative deference during the years that followed the APA’s enactment.¹⁸⁹

In its own era, *NLRB v. Hearst Publications, Inc.* was described as an “outstanding” example of mid-century deference to agencies.¹⁹⁰ By a vote of eight to one, *Hearst* upheld an agency adjudication that interpreted the National Labor Relations Act (“NLRA”) to regulate newspaper deliverers because they were “employees” rather than independent contractors.¹⁹¹ Congress had not explicitly defined the term “employee,” yet the Court held that the statute “obviously” declined to borrow well-known definitions that were created under state common law.¹⁹² Federal common law was also the wrong way to interpret “employee” because that would cause “administration of the statute . . . [to] become encumbered by the same sort of technical legal refinement as has characterized the long evolution of the employee-independent contractor dichotomy in the [state] courts.”¹⁹³ *Hearst* held that “Congress no more intended to import this mass of technicality” through federal judicial interpretations of “employee” than it intended to refer “the question outright to the local law.”¹⁹⁴

Because Congress deliberately chose *not* to rely on judicial decision-making, the Court found that federal courts’ interpretive adjudicatory function did not require them “to make a completely definitive limitation around the term ‘employee.’”¹⁹⁵ On the contrary, “[t]hat

¹⁸⁷ See Bamzai, *supra* note 8, at 987.

¹⁸⁸ See generally *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (describing the APA’s importance for administrative law, while also citing “legislative material elucidating” its contextual meaning).

¹⁸⁹ For a similarly skeptical critique of Bamzai’s statutory analysis, see Sunstein, *Chevron as Law*, *supra* note 5, at 1642–57.

¹⁹⁰ 322 U.S. 111 (1944); Davis, *supra* note 66, at 572 (citing *Hearst*, 322 U.S. 111).

¹⁹¹ *Hearst*, 322 U.S. at 120, 135 (discussing 29 U.S.C. § 152 (1940)).

¹⁹² *Id.* at 120, 122–23.

¹⁹³ *Id.* at 125.

¹⁹⁴ *Id.* at 125–26.

¹⁹⁵ *Id.* at 130.

task has been assigned primarily to the agency created by Congress to administer the Act.”¹⁹⁶ Echoing many decades of prior precedents, the Court held:

Everyday experience in the administration of the statute gives [the Board] familiarity with the circumstances and backgrounds of employment relationships The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. . . . Undoubtedly questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. But where the question is one of specific application of a broad statutory term . . . the reviewing court’s function is limited. Like [cases involving other administrative officials], the Board’s determination that specified persons are “employees” . . . is to be accepted if it has . . . a reasonable basis in law.¹⁹⁷

Justice Owen Roberts dissented alone, but even he did not generally question the *constitutional permissibility* of implicit congressional choices to grant the Board interpretive authority. Roberts simply felt that, as a matter of specific statutory interpretation, Congress did not make that kind of delegation through the NLRA.¹⁹⁸

With self-conscious iconoclasm, Bamzai claimed that Congress implicitly rejected administrative deference cases like *Hearst* by enacting the APA.¹⁹⁹ He said that every scholar and judge to consider the question simply failed to realize “that the APA’s judicial review provision adopted the traditional interpretive methodology that had prevailed from the beginning of the Republic until the 1940s.”²⁰⁰ Bamzai claimed that in 1946—only five years after the Court allegedly deviated from “traditional” canons of contemporaneity and custom—the APA’s counter-revolution put those canons back into power and asserted congressional dominance over matters of statutory interpretation.²⁰¹

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 130–31 (citations omitted).

¹⁹⁸ *Id.* at 135–36 (Roberts, J., dissenting). Roberts claimed with due exaggeration that the statutory text unambiguously adopted common law employment traditions “as clearly as language could do it.” *Id.*

¹⁹⁹ See Bamzai, *supra* note 8, at 985–90.

²⁰⁰ *Id.* at 987.

²⁰¹ *Id.* at 990.

Bamzai admitted that plain-meaning debates over the APA's textual provisions have remained inconclusive for decades, and he explicitly abandoned such overgrown battlefields to focus on legislative history.²⁰² Unfortunately, the latter evidence is insubstantial. For example, Senate and House reports said that "questions of law are for courts . . . to decide in the last analysis."²⁰³ Yet such documents did not say *how* courts should make such decisions, nor did they reference post-1940 cases that were supposedly on the chopping block.²⁰⁴ On the contrary, a Senate committee document from 1945 described administrative deference under an APA prototype as simply a "restatement of the scope of review" that should not be "taken as limiting or unduly expanding judicial review" beyond the status quo.²⁰⁵ Congress could not have launched Bamzai's attack on New Deal jurisprudence with the bland and unexplained noun "restatement." Nor can dramatic conclusions be squeezed out of committee debates. One speaker claimed that "the scope of review should be as it now is,"²⁰⁶ while another objected that "[f]rankly, I do not know what it now is [T]he Supreme Court apparently changes its mind daily"²⁰⁷ Those comments did not demonstrate any level of legislative consensus, much less did they signal a restoration of Bamzai's exaggerated image of pre-1940 orthodoxy.

Bamzai's best legislative evidence comes from Representative Francis Walter, who certainly did oppose mid-century doctrines of administrative deference. For example, Walter declared that the APA "requires courts to determine independently all relevant questions of law, including . . . statutory provisions."²⁰⁸ Yet Bamzai offered no evidence that other members of Congress agreed with Walter. To all appearances, Walter's strong stance was also quite lonely. Especially if "Congress was aware of the shifting jurisprudence on the Court," as

202 *Id.* at 986–87 (noting that "[s]cholars have long debated what [the APA's judicial review] instruction means," and purporting to resolve such debates using "the historical development of the law of judicial deference," in contrast to prior statutory analyses).

203 *Id.* at 988 (quoting H.R. REP. NO. 79-1980, at 44 (1946); S. REP. NO. 79-752, at 28 (1945)).

204 *See generally* H.R. REP. NO. 79-1980 (1946); S. REP. NO. 79-752 (1945).

205 S. COMM. ON THE JUDICIARY, 79TH CONG., (Comm. Print 1945), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, at 11, 39 (1946).

206 *Federal Administrative Procedure: Hearing on H.R. 184, H.R. 339, H.R. 1117, H.R. 1203, H.R. 1206, and H.R. 2602 Before the H. Comm. on the Judiciary*, 79th Cong. 84 (1945) (statement of Carl McFarland, Chairman of American Bar Association's Special Committee on Administrative Law).

207 *Id.* at 84 (statement of Rep. Francis Walter).

208 92 CONG. REC. 5654 (1946) (statement of Rep. Francis Walter).

Bamzai claimed, modern historians should not assume that the APA implicitly “sought to reject” recent and deferential Supreme Court decisions without direct and affirmative evidence of that choice.²⁰⁹ Evaluated by that standard, the APA’s legislative history seems entirely inconclusive.

Post-enactment evidence also does not support Bamzai’s characterization of the APA. A manual from the Attorney General in 1947 was the “most influential[] of the contemporaneous commentaries” about the APA.²¹⁰ Like the Senate Document, *supra*, the Attorney General’s Manual declared that the APA merely “*restat[ed] the present law* as to the scope of judicial review.”²¹¹ Bamzai expressed confusion about “[w]hat exactly was [the APA] ‘restating.’”²¹² Yet that question was clearly answered by an Attorney General’s committee in 1941:

[W]here the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body. . . . [T]he administrative interpretation is to be given weight—not merely as the opinion of some men . . . but as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it.²¹³

In 1941, such broad support for administrative deference was widespread and well-known, and the Attorney General’s committee notably relied on the “interpretation . . . of the administrative body,” instead of “merely” using Bamzai’s doctrines about the contemporaneous or customary “opinion[s] of some men.”²¹⁴ This was administrative deference, not ancient interpretive canons.

²⁰⁹ Bamzai, *supra* note 8, at 989–90. Bamzai noted that an earlier draft of the “scope of review” provision included language affirming judicial deference to an agency’s statutory interpretation. *Id.* at 983–84; *see also* FINAL REPORT, *supra* note 65, at 246–47. Bamzai claimed that Congress’s decision not to enact that language showed that agencies should not be afforded deference, Bamzai, *supra* note 8, at 985–86, yet it seems equally plausible that Congress chose not to alter the standards that courts were using at the time, or that Congress did not have enough votes to either affirm or deny a proper level of administrative deference. Legislative silence is often a difficult way to prove a thesis of dramatic change.

²¹⁰ Bamzai, *supra* note 8, at 990 (footnote omitted).

²¹¹ U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947) [hereinafter ATTORNEY GENERAL’S MANUAL] (emphasis added).

²¹² Bamzai, *supra* note 8, at 991.

²¹³ FINAL REPORT, *supra* note 65, at 90–91.

²¹⁴ *Id.* at 91. For a summary of pre-1941 cases applying deference to administrative agencies, *see supra* Sections II.A–B and *infra* Appendix. *See also* FINAL REPORT, *supra* note 65, at 90–91; *cf. supra* notes 168–70 and accompanying text (distinguishing administrative deference from broader notions of contemporary opinion).

Even Bamzai acknowledged that the Court expanded the prevalence and scope of administrative deference from 1941 to 1947,²¹⁵ which means that the committee’s approach became more accurate with each passing year. The half-decade of expanded deference that preceded the APA was not altogether coherent, yet it certainly represented the “present law” of deference that Congress declined to change through its “restatement” or nonstatement on the subject.

Bamzai’s last category of supporting evidence was public commentary from the 1940s, but almost no one believed that the APA repudiated Supreme Court precedents about deference.²¹⁶ Bamzai quoted a short article by Senator Pat McCarran claiming the APA as having “cut down the ‘cult of discretion’” that gained “considerable currency *in the last decade or so.*”²¹⁷ However, McCarran never mentioned administrative deference specifically—as opposed to issues of factual or policy “discretion”—nor did he identify recent judicial decisions that should be discarded.²¹⁸ On the contrary, McCarran simply quoted the APA’s text and wrote a topic heading: “Questions of Law Are for the Courts.”²¹⁹ McCarran speculated about some unidentified future moment, when eventually “there may be room for the return of certain functions to the ordinary [c]ourts of the land, or it may be wise to create new [c]ourts to exercise functions now casually committed . . . to executive agencies.”²²⁰ Even McCarran knew that the APA left many issues completely unresolved—including standards of administrative deference. For present purposes, his commentary seems regrettably vague, unsupported, and inconclusive.

There is one historical actor who did endorse Bamzai’s thesis, and that is Pennsylvania lawyer John Dickinson, who argued that the APA’s plain text required all legal questions to be decided by the “reviewing court for itself, and in the exercise of its own independent judgment,” thus making “impossible a judicial refusal . . . to consider

²¹⁵ See Bamzai, *supra* note 8, at 976–77.

²¹⁶ See *id.* at 991–92, 991 n.357, 992 nn.358–59 (collecting a wide range of academic commentators that did not reach that conclusion).

²¹⁷ *Id.* at 992–93 (emphasis added) (quoting Pat McCarran, *Improving “Administrative Justice”: Hearings and Evidence; Scope of Judicial Review*, 32 A.B.A. J. 827, 828, 893 (1946)).

²¹⁸ See McCarran, *supra* note 217, at 831.

²¹⁹ *Id.* Bamzai also quoted McCarran’s statement that the APA would confine agency discretion to “express[]” grants from Congress. Bamzai, *supra* note 8, at 993 (quoting McCarran, *supra* note 217, at 831). That observation, however, obviously said nothing about whether Congress *could* grant agencies the discretion to interpret statutes, and his Article’s constitutional focus did not identify the proper statutory language for Congress to use in granting administrative deference.

²²⁰ McCarran, *supra* note 217, at 894.

independently so-called ‘technical’ questions of law.”²²¹ Modern academics have perennially rehashed arguments about the APA’s text, yet for purposes of understanding the historical legal community in 1946, Bamzai did not cite anyone who embraced Dickinson’s conclusions at the time.²²² On the contrary, one leading scholar rejected Dickinson’s analysis, concluding simply that “[t]he APA . . . probably does not change the scope of review.”²²³ The latter represented a broad swath of opinion among mid-century academics, and the Attorney General’s Manual in 1947 used the same conventional wisdom to formulate litigating positions for the executive branch.²²⁴ Even though initial “[j]udicial decisions on the effect of the APA . . . [were] both inconclusive and unsatisfactory, . . . their prevailing tenor [was] that the Act [made] no change.”²²⁵ The dominant perspective of governmental officials, judges, and “sages of the law” in the 1940s indicates that the APA did not silently renounce federal courts’ broad and growing deference toward administrative agencies on questions of statutory interpretation.²²⁶

Administrative deference under the APA became even more acceptable as time passed. Even today, despite a few exceptions, the majority view rests somewhere between Adrian Vermeule’s claim that the APA “is generally indeterminate” about administrative deference²²⁷ and John Manning’s opinion that “the framers of the APA meant its judicial review provisions to be a restatement of pre-APA standards.”²²⁸ For seventy years, the federal government has continued to operate in accordance with the Attorney General’s Manual.²²⁹ As a matter of precedent, even Bamzai acknowledged that “[f]or better or worse, the enactment of the APA *did not seem to have any noticeable impact* on how courts reviewed agency interpretations of

221 John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434, 516 (1947), *quoted in* Bamzai, *supra* note 8, at 994; *id.* at 519. Bamzai’s article explicitly echoed several of Dickinson’s substantive points about legislative history. *Compare id.* at 517 n.40, with Bamzai, *supra* note 8, at 986.

222 *See* Bamzai, *supra* note 8, at 993–94.

223 Davis, *supra* note 66, at 562.

224 *See* ATTORNEY GENERAL’S MANUAL, *supra* note 211, at 108.

225 Davis, *supra* note 66, at 562.

226 *See* Bamzai, *supra* note 8, at 934 (quoting Sir Edward Coke).

227 ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 207–08 (2006).

228 John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 635 n.123 (1996).

229 *See, e.g.*, Brief for the Petitioner, *Lehman v. Zurko*, 527 U.S. 150 (1999) (No. 98-377), 1998 WL 886731, at *29–30 (claiming that the APA “restate[d]” the pre-APA standard of administrative deference).

statutes.”²³⁰ For six decades, no Supreme Court Justice endorsed arguments from Walter or Dickinson opposing administrative deference, and no Supreme Court majority has done so even now.²³¹ On the contrary, hundreds of judicial decisions before and after *Chevron* have assumed and held that the APA changed nothing about judicial deference to agencies’ statutory interpretation.

Given Bamzai’s remarkable enthusiasm for interpretive canons about contemporaneous interpretation and custom in other contexts, it is very strange that his article did not apply those principles to the APA itself. Although Bamzai admitted a “lack of clarity” about the APA’s legislative history and general purpose, he completely ignored principles of contemporaneous construction and custom, preferring instead his own purportedly “natural reading” and “simple[] explanation” of the text.²³² Even Scalia, whose judicial career was anchored in statutory textualism,²³³ chose to follow the APA’s original history and experiential gloss instead of any hyperliteral misconstructions of the statute’s words.

Scalia chided “stubborn” lawyers who might misread parts of the APA and its history to suggest that administrative “interpretations of statutory provisions . . . are subject to plenary judicial review.”²³⁴ He dismissed such arguments as meritless—“[t]hat is not true today, and it was not categorically true in 1945”—thereby relying on the APA’s original understanding and its long historical arc.²³⁵

In the end, this Article’s complex history of administrative deference supports a very simple conclusion. Various forms of administrative deference—which only somewhat and sometimes resembled *Chevron*—have existed for an immensely long time, and until recently, courts have not defined the limits of administrative deference

²³⁰ Bamzai, *supra* note 8, at 995 (emphasis added) (quoting JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 747 (2d ed. 2013)). *But cf.* *Kisor v. Wilkie*, 139 S. Ct. 2400, 2432–37 (2019) (Gorsuch, J., concurring) (endorsing most of Bamzai’s characterization of the APA).

²³¹ *See* *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 109–10 (2015) (Scalia, J., concurring) (noting that the Court has not interpreted the APA’s instruction that “the ‘reviewing court . . . interpret . . . statutory provisions’” as setting the standard of review, relying instead on pre-APA doctrine).

²³² Bamzai, *supra* note 8, at 987, 990.

²³³ *See* Sunstein, *Chevron as Law*, *supra* note 5, at 1631 (citing Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 22–25 (Amy Gutmann ed., 1997)).

²³⁴ Scalia, *supra* note 6, at 514.

²³⁵ *Id.*

by citing principles of constitutional law. Modern critics have claimed that deference to agencies offends constitutional traditions and values, but it is important to know that most lawyers and judges throughout American history consistently failed to notice.

III. MERITS OF CONSTITUTIONAL CRITIQUE

The past seven years have witnessed transformative changes in constitutional arguments about *Chevron* and administrative law—radically different from the 1980s and the distant past as well.²³⁶ This Part sequentially considers critiques of *Chevron* that rely on nondelegation arguments, *Marbury v. Madison*, individual rights, and old English history. Unlike most *Chevron* scholarship, this Article does not evaluate administrative deference based on precedential or policy grounds, much less will this Article debate *Chevron*'s application in particular cases or its modification by subconstitutional means. Instead, this Part seeks to demonstrate that *Chevron* deference does not violate the Constitution any more than other features of twentieth-century administrative law.²³⁷ Once it is clear that anti-*Chevron* critiques represent a radical shift in constitutional principles and doctrine, this Article's readers can evaluate for themselves whether such a transformation is institutionally warranted.²³⁸

A. *Nondelegation*

Because agencies are always created by Congress, every administrative law story starts with a statute. In a similar spirit, one group of anti-*Chevron* critics has cited arguments from Justices Thomas and Gorsuch that administrative deference is unconstitutional because Congress created agencies to administer broad and vague statutes with impermissibly scant legislative guidance.²³⁹ For this nondelegation argument, the constitutional flaw is statutory ambiguity itself—which inevitably grants interpretive power to someone other than Congress—more than *Chevron*'s specific rule about whether courts or agencies should resolve those ambiguities.

²³⁶ See *supra* Parts I–II.

²³⁷ Some readers might not accept “twentieth-century administrative law” as an appropriate benchmark, but this Article cannot comprehensively engage with “Constitution-in-exile” extremism. Instead, the point is merely to illustrate the constitutional implications of anti-*Chevron* critiques that have recently entered mainstream conservative discourse.

²³⁸ See *infra* Conclusion (addressing such questions directly).

²³⁹ See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

Nondelegation arguments bring anti-*Chevron* critics quite close to *Chevron*'s statutory presumption that vague congressional language creates interpretive authority for agencies.²⁴⁰ Yet such critics believe that *Chevron*'s statutory presumption raises deeper constitutional problems. Article I says that only Congress should write the laws—not anyone else—and nondelegation critics argue that agencies unconstitutionally legislate whenever they interpret statutes differently than judges.²⁴¹ This Section will first explain how and when such challenges appeared before evaluating their constitutional merit.

1. Modern History of Judicial Critiques

Not long ago, nondelegation arguments in any context would have seemed antiquated or feckless. For example, *Whitman v. American Trucking Ass'ns* unanimously held that Congress can grant agencies broad discretion without violating the Constitution's separation of powers, denying claims that the Clean Air Act violated Article I by allowing the agency to legislate instead of Congress.²⁴² Justice Scalia's opinion in *Whitman* seemed to defang the nondelegation doctrine once and for all, and that decision provides a doctrinal benchmark for modern efforts to revive nondelegation principles today.²⁴³

Congress required the EPA to set air quality standards that “protect the public health” with “an adequate margin of safety.”²⁴⁴ Under established doctrine, the constitutional question in *Whitman* was whether such language provided an “intelligible principle” for the EPA to follow.²⁴⁵ Scalia offered hardly any substantive analysis; instead, he buried the objections under prior precedents. The Clean Air Act was no less “intelligible” than standards that Congress prescribed in the Controlled Substance Act, the Occupational Safety and Health Act (“OSHA”), the Public Utility Holding Company Act, and other statutes that were upheld after 1935.²⁴⁶

²⁴⁰ See *Gonzales v. Oregon*, 546 U.S. 243, 293–94 (2006) (Scalia, J., dissenting) (arguing that the statutory broad term “public interest” meant that Congress “implicitly (but clearly)” delegated authority to the legally interpretive agency); Scalia, *supra* note 6, at 516.

²⁴¹ See *Michigan*, 135 S. Ct. at 2713 (Thomas, J., concurring).

²⁴² *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001); see also *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1053–55 (D.C. Cir. 1999), *reh'g granted in part*, 195 F.3d 4 (D.C. Cir. 1999).

²⁴³ See *Whitman*, 531 U.S. at 475–76.

²⁴⁴ *Id.* at 465 (quoting 42 U.S.C. § 7409(b)(1) (2000)).

²⁴⁵ *Id.* at 472.

²⁴⁶ See, e.g., *id.* at 473–75 (citing *Touby v. United States*, 500 U.S. 160 (1991) (Controlled Substance Act)); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (OSHA); *Lichter v. United States*, 334 U.S. 742, 746 (1948) (“excess profits”); *Am. Power &*

Under Scalia's view of nondelegation, huge swaths of modern legislation must stand or fall together, and therefore they must stand. Scalia wrote that the Clean Air Act's language about public health and safety was "*well within the outer limits* of [the Court's] nondelegation precedents."²⁴⁷ There were ancient precedents like *A.L.A. Schechter Poultry Corp. v. United States* and *Panama Refining Co. v. Ryan* from 1935 that applied nondelegation principles aggressively.²⁴⁸ But the Court in *Whitman* treated those pre-New Deal cases as isolated counterexamples that were largely abandoned and barely deserved mention.²⁴⁹

Although *Whitman* was not technically a *Chevron* case, its implications for deference were obvious. Congress did not violate separation of powers by allowing the EPA in *Whitman* to convert vague statutory terms like "public health" and "adequate . . . safety" into specific numerical standards that the agency could revise as it wished.²⁵⁰ By similar logic, the statute in *Chevron* did not violate the separation of powers by letting the EPA apply "stationary source" to entire industrial facilities or individual components—even when the agency changed its opinion from one President to the next.²⁵¹

Justice Thomas's concurring opinion in *Whitman* seems more important in hindsight than it was at the time. Thomas agreed that the EPA satisfied existing precedents about delegated authority.²⁵² But he wrote somewhat ominously that the Court might someday address whether "our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."²⁵³ Despite Thomas's invitation, *Whitman's* result did not encourage constitutional challenges to statutory delegations. In 2006, even Thomas appeared to surrender, as he joined an opinion granting remarkably

Light Co. v. SEC, 329 U.S. 90 (1946) (Public Utility Holding Company Act); *Yakus v. United States*, 321 U.S. 414, 420 (1944) ("fair and equitable" commodity prices); *NBC v. United States*, 319 U.S. 190 (1943) (Federal Communications Commission); *N.Y. Cent. Secs. Corp. v. United States*, 287 U.S. 12 (1932) (Interstate Commerce Commission).

²⁴⁷ *Whitman*, 531 U.S. at 474 (emphasis added); see also *id.* at 476 ("[The Clean Air Act] fits comfortably within the scope of discretion permitted by our precedent.")

²⁴⁸ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

²⁴⁹ See *Whitman*, 531 U.S. at 474 ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two [cases] . . .").

²⁵⁰ *Id.* at 476.

²⁵¹ See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

²⁵² See *Whitman*, 531 U.S. at 486–87 (Thomas, J., concurring).

²⁵³ *Id.* at 487.

broad deference to one administrator’s statutory interpretation.²⁵⁴ In the latter case, Thomas also wrote separately to complain that “expansive federal legislation and broad grants of authority to administrative agencies are merely the inevitable and inexorable consequence of this Court’s Commerce Clause and separation-of-powers jurisprudence.”²⁵⁵ Nevertheless, Thomas refused to fight about such constitutional issues because “that is now water over the dam.”²⁵⁶ Such acquiescence would disappear soon enough.

The earliest sign of a potentially transformative shift was *City of Arlington v. FCC* in 2013, which deferred to an agency’s interpretation of the statutory phrase “reasonable . . . time,” even though such language affected the agency’s jurisdiction.²⁵⁷ Scalia’s majority opinion celebrated *Chevron* as “a stable background rule against which Congress can legislate.”²⁵⁸ The Court held that “there is no difference . . . between an agency’s exceeding the scope of its authority” as a matter of jurisdiction, and the agency’s substantive misapplication of “authority that it unquestionably has.”²⁵⁹ Both contexts deserved full *Chevron* deference.²⁶⁰ Scalia rebuffed any effort to distinguish between jurisdictional and nonjurisdictional issues as a “dangerous” project.²⁶¹ He prophesied that inventing such doctrinal lines would bring “greater quarry in sight: Make no mistake—the ultimate target here is *Chevron* itself.”²⁶² Scalia was right. Five years later, Kennedy cited the dissent from *City of Arlington* as evidence that all *Chevron* deference was constitutionally suspect.²⁶³

Chief Justice John Roberts’s dissenting opinion in *City of Arlington* condemned the mixture of agencies’ executive, legislative, and ju-

²⁵⁴ See *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (Scalia, J., dissenting). Chief Justice John Roberts also joined Scalia’s dissenting opinion. *Id.* For Roberts’s subsequent criticism of *Chevron* in other contexts, see *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) and *infra* text accompanying notes 263–73.

²⁵⁵ *Gonzales*, 546 U.S. at 301 (Thomas, J., dissenting).

²⁵⁶ *Id.* Thomas also argued in a footnote that the constitutional challenge was not properly preserved. See *id.* at 302 n.2. In 2005, Thomas wrote a majority opinion that applied *Chevron* so aggressively that even Scalia dissented. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980–86, 1005 (2005).

²⁵⁷ *City of Arlington v. FCC*, 569 U.S. 290, 294 (2013).

²⁵⁸ *Id.* at 296.

²⁵⁹ *Id.* at 299 (emphasis omitted).

²⁶⁰ See *id.*

²⁶¹ *Id.* at 304.

²⁶² *Id.*

²⁶³ See *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring).

dicial power as almost “the very definition of tyranny.”²⁶⁴ He complained that “[t]he administrative state ‘wields vast power and touches almost every aspect of daily life’” in a way that “[t]he Framers could hardly have envisioned,” with further cumbersome agencies and regulations “on the way.”²⁶⁵ Addressing *Chevron* specifically, Roberts acknowledged that “[i]t would be a bit much to describe that result as ‘the very definition of tyranny.’”²⁶⁶ Yet the “danger posed by the . . . administrative state cannot be dismissed.”²⁶⁷

Scalia’s majority embraced the longstanding historical fact that “[a]gencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic.”²⁶⁸ By contrast, Roberts cited the existence of “thousands of pages of regulations” and “hundreds of federal agencies poking into every nook and cranny of daily life” as proof that modern courts must impose new legal restrictions on administrative deference, intervening more rigorously than they had done for at least 50 years.²⁶⁹ Roberts wrote that “[t]he rise of the modern administrative state has not changed [courts’] duty” under *Marbury* to “say what the law is.”²⁷⁰ He accepted that courts should “give binding deference to permissible agency interpretations of statutory ambiguities” concerning nonjurisdictional provisions “because Congress has delegated to the agency the authority to interpret those ambiguities.”²⁷¹ Yet he refused to apply that same *Chevron*-based presumption of legislative delegation with respect to statutory language that affects an agency’s jurisdiction.

In 2013, it was not entirely clear whether the real target of Roberts’s opinion was “*Chevron* itself.”²⁷² After all, this was the first time that any Supreme Court Justice had argued that applying *Chevron* might contradict the separation of powers. Roberts claimed that accepting the agency’s interpretation of “reasonable . . . time” violated the judiciary’s “duty to police the boundary between the Legislature

²⁶⁴ *City of Arlington*, 569 U.S. at 312 (Roberts, C.J., dissenting) (quoting THE FEDERALIST No. 47, at 324 (James Madison) (J. Cooke ed., 1961)).

²⁶⁵ *Id.* at 313.

²⁶⁶ *Id.* at 315.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 304 n.4.

²⁶⁹ *Id.* at 315.

²⁷⁰ *Id.* at 316 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Roberts’s argument concerning *Marbury* will be addressed *infra* Section III.B.

²⁷¹ *Id.* at 317 (emphasis omitted).

²⁷² *Id.* at 304 (majority opinion).

and the Executive.”²⁷³ But if the dissent in *City of Arlington* was a warning shot, its scope and significance remained uncertain.

The year 2015 was a turning point. Justice Thomas wrote three opinions that questioned the constitutionality of administrative law as a whole, and he explicitly targeted *Chevron* deference. *Perez v. Mortgage Bankers Ass’n* involved a technical dispute about exactly when the APA requires notice and comment rulemaking.²⁷⁴ As the Court rejected one of the litigants’ ancillary arguments in a footnote, it cautiously declined to use two precedents—*Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*—that granted deference to agency interpretations of their own regulations.²⁷⁵

Despite the majority’s effort at avoidance, Thomas wrote a concurring opinion arguing that deference under *Auer* and *Seminole Rock* was unconstitutional, and he chided the Supreme Court for “not always [being] vigilant about protecting the structure of our Constitution.”²⁷⁶ Thomas emphasized courts’ “obligation to guard against deviations” from constitutional separation of powers, and he decried *Seminole Rock* as only “one such deviation.”²⁷⁷ Thomas condemned *Chevron* by analogy: “Just as it is critical for judges to exercise independent judgment in applying statutes,” as in *Chevron*, “it is critical for judges to exercise independent judgment in [interpreting] a regulation,” contrary to *Seminole Rock* and *Auer*.²⁷⁸ The *Perez* litigants never briefed or argued *Seminole Rock*’s constitutional status, much less did they question the constitutionality of *Chevron*.²⁷⁹ Nevertheless, Thomas proclaimed on his own initiative that “the entire line of precedent beginning with *Seminole Rock* [in 1945] raises serious constitutional questions and should be reconsidered in an appropriate case.”²⁸⁰

The same day as *Perez*, Thomas once again attacked the constitutional status of administrative law. *Department of Transportation v.*

²⁷³ *Id.* at 327–28 (Roberts, C.J., dissenting).

²⁷⁴ *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96–97 (2015) (holding that the APA does not require notice and comment rulemaking to reject a preexisting “interpretative rule”).

²⁷⁵ *Perez*, 575 U.S. at 104 n.4 (citing *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)).

²⁷⁶ *Perez*, 575 U.S. at 115 (Thomas, J., concurring).

²⁷⁷ *Id.* at 118–24 (emphasis added).

²⁷⁸ *Id.* at 123 (emphasis added).

²⁷⁹ See Transcript of Oral Argument, *Perez*, 575 U.S. 92 (No. 13-1041, No. 13-1052); Brief for Petitioner, *Perez*, 575 U.S. 92 (No. 13-1052); Consolidated Brief of Respondent, *Perez*, 575 U.S. 92 (No. 13-1041, No. 13-1052); Petition for a Writ of Certiorari, *Perez*, 575 U.S. 92 (No. 13-1041).

²⁸⁰ *Perez*, 575 U.S. at 133 (Thomas, J., concurring).

Association of American Railroads upheld Amtrak's status as a "governmental entity" that was authorized to set quantitative legal standards for passenger railroads.²⁸¹ Thomas concurred in the judgment, but he wrote separately to announce that "[w]e have come to a strange place in our separation-of-powers jurisprudence."²⁸² As in *Perez*, Thomas rejected the project of administrative government as a whole: "[H]istory confirms that the core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make . . . generally applicable rules of private conduct."²⁸³ Even though Thomas recently accepted permissive nondelegation precedents as "water over the dam,"²⁸⁴ now they seemed more like a house on fire. Justice Samuel Alito's concurrence in the Amtrak case even cited *A.L.A. Schechter* and *Panama Refining*, thus resetting the calendar to 1935 as though cases like *Whitman* never displaced such nondelegation decisions.²⁸⁵

Thomas wrote that the Supreme Court for many decades has "overseen and sanctioned the growth of an administrative system" that "finds no comfortable home in our constitutional structure."²⁸⁶ Thomas's nondelegation arguments would have eliminated *Chevron* as a byproduct of eliminating all "legislative" rulemaking and adjudication. Such aggressive nondelegation arguments had not been heard from any Supreme Court Justice in a generation,²⁸⁷ and of course, no judge had ever used nondelegation arguments to challenge *Chevron*.²⁸⁸

That last unprecedented step occurred in *Michigan v. EPA*, a seemingly ordinary case about whether the statutory terms "appropriate and necessary" required certain EPA regulations to consider rele-

²⁸¹ *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 46 (2015).

²⁸² *Ass'n of Am. R.Rs.*, 575 U.S. at 66 (Thomas, J., concurring). That statement seems correct, though perhaps in the opposite sense of what Thomas intended. See *infra* Conclusion (discussing the constitutional strangeness of anti-*Chevron* critiques).

²⁸³ *Id.* at 76.

²⁸⁴ *Gonzales v. Oregon*, 546 U.S. 243, 301 (2006) (Thomas, J., dissenting). For more extensive reliance on *A.L.A. Schechter* and *Panama Refining*, see *Gundy v. United States*, 139 S. Ct. 2116, 2137–39 (2019) (Gorsuch, J., dissenting).

²⁸⁵ See *Ass'n of Am. R.Rs.*, 575 U.S. at 61 (Alito, J., concurring).

²⁸⁶ *Id.* at 91 (Thomas, J., concurring).

²⁸⁷ See *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 671–88 (1980) (Rehnquist, J., concurring) (invoking the nondelegation doctrine in an opinion that no other Justice joined).

²⁸⁸ The most aggressive modern use of nondelegation doctrine before Thomas was *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 671–88 (1980) (Rehnquist, J., concurring), which did not involve administrative deference.

vant costs.²⁸⁹ Scalia’s majority opinion applied *Chevron* deference but held that the EPA was wrong to ignore regulatory costs.²⁹⁰ Without any prompting from the litigants, Thomas wrote a separate concurrence that constitutionally attacked the Supreme Court’s “broader practice of deferring to agency interpretations of federal statutes.”²⁹¹ Citing his months-old *Perez* opinion, Thomas claimed that “[t]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.”²⁹² By contrast, *Chevron* deference “wrests from Courts the ultimate interpretive authority to ‘say what the law is,’ and hands it over to the Executive,” thereby unconstitutionally violating Article III’s exclusive allocation of judicial power to judges.²⁹³ Thomas’s objection concerning judicial power will be discussed, *infra*, in Section III.B.

Thomas also suggested that *Chevron*’s usurpation of judicial power under Article III usurped legislative power under Article I, citing his *Amtrak* opinion’s attack on modern nondelegation precedents.²⁹⁴ In Thomas’s world of sharply separated constitutional powers, it is hard to see how agencies could be unconstitutionally legislating and judging at exactly the same time. Yet Thomas did not worry whether *Chevron* was unconstitutional one way or the other. Instead, he capped off his dramatic year of administrative law by declaring that “we seem to be straying further and further from the Constitution without so much as pausing to ask why.”²⁹⁵ That last sentence ignored a full generation of authors—including Scalia, Starr, Kmiec, and Monaghan—who did address and answer constitutional questions about administrative deference. Thomas also failed to clarify when the Court’s unconstitutional “straying” might have begun. Was it in 2001 with *Whitman*, 1940 with the Roosevelt Court, or perhaps 1827 with *Edwards’ Lessee*?²⁹⁶ Discarding all of that history was essential to Thomas’s plan for crafting a bold and radical future, and this Article’s readers are well positioned to appreciate that maneuver’s tactical significance.

289 *Michigan v. EPA*, 135 S. Ct. 2699, 2704 (2015).

290 *Id.* at 2712.

291 *Id.* (Thomas, J., concurring).

292 *Id.* (quoting *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring)).

293 *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

294 *See id.* at 2713 (citing *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 85–87 (2015) (Thomas, J., concurring)).

295 *Id.* at 2714.

296 *See supra* Section II.B (discussing *Edwards’ Lessee*); *supra* Section II.C (discussing the Roosevelt Court); *supra* Section III.A.1 (discussing *Whitman*).

When Thomas wrote his revolutionary opinions in 2015, he had been a Supreme Court Justice for twenty-three years, a D.C. Circuit judge for eighteen months before that, and Chair of the EEOC for almost eight years more.²⁹⁷ The vast bulk of Thomas's career of government service happened entirely inside the *Chevron* regime, and other forms of administrative deference emerged long before Thomas was born. Thomas never constitutionally objected to deference before 2015, and he never explained why that year sparked a sudden assault on doctrines and institutional structures that were ubiquitous and well-known throughout his adult life.²⁹⁸

In 2016, a second federal judge joined Thomas's attack on *Chevron*: Neil Gorsuch of the Tenth Circuit. The context was a technical fight about exactly when an agency's interpretation of immigration law should become effective if it contradicts existing judicial precedent.²⁹⁹ Then-Judge Gorsuch wrote for a unanimous panel that the government's statutory interpretation could not be legally valid until the date that a federal court formally accepted it.³⁰⁰ Gorsuch also wrote a separate opinion that concurred with his own majority opinion. Even though no party raised the issue, the Gorsuch concurrence proclaimed "[t]here's an elephant in the room with us today" because *Chevron* deference allows "executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution."³⁰¹

That was quite an elephant, and if Thomas's Supreme Court opinions seemed bold, Gorsuch's Tenth Circuit opinion was brazen. His intermediate judicial status did not stop Gorsuch from criticizing a handful of Supreme Court opinions, and he excoriated *Chevron*'s longstanding precedent as "judge-made doctrine for the abdication of the judicial duty."³⁰² Gorsuch largely repeated Thomas's arguments, claiming that deference to agencies was simultaneously unconstitutional legislation under Article I and also unconstitutional adjudica-

²⁹⁷ See *Justice Clarence Thomas*, SUPREME COURT HISTORICAL SOC'Y, <https://supremecourthistory.org/history-of-the-court/the-current-court/justice-clarence-thomas/> [<https://perma.cc/9JLH-6EM9>].

²⁹⁸ For analysis of the political context surrounding Thomas's change of heart, see Green, *supra* note 13.

²⁹⁹ *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1143–44 (10th Cir. 2016).

³⁰⁰ *Id.* at 1147–48.

³⁰¹ *Id.* at 1149 (Gorsuch, J., concurring).

³⁰² *Id.* at 1152.

tion under Article III.³⁰³ Gorsuch further articulated a new set of objections, addressed *infra* Section III.C, claiming that allowing agencies under *Chevron* “to alter and amend existing law” violated due process and equal protection.³⁰⁴

Nominated to the Supreme Court in 2017, Gorsuch had the most aggressive record on *Chevron* of any circuit judge in modern history, and those views about administrative law were the most remarkable feature of his judicial resume.³⁰⁵ Soon after the Gorsuch confirmation and media coverage, other conservative judges wrote likeminded opinions arguing that *Chevron* is unconstitutional.³⁰⁶ Even some state courts, applying their own state-law versions of *Chevron* deference, took notice of Gorsuch’s remarkable constitutional critique.³⁰⁷

³⁰³ *Id.* at 1152–53.

³⁰⁴ *Id.* at 1158.

³⁰⁵ See Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES MAG. (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html> [<https://perma.cc/GQ46-5X4Y>] (“Gorsuch is said to have risen to the top of Trump’s Supreme Court list in large part because of a 2016 concurring opinion he wrote as a judge on the United States Court of Appeals for the 10th Circuit, in which he forcefully attacked what’s known as ‘Chevron deference’ . . .”).

³⁰⁶ See, e.g., *Chamber of Commerce v. Dep’t of Labor*, 885 F.3d 360, 379 n.14 (5th Cir. 2018) (“[T]he *Chevron* doctrine has been questioned on substantial grounds, including that it represents an abdication of the judiciary’s duty under Article III . . .”); *S.E.R.L. v. Attorney Gen.*, 894 F.3d 535, 554 (3d Cir. 2018) (citing *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring)) (“The *Chevron* doctrine of deference to federal agencies is open to question . . .”); *Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1334 (Fed. Cir. 2017) (Moore, J., concurring); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring); *Helen Mining Co. v. Elliott*, 859 F.3d 226, 238 (3d Cir. 2017) (citing *Egan*, 851 F.3d at 278–83 (Jordan, J., concurring); *Our Country Home Enters. v. Comm’r*, 855 F.3d 773, 790 (7th Cir. 2017) (citing *Gutierrez-Brizuela*, 834 F.3d at 1149–58 (Gorsuch, J., concurring); *Egan*, 851 F.3d at 278 (Jordan, J., concurring)) (“[S]ome judges have questioned the *Chevron* doctrine’s wisdom. Others have called upon the Supreme Court and Congress to revisit that doctrine.”); *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 407, 409, 417 (D.C. Cir. 2017) (Brown, J., dissenting from denial of rehearing en banc) (citing HAMBURGER, *supra* note 25, and deriding “judicial abdication” through *Chevron* deference as “no longer on the Constitution’s path”); *Gutierrez-Brizuela*, 834 F.3d at 1151–55 (Gorsuch, J., concurring)) (“[S]ome distinguished jurists have recently raised thought-provoking questions about the proper bounds of *Chevron* and judicial deference . . .”); Nat’l Constitution Ctr., *The Constitution and the Administrative State, Part 2 (HD)*, YOUTUBE (Jan. 12, 2017), <https://www.youtube.com/watch?v=OGAxQxh8eqE> [<https://perma.cc/99H9-KQLC>]; Barnett et al., *supra* note 118.

³⁰⁷ See Stambaugh v. Killian, 398 P.3d 574, 578 (Ariz. 2017) (Bolick, J., concurring) (citing *Gutierrez-Brizuela*, 834 F.3d at 1149–58); *Whynes v. Am. Sec. Ins. Co.*, 240 So. 3d 867, 872 (Fla. Dist. Ct. App. 2018) (Levine, J., concurring) (citing *Gutierrez-Brizuela*, 834 F.3d at 1149); *Pedraza v. Reemployment Assistance Appeals Comm’n*, 208 So. 3d 1253, 1257 (Fla. Dist. Ct. App. 2017) (Shepherd, J., concurring); *Sierra Packaging & Converting, LLC v. Chief Admin. Officer of OSHA*, 406 P.3d 522, 527 (Nev. Ct. App. 2017) (Tao, J., concurring) (citing *Gutierrez-Brizuela*, 834 F.3d at 1149); *Tetra Tech EC, Inc. v. Wis. Dep’t of Revenue*, 914 N.W.2d 21, 48 (Wis. 2018) (citing *Gutierrez-Brizuela*, 834 F.3d at 1151–52).

Most judicial objections to *Chevron*—including those of Thomas and Gorsuch—have appeared in concurring opinions, which has insulated them from appellate review.³⁰⁸ On the Supreme Court, however, Gorsuch and Thomas have continued to highlight novel ideas about separation of powers as an important feature of their constitutional jurisprudence.³⁰⁹ Immediately after Kennedy’s announcement in *Pereira v. Sessions*,³¹⁰ litigants filed certiorari petitions that explicitly questioned *Chevron*’s constitutional status.³¹¹ Thomas and Gorsuch were the first judges to raise such anti-*Chevron* objections, and it is also likely that they will participate in producing a final answer.³¹²

³⁰⁸ See, e.g., *Egan*, 851 F.3d at 279 (Jordan, J., concurring).

³⁰⁹ See *Sessions v. Dimaya*, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring); *id.* at 1248 (Thomas, J., dissenting).

³¹⁰ *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).

³¹¹ See Brief for the State of Texas et al. as Amici Curiae in Support of Petitioners, *Cal. Sea Urchin Comm’n v. Combs*, 139 S. Ct. 411 (2018) (No. 17-1636); Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners, *Breckinridge Health, Inc. v. Azar*, 139 S. Ct. 64 (No. 17-1408).

³¹² While this Article was in the publication process, the Supreme Court decided *Gundy v. United States*, 139 S. Ct. 2116 (2019), and *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), which cannot be fully analyzed here. For early reactions, see Aditya Bamzai, Comment, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164 (2019); Peter Strauss, *Kisor, Gundy, Mead, Chevron, Skidmore, Hearst*, YALE J. ON REG.: NOTICE & COMMENT (July 16, 2019), <https://www.yalejreg.com/nc/kisor-gundy-mead-chevron-skidmore-hearst-by-peter-strauss/> [<https://perma.cc/TGT4-U2X6>]; Green, *supra* note 13.

Each of those cases has an ambivalent relationship to this Article’s doctrinal history. For example, *Kisor* was a case about *Auer* deference, not *Chevron*, and the majority offered encouraging signs by upholding *Auer* deference as legally valid. *Kisor*, 139 S. Ct. at 2422–23. On the other hand, the majority greatly narrowed *Auer* to earn Roberts’s vote, *id.* at 2414–18, and Roberts insisted there was not ultimately such a “[great] distance” between the majority’s narrow approach and overruling *Auer* deference altogether, *id.* at 2424 (Roberts, C.J., concurring in part). Kavanaugh’s dissenting opinion agreed on the latter point. *Id.* at 2448 (Kavanaugh, J., concurring in judgment).

Gorsuch’s concurring opinion argued that *Auer* violated both the APA and the Constitution. *Id.* at 2432–41 (Gorsuch, J., concurring in judgment). Alito joined the Gorsuch opinion, except for his arguments about policy and stare decisis—perhaps Alito did not care too much about those. *Id.* at 2425. As a constitutional matter, Gorsuch focused almost entirely on judges’ impartiality, rather than concerns about nondelegation or individual rights, claiming emphatically that when judges “defer to an agency interpretation that differs from what we believe to be the best interpretation of the law, we compromise our judicial independence and deny the people who come before us the impartial judgment that the Constitution guarantees them.” *Id.* at 2439; see also *id.* at 2425 (mentioning “bias” in favor of the “powerful” government); *id.* at 2437 n.76 (characterizing judicial independence as protecting “the unpopular and vulnerable” (quoting *Oil States Energy Servs. v. Greene’s Energy Grp.*, 138 S. Ct. 1365, 1381 (2018) (Gorsuch, J., dissenting))). Many arguments in *Kisor*—from Gorsuch and the majority alike—applied to *Chevron* just as much as *Auer*, yet the potentially decisive swing votes—Roberts and Kavanaugh—acted as though the two contexts were entirely different. Quite puzzling and without further explanation, Roberts wrote the following: “Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with

2. *Rebutting Nondelegation Critiques*

As a matter of precedent, to invalidate *Chevron* on nondelegation grounds would be undeniably radical. Critics like Thomas and Gorsuch have used self-conscious and dramatic language to signal their meat-cleaver attack on the perceived corruption and decadence of existing case law. Nondelegation critiques of *Chevron* contradict numerous precedents like *Whitman*, alongside older examples of deference discussed *supra* in Part II.³¹³ Citations to *A.L.A. Schechter* and *Panama Refining* illustrate nondelegation critiques as indeed a kind of

judicial deference to agency interpretations of statutes enacted by Congress. I do not regard the Court's decision today to touch upon the latter question." *Id.* at 2425 (Roberts, C.J., concurring in part) (citation omitted). Kavanaugh's concurrence quoted both of those sentences, also without offering any explanation. *Id.* at 2449 (Kavanaugh, J., concurring in judgment). For all those reasons, *Kisor* does not offer clear evidence about what the Court will do about *Chevron*, except to show that four Justices are eager to overturn some forms of deference *on constitutional grounds*, as opposed to any other source of law. *See id.* at 2425 (Gorsuch, J., concurring in judgment) (arguing that *Auer* should be held explicitly unconstitutional because "means, not just ends, matter").

The other case, *Gundy*, has mixed significance for Article I objections to *Chevron* that mirrors *Kisor*'s ambivalence for Article III critiques. On one hand, *Gundy* involved nondelegation challenges to a criminal statute, not an administrative statute, and a plurality upheld the law's constitutionality—just like all nondelegation decisions since 1935. *See Gundy*, 139 S. Ct. at 2121 (plurality opinion). On the other hand, Kavanaugh did not vote in *Gundy* because the oral argument preceded his confirmation. Therefore, the fifth vote to affirm was Alito, who wrote a strange three-paragraph opinion: "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment." *Id.* at 2131 (Alito, J., concurring in the judgment).

Gorsuch's dissent—which Roberts joined along with Thomas—was a manifesto of constitutional radicalism. *See id.* at 2131–48 (Gorsuch, J., dissenting). Gorsuch included extensive praise for the 1935 cases *A.L.A. Schechter* and *Panama Refining*, which "happened to be handed down during the same era as . . . now-discredited substantive due process decisions," *id.* at 2138, and Gorsuch excoriated modern constitutional standards as inconsistent "with more traditional teachings," *id.* at 2140. "While it's been some time"—75 years—"since the Court last held that a statute improperly delegated," *id.* at 2141, Gorsuch offered an entirely new framework for nondelegation analysis, *see id.* 2136–37, and he cited restrictive applications of *Chevron* as modern support, *see id.* at 2141–42, implying that when nondelegation doctrine became "unavailable to do its intended work, the hydraulic pressures of our constitutional system . . . shift[ed] the responsibility to different doctrines" concerning *Chevron*, *id.* at 2141. As with *Kisor*, *Gundy*'s result did not have any direct implications for *Chevron* deference. Yet both cases together confirm the ongoing seriousness of constitutional threats to administrative deference, the possible revival or recreation of long-abandoned constitutional principles, and important most of all, a revolutionary detachment from many decades of precedent, tradition, and historical experience. *Cf. Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari) (praising "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine" for raising "important points that may warrant further consideration in future cases").

³¹³ *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

“1930s redux,”³¹⁴ but even that moniker understates the doctrinal transformation at stake. It was one thing for judges in the 1930s to oppose the New Deal when those governmental policies were at least nominally “new” and innovative.³¹⁵ By contrast, modern conservatives are using equally dramatic principles to attack New Deal structures and practices that were already “old” when anti-*Chevron* critics were born.

Paired with historical and precedential evidence from Parts I and II, this Section raises normative problems concerning nondelegation critiques. At their highest abstraction, nondelegation arguments raise theoretical questions about what “legislation” means. For example, is legislating a verbal declaration of legal norms that is totally separate from executive enforcement? If so, how much specificity is necessary to insulate people who have “legislative” power from people who merely “enforce” the law? In the alternative, if legislation means the creation of practically effective legal norms, it must involve some kind of implementation, but in what capacity and how much?³¹⁶ Anti-*Chevron* originalists might insist that such questions should be pushed backward in time to an eighteenth-century context. What did legislation mean for state and federal governments two hundred years ago?

Instead of pursuing such complex issues, this Article’s simple point is that nondelegation critiques of *Chevron* cannot be limited to statutory interpretation by agencies. On the contrary, the constitutional argument against *Chevron* also cuts against the interpretation of vague statutes by federal courts.³¹⁷ The Constitution does not forbid

³¹⁴ See *supra* Part II. Compare *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1154–55 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that *Chevron* is at least as egregious a delegation of legislative power as the statute the Court struck down in *A.L.A. Schechter*), with Metzger, *supra* note 2, at 57 (explaining that constitutional rulings against the administrative state, such as *A.L.A. Schechter*, “largely disappeared” after the 1930s).

³¹⁵ *But cf.* DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE 1–7 (1998) (tracing the New Deal’s longer and geographically broader history as a matter of “social politics”).

³¹⁶ For a sample of theories on the meaning of “legislative” power, see *Opp Cotton Mills, Inc. v. Adm’r of Wage & Hour Div.*, 312 U.S. 126, 145 (1941); JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 143 (London, Whitmore & Fenn & C. Brown 1821) (1690); Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1269–70 (1947); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2115–16 (2004).

³¹⁷ See generally Frank, *supra* note 316, at 1270 (observing that a grant of interpretive discretion to courts is just as much a delegation of lawmaking power as a similar grant to agencies); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 408 (2008) (“Congress delegates authority not only to agencies, but to courts as well. Yet virtually no effort has been made to fit delegations to courts into

agencies from legislating—whatever that means—it forbids everyone other than Congress from legislating, including judges.³¹⁸ That is why some politically conservative academics have claimed that nondelegation doctrine prohibits federal common law by judges much as it prohibits administrative lawmaking by agencies.³¹⁹

The constitutional parallel between statutory interpretation by judges and similar activity by agencies has consequences for many federal statutes. Whenever it is unconstitutional for agencies to “legislate” by providing substantive content for vague federal statutes, it is also unconstitutional for courts to provide substantive content for vague federal statutes. Because only Congress can write federal laws, neither agencies nor courts can undertake legislation-in-fact while claiming that they are only doing “interpretation.”³²⁰ Conversely, whenever it is permissible for federal courts to interpret vague statutes without unconstitutionally “legislating,” it is equally reasonable for agencies to do the same.³²¹

The Court’s immigration case *Sessions v. Dimaya* illustrated links among statutory vagueness, judicial interpretation, and nondelegation doctrine when it held the term “crime of violence” invalid on vagueness grounds.³²² Justice Elena Kagan wrote for a plurality that, although statutory vagueness is typically analyzed as a due process

nondelegation theory or practice.” (footnote omitted)); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723–27 (2002) (describing the scope of current nondelegation debates).

³¹⁸ See U.S. CONST. art. I, § 1.

³¹⁹ See Craig Green, *Erie and Problems of Constitutional Structure*, 96 CAL. L. REV. 661, 677 (2008) (discussing one example of that argument); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 758–61 (2010) (similar); see also *Collins v. Virginia*, 138 S. Ct. 1663, 1679 (2018) (Thomas, J., concurring) (doubting the constitutional status of any federal common law that preempts state law); *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) (claiming that the displacement of common law within the federal judiciary should substantially weaken the power of stare decisis).

³²⁰ See Abbe R. Gluck, *Justice Scalia’s Unfinished Business in Statutory Interpretation: Where Textualism’s Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2060–61 (2017).

³²¹ Consider a classic nondelegation hypothetical: if Congress were to create an agency with broad statutory instructions to “make good rules that discourage bad conduct,” all substantive control over legislative content would impermissibly rest with the agency instead of Congress. But that logic would equally invalidate a statute that told judges to “make good judgments that discourage bad conduct.” See generally Posner & Vermeule, *supra* note 317, at 1731 (describing the Sherman Act and the Rules Enabling Act as inherently delegating lawmaking authority to courts). By comparison, any statute that is specific enough for judges to interpret without performing unconstitutional legislation is also specific enough for agencies to interpret. Insofar as federal judges have interpreted vague statutes for centuries without nondelegation problems, agencies should be able to do so as well.

³²² *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210 (2018).

issue, “the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.”³²³ Kagan explained that statutory vagueness is usually tolerable with respect to “civil rather than criminal penalties because the consequences . . . are qualitatively less severe.”³²⁴ Yet the Court applied strict constitutional limits to the statute in *Dimaya* because that case involved the “drastic measure” of deportation, which is comparable to “banishment or exile.”³²⁵

Gorsuch’s concurring opinion went much farther, claiming that “the *more important* aspect of vagueness doctrine is not actual notice, but . . . the requirement that a legislature establish minimal guidelines” to “keep the separate branches within their proper spheres.”³²⁶ Contradicting modern precedents, Gorsuch declared that the Constitution should not “require any less . . . in the civil context” than the “fair notice” standard for criminal cases, bemoaning that “[o]urs is a world filled with more and more civil laws bearing more and more extravagant punishments.”³²⁷ Although Gorsuch did not mention administrative agencies, he explained that “[t]oday’s ‘civil’ penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses . . . , and the power to commit persons against their will indefinitely.”³²⁸ Citing generic images of legal sprawl, Gorsuch refused to treat deportation differently from civil commitment, residential forfeiture, or any administrative decision to revoke “a business license.”³²⁹

Gorsuch suggested that statutory vagueness—which is the hallmark predicate of *Chevron* and administrative delegation—is constitutionally suspect wherever it might appear.³³⁰ Gorsuch therefore rejected arguments that *Dimaya*’s statute was valid if it was “intelligible,” deliberately echoing Thomas’s critique of the “intelligible principle” standard for nondelegation cases across the board.³³¹ “I am persuaded . . . that void for vagueness doctrine, at least properly con-

³²³ *Id.* at 1212 (plurality opinion).

³²⁴ *Id.* (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982)).

³²⁵ *Id.* at 1212–13 (quoting *Jordan v. De George*, 341 U.S. 223, 231 (1951)).

³²⁶ *Id.* at 1228 (Gorsuch, J., concurring in part).

³²⁷ *Id.* at 1228–29.

³²⁸ *Id.* at 1229.

³²⁹ *Id.* at 1231.

³³⁰ *Id.* at 1224.

³³¹ *See id.* at 1228; *cf.* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 486–87 (2001) (Thomas, J., concurring).

ceived, serves as a faithful expression of ancient due process and separation of powers principles the framers recognized as vital to ordered liberty under our Constitution.”³³²

Thomas did not agree with *Dimaya*'s result for various technical reasons.³³³ Nevertheless, he restated broad skepticism about congressional delegations outside the context of immigration law.³³⁴ Unlike Gorsuch, Thomas emphasized that federal courts have always construed vague statutes without violating the Constitution, but Thomas regrettably failed to acknowledge that agencies have done much the same.³³⁵

Dimaya has potentially broad consequences for *Chevron*'s nondelegation critique.³³⁶ There are thousands of contexts where agencies enforce civil penalties based on substantively vague statutes, and one trivial example is airplane smoke detectors.³³⁷ *Federal regulations* unambiguously require passenger flights with bathrooms to have smoke detectors, which “[n]o person may tamper with, disable, or destroy.”³³⁸ However, the *statutory basis* for requiring smoke detectors is vague language authorizing the Secretary of Transportation to issue

³³² *Dimaya*, 138 S. Ct. at 1224 (Gorsuch, J., concurring in part).

³³³ *See id.* at 1248–49 (Thomas, J., dissenting) (suggesting that the President’s constitutional authority “includes the power to deport aliens” regardless of federal statutes); *id.* at 1259 (describing the majority’s ruling as “triple flawed” based on its analysis of existing precedent, unconstitutional vagueness, and statutory interpretation).

³³⁴ *See id.* at 1249–50.

³³⁵ *See id.* at 1248–50 (“Courts were expected to clarify the meaning of such texts over time as they applied their terms to specific cases. Although early American courts declined to apply vague or unintelligible statutes as appropriate in individual cases, they did not wholesale invalidate them as unconstitutional delegations of legislative power.” (citations omitted)); *Johnson v. United States*, 135 S. Ct. 2551, 2572–73 (2015) (Thomas, J., concurring in the judgment) (“To accept the vagueness doctrine as founded in our Constitution . . . one must reject the possibility ‘that the Due Process Clause requires only that our Government must proceed according to . . . written constitutional and statutory provisions,’ which may be all that the original meaning of this provision demands.” (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 589 (2004))).

³³⁶ *See Fifth Amendment—Due Process—Void-for-Vagueness Doctrine—Sessions v. Dimaya*, 132 HARV. L. REV. 367, 372–73 (2018) (“The Court should be vigilant against this creep of separation of powers-based vagueness doctrine, which risks delegitimizing the Court and exposing it to the charge of Lochnerism. . . . Ambiguity, and thus some degree of vagueness, is tolerated—even presumed—to make the federal government run.”).

³³⁷ *See generally* John Hughes & Jeff Green, *In-Flight Smokes Entice Hundreds 20 Years After Ban*, BLOOMBERG (Apr. 12, 2010, 6:08 PM), <https://www.bloomberg.com/news/articles/2010-04-09/in-flight-smokes-entice-hundreds-to-break-law-20-years-following-u-s-ban> [<https://perma.cc/SPV2-QYCX>] (“‘There’s a reason it’s against the law to tamper with smoke detectors in the lavatory,’ [consultant John Eakin, of Air Data Research] said. ‘People must have tried it.’”).

³³⁸ 14 C.F.R. § 121.317 (2019); *see also* 49 U.S.C. § 46301 (2018).

regulations that are “necessary” to prohibit smoking.³³⁹ As a matter of fair notice and individual rights, everyone understands what can and cannot be done on airplanes. In applying separation of powers, however, anti-*Chevron* critics like Gorsuch and Thomas might think that notice and specificity are currently provided by the wrong branch.

Chevron’s nondelegation critics cannot distinguish circumstances where courts interpret ambiguous statutes from other contexts where agencies do the same thing.³⁴⁰ On the facts of *Chevron*, if it was an unconstitutional delegation for Congress to let the EPA decide what “stationary source” means, it should be equally unconstitutional for Congress to let courts make that decision. Either it is legislation to prescribe a specific meaning for “stationary source,” or it is not. As a matter of nondelegation doctrine, constitutional limits should apply regardless of whether the arguably legislating entity is an agency or a court. Contrary to *Chevron*’s critics, the charmingly oversimplified argument that only Congress “writes the laws” cannot stop agencies and courts from resolving statutory ambiguities. *Chevron*’s critics have never explained how much “nonlegislative” interpretation they think agencies and courts can exercise, but that line-drawing problem is one reason that Scalia—unlike Thomas and Gorsuch—rejected nondelegation cases like *A.L.A. Schechter* and *Panama Refining* as unredeemed outcasts.³⁴¹

It is not enough for *Chevron*’s critics to decry modern government by collecting eighteenth-century quotations that generically celebrate “separation of powers,” “three branches,” or “liberty.”³⁴² The Early American Republic did not confront the same sociological, technological, commercial, environmental, transportation, and labor issues that have affected later generations. In part, that is why eighteenth-century Americans often relied on state and local governments for regulatory solutions.³⁴³ The Constitution’s text and original history did not directly address the unforeseeable possibility that Congress

339 49 U.S.C. § 41706(e). See generally *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413–19 (1819) (discussing various flexible meanings of “necessary”).

340 Cf. Frank, *supra* note 316, at 1270 (noting inherent delegations of legislative power in both the enforcement and interpretation of statutes, whether by agencies or by courts).

341 See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (2001).

342 E.g., HAMBURGER, *supra* note 25, at 330, 336, 339, 359.

343 See WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 10 (1996); BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY* 3–43 (2001); Edward A. Purcell, Jr., *Evolving Understandings of American Federalism: Some Shifting Parameters*, 50 N.Y.L. SCH. L. REV. 635, 675–81 (2006).

would create legally interpretive agencies as a democratic response to nationally significant problems.³⁴⁴

To be more specific, when Article I created Congress, it did not prohibit Congress from creating agencies. Nor did Article I limit Congress's power to create agencies that interpret ambiguous statutes. Least of all did Article I and its Framers determine how courts should review agencies' interpretations of ambiguous statutes. The Constitution did not answer any of those questions because its Framers did not know they could exist. Despite *Chevron's* nineteenth-century antecedents,³⁴⁵ administrative deference and many other vital problems of administrative law raise twentieth-century issues, which must be answered for better or worse through political struggles within their own historical context.

To borrow an example from literature, if Washington Irving's eighteenth-century character Rip Van Winkle had slept for 200 years instead of 20, he might have howled at present-day agencies and their voluminous paperwork.³⁴⁶ But he also might have gasped at the number of federal judges and their dockets, yelped at the United States' continental breadth, and fainted at the millions of citizens who occupy such lands. None of those realities was imaginable in 1787, and as Justice David Souter powerfully explained:

[T]he Framers' surprise at, say, the [Fair Labor Standards Act], or the Federal Communications Commission, or the Federal Reserve Board is no threat to the constitutionality of any one of them "[W]hen we are dealing with words . . . like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."³⁴⁷

The people who framed and ratified Article I had no experience with congressionally created administrative agencies, nor with the pol-

³⁴⁴ This Article does not rely on heroic optimism or historical naivete about the political processes that have produced modern administrative bureaucracies—or any other legislation for that matter. See generally SAMUEL DECANIO, *DEMOCRACY AND THE ORIGINS OF THE AMERICAN REGULATORY STATE* (2015) (arguing that popular ignorance, partisan politics, and financial corruption were vital to the creation of late-nineteenth-century administrative statutes). In a broader historical context, however, such good and bad aspects of American democracy represent everything that the celebrated word “democracy” has ever truly meant for the United States government.

³⁴⁵ See *supra* Section II.A.

³⁴⁶ See *THE COMPLETE TALES OF WASHINGTON IRVING* 1–17 (Charles Neider ed., 1998).

³⁴⁷ *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting) (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (Holmes, J.)).

icy and political dynamics that have made them important. Eighteenth-century Americans could not see the future well enough to authorize or forbid the establishment of agencies that have their own authority to interpret federal laws. Given such historical ambiguities, anti-*Chevron* critics are certainly free to celebrate Congress's legislative power as a policy preference—but their crusade to invalidate large swaths of federal statutes is an odd way to express that sentiment.

B. *Marbury v. Madison*

Alongside criticism of *Chevron* as a delegation of legislative power, Roberts, Kennedy, Thomas, and Gorsuch articulated another critique of deference as an unconstitutional usurpation of adjudicative power from the courts. *Marbury* stressed the duty of federal judges “to say what the law is,”³⁴⁸ but that cliché does not specify what kind of “law” judges should be speaking about. From the very beginning, *Chevron*'s deference was a judicial interpretation of federal statutes, and it is therefore an example of judges' saying what the law is. *Chevron*'s key step was its institutional interpretation of statutes that created administrative agencies in the first place.³⁴⁹ Because *Chevron* requires courts to follow unambiguous statutory meanings, it simply prescribes which entity should “say what the law is” when Congress has not addressed a legal issue. That is altogether different from *Marbury*, which held that courts should declare the law's meaning when it is unambiguous.³⁵⁰ *Marbury* did not address any form of legal ambiguity, nor did it consider the interpretive authority of any federal agency.

Even if one disagrees with *Chevron*'s result, the decision represents the Supreme Court's own judicial effort to interpret congressional statutes concerning governmental structure. When Congress creates a substantive statutory provision that is unclear and also creates an agency with legal mechanisms of statutory interpretation, *Chevron* held that the agency can presumptively resolve legal ambiguities instead of courts. From a constitutional perspective, such administrative deference is an illustration of judicial interpretive authority rather than abdication of that authority.

Chevron deference limits federal courts' independent judgments about what is substantively right and wrong, but there are many contexts where federal courts do not consider substantive legal questions

³⁴⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

³⁴⁹ See *supra* text accompanying notes 77–78, 181.

³⁵⁰ See *Marbury*, 5 U.S. (1 Cranch) at 177–78.

de novo. Choice of law and *Erie* are circumstances where federal courts do not apply independent judgment about substantive law; instead, they apply standards that are borrowed from some other legal system.³⁵¹ Federal courts also have self-restricted their interpretive authority in contexts that involve executive power, foreign policy, qualified immunity, and habeas review of state convictions.³⁵² In each of those circumstances—as with *Chevron*—courts “say what the law is,” yet they perform that task one step removed from methods that they might use in other contexts, without other legal interpreters. For constitutional purposes, judges are still judging when their adjudicative process is complicated by the presence of other institutional entities and values.

At a sufficiently abstract level, statutory interpretation is *always* an effort to implement decisions from Congress as opposed to judges’ independent preferences, and *Chevron* is an example of that genre.³⁵³ Consider various ways that Congress unquestionably could have influenced judicial decision-making in a case like *Chevron*: Congress could have said that “stationary source” meant individual facility components, that the term meant industrial facilities as a whole, or that courts should apply either of those standards whenever one or the other seemed “reasonable.”³⁵⁴ Given Congress’s immense flexibility to achieve almost any legal outcome—without impeding judicial authority under Article III—it is hard to believe that the Constitution and *Marbury* uniquely prohibit Congress from prescribing *Chevron* deference. In effect, Congress defined “stationary source” as “*the EPA Administrator’s choice* between facility-based or component-based polluters, wherever federal courts find that the Administrator’s choice

³⁵¹ *Erie R.R. v. Thompkins*, 304 U.S. 64, 78 (1938) (holding that federal courts may not supplant state law with “what the judge advancing the doctrine [of general law] thinks at the time should be the general law on a particular subject” (quoting *Balt. & Ohio R.R. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting))).

³⁵² See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (executive power); *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2079 (2015) (foreign policy); *Ashcroft v. Al-Kidd*, 563 U.S. 731, 753 (2011) (Sotomayor, J., concurring in judgment) (qualified immunity); *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (habeas review of state convictions).

³⁵³ See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 6 (2012); Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 804 (2010) (“A deconstructionist view of interpretation . . . is inconsistent with the consensus among judges that they are the faithful agents of Congress in matters of statutory interpretation.”).

³⁵⁴ The last of these options seeks to mimic the result in *Chevron*, except that interpretive deference rests with judges instead of agencies.

is reasonable.”³⁵⁵ Rephrased that way, it is clear that courts retain constitutional authority under *Chevron* to “say what the law is,” even though Congress drafted applicable statutes—as it often does—to guide and restrict judges’ substantive decision-making, including their relationship to other government institutions.

One could debate what kind of statutory language should trigger *Chevron* deference, but *Marbury* should not constitutionally prevent Congress from choosing between administrative or judicial mechanisms to resolve statutory ambiguities. If *Chevron* were invalid under *Marbury*, Congress could not create any statutory structures for federal courts to defer on legal issues. That result would not only annihilate *Chevron*, *Auer*, and *Seminole Rock*. It would also condemn every example of less rigorous administrative deference that appears in the Appendix and Section II.B.³⁵⁶

To hedge against that kind of radical result, some critics have cheerfully speculated that, after *Chevron* is overthrown, courts might return to some kind of pre-*Chevron* regime where case-by-case deference depends on a particular agency’s expertise, the legal dispute’s technical nature, and the decision’s procedural thoroughness.³⁵⁷ For example, Gorsuch wrote that “[w]e managed to live with the administrative state before *Chevron*. We could do it again.”³⁵⁸ As a matter of constitutional law, however, the opposite is true. For purposes of *Marbury* and Article III, *Chevron*’s categorical deference is identical to pre-*Chevron* deference that varied in different circumstances. Administrative deference either violates *Marbury* by misallocating adjudicative authority, or it does not. That is why every living judge until recently reached the latter conclusion.

³⁵⁵ In a similar vein, Kavanaugh has objected that *Chevron* is misguided because it requires judges to decide whether statutory language is ambiguous. See, e.g., Brett Kavanaugh, *Separation of Powers*, C-SPAN (Oct. 25, 2017), <https://www.c-span.org/video/?436265-1/judge-brett-kavanaugh-speaks-separation-powers-2017> [<https://perma.cc/8Y5J-NFE9>] (video at 24:50); *supra* note 4. Kavanaugh has not claimed that pragmatic difficulties in deciding whether a statute is “clear” also cause constitutional problems. On the contrary, his citations to examples of statutory construction and the proper use of legislative history suggest that such objections concern judicial practice, not constitutional principles. See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2110–12 (1990) (noting that “[c]lear statement’ principles are omnipresent in current law”).

³⁵⁶ See *infra* Appendix; *supra* Section II.B (discussing examples of unsystematic administrative deference).

³⁵⁷ See *Egan v. Del. River Port Auth.*, 851 F.3d 263, 281 (3d Cir. 2017) (Jordan, J., concurring in judgment) (arguing that administrative deference should be limited to agencies that have “expertise” on “technical issues”).

³⁵⁸ *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

If *Chevron*'s critics are right—and Congress cannot create judicial deference for agencies that legislators deem more “expert,” “technical,” or “thorough” than judges—then courts certainly cannot apply administrative deference themselves through their own case-by-case ad hoc decisions. Particular judges might suppose that they are expert enough to decide union issues, antitrust issues, or environmental questions that rely on complex questions of fact, science, or policy. *Chevron* avoided such unsteady variation by having Congress decide when and how to limit judges' interpretive input. It is impossible to imagine that *Chevron*'s broad presumption is unconstitutional, yet pre-*Chevron* case-by-case deference is perfectly fine.

Unless courts altogether invalidate federal statutes on nondelegation grounds as discussed *supra*,³⁵⁹ *Marbury*-based critiques of administrative deference would require federal judges to render de novo decisions interpreting numerous statutory provisions. Examples include what qualifies as an “[u]nfair method[] of competition,”³⁶⁰ what is a “reasonable rate” for motor carriers,³⁶¹ when do occupational health or safety standards serve statutory “objectives,”³⁶² and should nonsmokers be punished for damaging airplane smoke detectors.³⁶³

Courts are not literally incapable of making those decisions, and where Congress has not created agencies to administer federal statutes, judges are required to resolve legislative ambiguities by necessity and default. Nevertheless, if courts suddenly started interpreting every administrative statute in the United States Code de novo, seeking to determine whether they would have reached the same result without applying interpretive deference, that would risk overturning every existing precedent that relied on *Chevron* or any other form of administrative deference.

Such scenarios would represent the most dramatic reversal of judicial precedent since *Erie* overturned one hundred years of “federal general common law” under *Swift v. Tyson*.³⁶⁴ In fact, overruling *Chevron* might be even more extreme because it would not simply affect judicial precedents. Overruling *Chevron* would undermine decades of federal legislation and administrative practice, while also lim-

³⁵⁹ See *supra* Section III.A.

³⁶⁰ 15 U.S.C. § 45(a)(1) (2018).

³⁶¹ 49 U.S.C. § 13701(d)(4) (2018).

³⁶² 29 U.S.C. § 655(b)(1) (2018).

³⁶³ 49 U.S.C. § 41706(e) (2018).

³⁶⁴ 41 U.S. (16 Pet.) 1 (1842); see Green, *supra* note 9, at 431, 439 (noting that *Erie*'s constitutional issues were not anticipated or briefed by the parties, nor were they mentioned by the District Court or Second Circuit panel).

iting the power of American democracy to require administrative deference in future contexts. Given such radical practical consequences, Gorsuch's description of post-*Chevron* administrative law seems misleading: "[I]t seems to me that in a world without *Chevron* very little would change—except perhaps the most important things."³⁶⁵ Only the second half of that sentence is correct.

C. *Due Process and Equal Protection*

In the Tenth Circuit case discussed *supra*, Gorsuch claimed that due process and equal protection constitutionally prohibit administrative deference when agencies have changed their statutory interpretation.³⁶⁶ Gorsuch wrote that overruling *Chevron* "would promote reliance interests by allowing citizens to organize their affairs with some assurance that the rug will not be pulled from under them tomorrow, the next day, or after the next election."³⁶⁷ Even if those concerns about stability seem generally plausible as a matter of judicial policy, they cannot justify overruling *Chevron* on constitutional grounds. There is no constitutional right to legal stasis or political insulation, and the Constitution does not prohibit the implementation of legal change through administrative agencies.

Gorsuch did not try to explain under standard constitutional doctrine how most or all examples of *Chevron* deference violate due process or equal protection. For example, neither of those constitutional provisions says that courts should resolve statutory ambiguities instead of an agency. On closer examination, Gorsuch's arguments did not apply to *Chevron* deference as a category, but only to narrower circumstances when an agency adjudication applies new precedent retroactively.

To understand this point, imagine an agency that construes an ambiguous federal statute for the first time. Such first-instance legal interpretation would receive full *Chevron* deference, but it would not raise any of Gorsuch's concerns about public reliance, due process, or equal protection. When an agency interprets an ambiguous statute

³⁶⁵ *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

³⁶⁶ *Id.* at 1146 (majority opinion) ("The due process and equal protection concerns . . . apply to this case . . . because the retroactive application of new penalties to past conduct that affected persons cannot now change denies them fair notice of the law and risks endowing a decisionmaker expressly influenced by majoritarian politics with the power to single out disfavored individuals for mistreatment.").

³⁶⁷ *Id.* at 1158 (Gorsuch, J., concurring).

and does so “reasonably,” that does not violate public expectations, much less does it violate constitutional rights.

Gorsuch’s arguments are also irrelevant when agencies change an existing interpretation of ambiguous statutes through notice and comment rulemaking, as happened in *Chevron* itself. The Carter Administration had interpreted “source” to regulate individual smokestacks, but the Reagan Administration said that “source” regulated industrial plants as a whole.³⁶⁸ Under both scenarios, it was clear that Congress itself had not answered such questions, and there was no legitimate basis for the public to think that Carter’s rule would last forever. Reagan’s EPA followed ordinary administrative procedures to change the agency’s regulations, and there was no unconstitutional surprise when its new legal standards were announced.³⁶⁹ The same is true in rare cases of prospective administrative adjudication.³⁷⁰ In many scenarios where agency interpretations receive full *Chevron* deference, normal procedures give regulated entities adequate notice and opportunities to object or adapt. Due process problems arise from deprivations of “life, liberty, or property,” not from the mere fact of interpretive change, much less from the application of administrative deference.³⁷¹ In most contexts, Gorsuch’s effort to link due process and equal protection with anti-*Chevron* arguments are a distraction that diverts discussion by reference to inapplicable legal categories.

Gorsuch’s objections are only pertinent when an agency adjudication applies new regulatory burdens retrospectively, without providing a chance for regulated entities and individuals to adapt.³⁷² With respect to that small fraction of circumstances that apply *Chevron*, Gorsuch explained that “the equal protection problems are obvious . . . : if the agency were free to change the law retroactively based on shifting political winds, it could use that power to punish politically disfavored groups or individuals for conduct they can no longer alter.”³⁷³ Of course, there was no factual allegation that any kind of political punishment actually occurred in the Tenth Circuit’s case, and once again, this could not support constitutional arguments against *Chevron* or administrative deference as a legal category. On the contrary, despite

³⁶⁸ See *supra* Section I.A.

³⁶⁹ See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 840–41 (1984).

³⁷⁰ See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (analyzing an agency’s prospective adjudication without any discussion of due process, equal protection, or other provisions of constitutional law).

³⁷¹ U.S. CONST. amend. V.

³⁷² See *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring).

³⁷³ *Id.* at 1146 (majority opinion).

Gorsuch's vivid language about "elephants," his due process and equal protection arguments only challenged agencies' relatively narrow authority to apply new precedents retrospectively through adjudication.

Even in the limited context of applying new administrative precedents, Gorsuch's argument has troublesome implications for federal judges, who often use retrospective adjudication to change precedents in unexpected ways. Courts in civil cases regularly overturn precedents or offer new statutory interpretations, just like the agency in Gorsuch's case. Whenever that happens, courts very often apply their new results to the litigants at hand, thus regulating parties' behavior even though it occurred in the past. Some people fear that judges—no less than agencies—change their rulings in response to "shifting political winds." And certain legal changes—by agencies and courts alike—can arise from the addition of new government personnel, quoting Gorsuch's words, "after the next election."³⁷⁴ Gorsuch made no effort to explain whether his individual rights critique of retrospective adjudication should apply with equal force to judges and agency adjudicators alike. Much less did any of his concerns relate to *Chevron* deference as a whole.

If judges are allowed to change their minds about civil precedents without violating constitutional rights, then similar reversals or clarifications by administrative agencies should be permissible through administrative adjudication. By contrast, if an agency that announces a new precedent or reverses an old one somehow violates constitutional rights, so should similar changes with respect to judicial precedents. To complete the comparison, it would not have violated due process or equal protection if the D.C. Circuit had changed its own judicial interpretation of "stationary source" in 1984, analogous to the EPA's changed regulatory interpretation in *Chevron*. Nor would it have violated constitutional rights for the Tenth Circuit to change the relative priority of immigration laws by announcing a new precedent, just like the agency did in Gorsuch's case. Sudden and retroactive legal changes occur in any adjudicative system because the power to make precedents implies a corresponding power to unmake and reverse them. The ordinary safeguard against sudden precedential change—

³⁷⁴ See *id.* at 1158 (Gorsuch, J., concurring) (discussing how certain legal changes can negatively affect a citizen's reliance interests). Gorsuch himself was appointed after President Trump's election as a result and also a confirmation of "shifting political winds." *Id.* at 1146 (majority opinion); see Adam Liptak, *Adding Gorsuch, a Polarized Supreme Court Is Likely To Grow Even More So*, N.Y. TIMES, Apr. 10, 2017, at A9.

by either agencies or courts—is *stare decisis* rather than due process or equal protection.

There is a profound irony in contrasting Gorsuch’s arguments about adjudicative stability and constitutional reliance with his eagerness to create massive legal disruption by overturning *Chevron*. There is also a more subtle tension, however, between Gorsuch’s anti-*Chevron* arguments in the Tenth Circuit and his vote on the Supreme Court to support President Trump’s “travel ban.”³⁷⁵ In *Trump v. Hawaii*, the Court upheld restrictions on immigrant and nonimmigrant visas for five countries—Iran, Libya, Somalia, Syria, and Yemen—whose populations are almost entirely Muslim.³⁷⁶ As a statutory matter, the Court upheld the President’s judgment that it “would be detrimental to the interests of the United States” for such foreign citizens to enter the country.³⁷⁷ Roberts’s majority opinion explained that such statutory language “grants the President broad discretion” and “[b]y its terms . . . exudes deference to the President in every clause.”³⁷⁸ The Court effectively refused to evaluate the substance of presidential arguments about national security because doing so would be “inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere.”³⁷⁹

None of *Chevron*’s critics—including Roberts himself—mentioned their concerns from other legal contexts about statutory delegations and judicial abdication that involved similarly “broad statutory text” and “deference traditionally accorded” to agencies.³⁸⁰ With respect to separation of powers, the five-Justice majority in *Trump v. Hawaii* held that courts should grant almost limitless deference to unsubstantiated and implausible presidential arguments about national security, thus refusing to express any independent judgment

³⁷⁵ *Trump v. Hawaii*, 138 S. Ct. 2392, 2402, 2437 (2018).

³⁷⁶ *See id.* at 2423; *Iran*, CIA: THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html> [<https://perma.cc/U8CK-7GDT>]; *Libya*, CIA: THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ly.html> [<https://perma.cc/W837-AT3T>]; *Somalia*, CIA: THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> [<https://perma.cc/TZ5N-XGUC>]; *Syria*, CIA: THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html> [<https://perma.cc/NPJ6-47FK>]; *Yemen*, CIA: THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ym.html> [<https://perma.cc/UU6M-QJXU>].

³⁷⁷ *Trump*, 138 S. Ct. at 2403 (quoting 8 U.S.C. § 1182(f) (2018)).

³⁷⁸ *Id.* at 2408.

³⁷⁹ *Id.* at 2409.

³⁸⁰ *Compare id.* (approving broad executive discretion), with *supra* Section III.A (discussing nondelegation critiques of *Chevron*).

about “what the law is” for the vague statutory standard “detrimental to the . . . United States.”³⁸¹

By rejecting claims about religious discrimination, the Supreme Court held that facial neutrality and unexamined policy justifications were enough to counteract Trump’s public statements derogating Muslims.³⁸² More than any other case in this Article, the travel ban did represent—in Gorsuch’s words—a bureaucratic choice “to change the law retroactively based on shifting political winds,” using governmental power “to punish politically disfavored groups or individuals for conduct,” including their nationality, that “they can no longer alter.”³⁸³ There may be technically credible ways to reconcile Gorsuch’s opinion on the Tenth Circuit with his unexplained vote in the Hawaii case.³⁸⁴ But that only highlights persistent uncertainties about how broad or narrow Gorsuch’s individual rights critique could become if it were taken seriously.

Ordinary due process cases focus on identifying protected “liberty” and “property” interests, while ordinary equal protection precedents emphasize “suspect classifications” like race.³⁸⁵ None of those standards apply to *Chevron* deference as a legal category or general practice. Gorsuch would certainly surprise some observers if he sought to recognize new and innovative forms of liberty and equality, scrutinized adjudications by courts like those of agencies, or showed special solicitude for “politically disfavored groups.”³⁸⁶ If Gorsuch does not pursue those broader constitutional projects in the future, his anti-*Chevron* paean to individual rights might be characterized as a “ticket good for one day only,” or perhaps for only one anti-adminis-

381 *See id.* at 2403, 2406 (noting, among other things, the President’s claim that his policy of singling out citizens of Chad for special travel restrictions would increase American national security). *Trump v. Hawaii* involved Article I delegation of authority to the President to determine what “would be detrimental to the interests of the United States.” *Id.* at 2408. And it also arguably involved delegation of judicial authority under Article III to “say what the law is,” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), insofar as the President exclusively determined what the statutory phrase meant. *See id.* at 2409. For additional arguments that extreme administrative deference with respect to national security contradicts constitutional lessons from World War II and the Global War on Terror, see Craig Green, *Ending the Korematsu Era: An Early View from the War on Terror Cases*, 105 NW. U. L. REV. 983 (2011).

382 *Trump*, 138 S. Ct. at 2417–21.

383 *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1146 (10th Cir. 2016).

384 One example is Thomas’s suggestion in *Dimaya* that deporting immigrants might be an inherent constitutional power of the President. *See Trump*, 138 S. Ct. at 2424 (Thomas, J., concurring).

385 *San Antonio Indep. Sch. Dist. v. Rodriguez* 411 U.S. 1, 40 (1973); *see also* *Martinez v. Bynum*, 461 U.S. 321, 328 n.7 (1983); *Paul v. Davis*, 424 U.S. 693, 701–02 (1976).

386 *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1146 (10th Cir. 2016).

trative context.³⁸⁷ Gorsuch’s puzzling invocation of due process and equal protection could require state courts to examine their own doctrines of administrative deference and judicial precedent in order to satisfy his unprecedented and ill-defined ideas about federal constitutional rights—all under the paradoxical banner of protecting legal stability. At present, observers can only wait for doctrinal development and clarity with an appropriate mixture of skepticism and concern.

D. *English History*

Philip Hamburger’s book in 2014, *Is Administrative Law Unlawful?*, made him the most prolific anti-*Chevron* critic in United States history.³⁸⁸ Blazing the trail for scholars like Bamzai, Hamburger traced a long historical arc from England in the 1500s to present-day America.³⁸⁹ Drawing analogies to old English conflicts about royal prerogative power, Hamburger claimed that all modern regulation of private persons is unlawful whenever the federal government acts outside of legislative statutes and adjudicative courts.³⁹⁰

Hamburger asserted that revolutionary Americans—especially under the post-revolutionary Constitution—rejected administrative government more completely and coherently than their English precursors.³⁹¹ Hamburger admitted that “extralegal” prerogative was not necessarily “unlawful[] or without legal authorization” in England, yet he proposed that new Americans in the eighteenth century rejected federal administrative governance as an issue of constitutional law.³⁹² From Hamburger’s perspective, the conceptual ingredient that bound all of these Anglo-American examples together is the government’s effort to restrict individuals through “extralegal edicts” that are not produced by legislative statutes or adjudicative courts.³⁹³ Scholars have debated various aspects of Hamburger’s historical account, analytical architecture, and practical conclusions.³⁹⁴ This Section will join those debates by identifying difficulties that arise from

³⁸⁷ Richard M. Re, *On “A Ticket Good for One Day Only”*, 16 GREEN BAG 2D 155, 155–57 (2013).

³⁸⁸ This Article will focus on Philip Hamburger’s longest work, *Is Administrative Law Unlawful?*, HAMBURGER, *supra* note 25, and his most recent article, *Early Prerogative and Administrative Power: A Response to Paul Craig*, Hamburger, *supra* note 28.

³⁸⁹ See HAMBURGER, *supra* note 25, *passim*.

³⁹⁰ See *id.* at 133–40; Hamburger, *supra* note 28, at 978.

³⁹¹ See Hamburger, *supra* note 28, at 957.

³⁹² *Id.* at 940–41.

³⁹³ *Id.* at 945.

³⁹⁴ See *id.* at 939 n.2 (citing Paul Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight* 2–4 (Univ. of

applying Hamburger's thesis against *Chevron*. Some of those problems involve Hamburger's use of colonial history, early American history, and arguments that seek to transcend history altogether.

1. Colonial English History

First, as a matter of English history, it was impossible for legal institutions in the 1600s and 1700s to address the kinds of institutional questions that determine *Chevron's* constitutional status today. Parliament in the seventeenth and eighteenth centuries never created "legally interpretive agencies" like the ones that have emerged under modern governments.³⁹⁵ No one ever considered whether Parliament could hypothetically grant deference to hypothetical agencies that administer hypothetical statutes governing large parts of public life. In this respect, abstract principles of government spanning four hundred years of transatlantic legal practice are the intellectual products of modern times and thinkers, rather than authentic historical ones.

Even if Parliament had created legally interpretive agencies hundreds of years ago, English courts did not have authority to invalidate them. Unlike the United States Constitution—which is a supermajoritarian written document—the English constitution includes various statutes, parliamentary conventions, judicial decisions, and legal interpretations.³⁹⁶ And unlike federal courts that reject congressional statutes if they are unconstitutional, English courts are bound to follow parliamentary acts even if they violate constitutional norms and practice.³⁹⁷

Consistent with those institutional realities, Hamburger's book collected examples of English courts that criticized the King's royal prerogative but did not invalidate parliamentary statutes, and he listed episodes where *Parliament itself* repealed or revised legislation without any reaction from English courts.³⁹⁸ Because England's legal institutions were so different from American ones, however, there could

Oxford Legal Research Series, Paper No. 44, 2016) (debating Hamburger's historical account)); Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015) (reviewing HAMBURGER, *supra* note 25).

³⁹⁵ See *supra* text accompanying notes 342–47.

³⁹⁶ See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 4–7 (8th ed. 1982).

³⁹⁷ *Id.* at 37–38.

³⁹⁸ E.g., HAMBURGER, *supra* note 25, at 37–38, 47, 135–36, 138; see Hamburger, *supra* note 28, at 943 nn.10 & 12, 949–50 nn.37 & 39, 955; see also An Act for [the Regulating] the Privie Councill and for Taking away the Court Commonly Called the Star Chamber 1640, 16 Car. I c. 10 (Eng.); An Act for Repeal of a Branch of a Statute Primo Elizabethe Concerning Commissioners for Causes Ecclesiasticall 1640, 16 Car. I c. 11 (Eng.).

never be any English precedents requiring *federal courts* to invalidate administrative deference that *Congress authorized*, especially when administrative deference itself represents a judicial interpretation of relevant federal statutes. Anti-*Chevron* efforts to abolish deference and prohibit future Congresses from authorizing similar deference in the future were institutionally inconceivable under English law.

Hamburger claimed that English lawmaking was always “extralegal” whenever it occurred outside of legislative statutes and adjudicative courts, but that depends entirely on the word “legal.” Some forms of royal prerogative were not “legal” because they were never authorized by Parliament, while others like the Star Chamber and Court of High Commission were “extralegal” because Parliament abolished them and they violated individual rights.³⁹⁹ Neither of those problems about “legality” has anything to do with the modern administrative state and *Chevron*. For example, the EPA was explicitly created by Congress and President Nixon, and the agency does not impose criminal punishment without juries like English ecclesiastical and prerogative courts. It is quite uncertain whether administrative agencies like the EPA would have been “extralegal” in Hamburger’s sense of the word if Parliament had somehow created such entities in the 1700s.

Would legally interpretive agencies have been “non-statutory” and “extralegal”—as Hamburger argued—because their regulations and adjudications were promulgated through mechanisms other than statutes and court decisions? Or would they have been “statutory” and “intralegal” because the agencies themselves were created, defined, and limited by parliamentary statutes? Such questions remain hypothetical as a historical matter. Modern agencies certainly would have been different from legally orthodox institutions that existed three or four hundred years ago. But they also would have been different from the historically “extralegal” institutions that Hamburger criticized.

In the twentieth and twenty-first centuries, it is very clear that modern American agencies exist and operate inside of federal statutes, not outside of them. The “intralegal” status of modern agencies does not depend on how early English jurists might have described modern circumstances that they could not possibly imagine. With extraordinary creativity, Hamburger advocated “ideals” of government that stretched across several centuries and 4,000 miles, while also crafting subtle exceptions to deal with counter-evidence. Yet his En-

³⁹⁹ Hamburger, *supra* note 28, at 949, 955.

glish history is categorically different from the constitutional circumstances of *Chevron* and other statutory deference. Hamburger acknowledged in candor that “the English did not apply . . . constitutional ideals against extralegal power as systematically as did Americans” and that “none of this [English history] was determinative of what Americans would do” in crafting their own constitutional law.⁴⁰⁰ But those concessions about the questionable relevance of English history raises the burden of proof for Hamburger to identify a clear shift in eighteenth-century America, while also raising methodological questions about why he spent so much time on old English history in his effort to criticize modern law and politics.⁴⁰¹

2. *Eighteenth-Century American History*

When it comes to early American history, Hamburger did not quote speeches or documents from the American Revolution, Articles of Confederation, and Constitution that opposed “extralegal” agencies and administrators as a general category. Many Americans opposed specific taxes and tribunals,⁴⁰² yet they did not inherit Hamburger’s antipathy to extralegal governance through some miracle of legal genetics. On the contrary, British North Americans lived for centuries under a broadly accepted legal system that included royal prerogative in the colonies.⁴⁰³ When vigorous protests finally surfaced in the late 1760s, they centered on particular objections to parliamentary taxes, interference with colonial assemblies, trade policies, local representation, and imperial abuse that did not always coincide with Hamburger’s tight focus on “extralegal” forms of administration.⁴⁰⁴

As a chronological matter, revolutionaries *first of all* objected to legislative statutes passed by Parliament and *only as a last resort* at-

⁴⁰⁰ *Id.* at 954, 957.

⁴⁰¹ See Green, *supra* note 13.

⁴⁰² For example, there certainly were objections to juryless criminal trials during the late colonial period. Nancy Jean King, *The American Criminal Jury*, 62 L. & CONTEMP. PROBS. 41, 42 (1999). But that issue has only very abstract connections to *Chevron*, the EPA, or the administrative state. Juries obviously decided particular cases, for example, but they did not issue broad statements interpreting federal statutes analogous to statutory interpretation by modern agencies and courts.

⁴⁰³ Hamburger, *supra* note 28, at 971.

⁴⁰⁴ For standard works in this area, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* (1986); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* (1998).

tacked nonlegislative policies from the King.⁴⁰⁵ The Declaration of Independence did not explicitly mention Hamburger's categorical objections to extralegal lawmaking. Instead, Americans complained about Britain's refusal and obstruction of their own (arguably illegal) laws more than they rejected British efforts to enforce administrative law through improper institutional mechanisms.⁴⁰⁶

The 1770s and 1780s would have been an especially awkward time for Americans to insist on formal governmental channels and fastidious lawmaking procedures because revolutionaries themselves often used a mixture of vigilante justice and self-authorized "congresses" to achieve their legal and political goals.⁴⁰⁷ For example, the Second Continental Congress was a dominant mechanism for pursuing American war and independence, but one historian called that ramshackle group of politicians "the first government of the United States, and no doubt the strangest government we have ever had."⁴⁰⁸ Americans had no legal charter at all until they ratified the Articles of Confederation in 1781, and even that document did not target the kind of central administrators and agencies that Hamburger demonized.⁴⁰⁹ The Articles established most of the central government's powers without providing any explicit directions about how they should be implemented.

In practice, Americans explicitly authorized irregular legal institutions whenever it seemed to them appropriate.⁴¹⁰ For example, one of the Articles' provisions declared that property disputes over "the private right of soil claimed under different grants of two or more States" should be resolved by an ad hoc interstate commission instead of a judge or jury.⁴¹¹ The Articles created a "Committee of the States"—different from the full Congress—that would exercise broad legislative authority during legislative recess, with an explicit license "to appoint such other committees and civil officers as may be necessary for managing the general affairs of the united states under their

⁴⁰⁵ BRENDAN McCONVILLE, *THE KING'S THREE FACES: THE RISE & FALL OF ROYAL AMERICA, 1688–1776* 255 (2006).

⁴⁰⁶ See *THE DECLARATION OF INDEPENDENCE* paras. 2–4 (U.S. 1776).

⁴⁰⁷ See Tara Helfman, *Crown and Constitution*, 128 *HARV. L. REV.* 2234, 2245 (2015) (book review) (discussing how the "Intolerable Acts in North America" in the 1770s and 1780s led to "a wave of violent resistance in Boston and prompted the colonies to summon the First Continental Congress.").

⁴⁰⁸ PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* xxi (1997).

⁴⁰⁹ See *ARTICLES OF CONFEDERATION* of 1781, arts. V, IX.

⁴¹⁰ See *id.* art. IX.

⁴¹¹ *Id.* paras. 2–3.

direction.”⁴¹² Hamburger claimed that Americans were uniquely “systematic[]” in opposing all legal authority other than ordinary legislation and adjudication.⁴¹³ Yet the Revolution and Articles also reveal contrary tendencies based on institutional flexibility and pragmatism, just as one might expect under the dire circumstances of rebellious improvisation.

In preconstitutional America, the most widely debated structural issue was federalism—not separation of powers—and state governments were especially flexible and innovative about new forms of law-making. Early state constitutions did not prohibit “extralegal” governance any more than the Articles, and throughout the nineteenth century, states employed far more numerous and elastic administrative tools than the federal government.⁴¹⁴ Hamburger intellectually disregarded the administrative practice of eighteenth-century states by asserting his own “local” exception to Americans’ supposedly “systematic” opposition to “extralegality.”⁴¹⁵ Yet the term “local” is in the eye of the beholder, especially because most states were larger than any “locality” under English law, and four states were bigger than England as a whole.⁴¹⁶ Hamburger claimed that Americans’ revolution against Britain was a struggle against extralegal government. But he produced very little evidence of that struggle based on revolutionary propaganda and formative legal documents that have been well-studied by historians for generations.

⁴¹² *Id.* para. 5.

⁴¹³ Hamburger, *supra* note 28, at 957.

⁴¹⁴ Hamburger explicitly acknowledged that state constitutions, despite and alongside their “stated principles” concerning legal government, routinely allowed “local administrative power.” *Id.* at 965. His evidence is much more sparse in claiming that “federalism allowed Americans in the U.S. Constitution to establish strong principles against extralegal power, without the sort of tension between constitutional principles and localized administrative practices that was evident in states such as Virginia.” *Id.* at 966. Some authors view eighteenth-century federalism as a much more improvisational enterprise. See Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 MICH. L. REV. (forthcoming 2021).

⁴¹⁵ See Hamburger, *supra* note 28, at 940 (“Although the English did not directly apply these principles to their inherited and mostly localized administrative power, Americans in the U.S. Constitution pursued their constitutional principles more systematically.”).

⁴¹⁶ See HAMBURGER, *supra* note 25, at 100–01 (recalling a local government conflict arising from a dispute in Fairfax County, Virginia over the construction of a new courthouse). Compare *United Kingdom*, NATIONS ENCYCLOPEDIA, <https://www.nationsencyclopedia.com/Europe/United-Kingdom.html> [<https://perma.cc/V7XL-TXJQ>] (describing England at the time of the American Revolution), with *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU, <https://www.census.gov/geographies/reference-files/2010/geo/state-area.html> [<https://perma.cc/HEA8-YVB6>] (describing the size of revolutionary North Carolina, New York, Georgia, and Virginia, which included what modern people call West Virginia).

Instead of focusing on revolutionary history, Hamburger mostly referred to documents from a decade later, including the Constitution's text and the *Federalist Papers*.⁴¹⁷ Those documents certainly indicate general objections about "separation of powers," but they do not explicitly mention Hamburger's concerns about "extralegal" governance, administrative agencies, or statutory delegations of power.⁴¹⁸ The latter issues simply were not high priorities, and they did not speak to the historical crisis that produced the Constitution.⁴¹⁹ Everyone agrees that separation of powers was constitutionally important, and such ideas were cited by public advocates who wanted the public to ratify America's new three-headed government.⁴²⁰ What is missing from Hamburger's account is precision about what those general concepts from the eighteenth century should mean for modern agencies and administrative deference. Without more historical evidence, one presumption is that they were not directly addressed because they did not seem sufficiently important.

Hamburger candidly acknowledged that the new federal government regularly used "extralegal" power to allocate federal land, regulate trade with Native Americans, govern United States territories, license coastal and fishing vessels, manage pensions, instruct tariff collectors, run the post office, and a great deal else.⁴²¹ However, Hamburger largely discarded those actions as irrelevant because they did not "bind" subjects of the United States, and thus they were not "'really' legislative" acts.⁴²² As a historical matter, it is not clear that eighteenth-century actors followed Hamburger's clever architecture and nuanced line-drawing. For example, the Constitution's term "legislative Powers" is obviously broader than Hamburger's approach to laws that "bind."⁴²³ There are many federal laws that do not "bind" in that respect, and the eighteenth-century Constitution did not incorporate Hamburger's twenty-first-century redefinition of "'really' legislative" acts.⁴²⁴

417 See HAMBURGER, *supra* note 25, at 104–06.

418 See, e.g., THE FEDERALIST NO. 47 (James Madison) (John C. Hamilton ed., 1864).

419 See MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016); GEORGE WILLIAM VAN CLEVE, WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION (2017).

420 See, e.g., THE FEDERALIST NO. 47, *supra* note 418, at 373–74 (James Madison).

421 See HAMBURGER, *supra* note 25, at 100–06.

422 *Id.* at 93–95, 100–01.

423 U.S. CONST. art. I, § 1; see also HAMBURGER, *supra* note 25, at 84–85. See generally *INS v. Chadha*, 462 U.S. 919 (1983) (imposing legislative procedures under Article I, Section 8 upon an administrative action that increased individual liberties rather than taking them away).

424 See HAMBURGER, *supra* note 25 at 93–95, 100–01.

For present purposes, the important issue is what standard of proof should be used in analyzing examples of administrative practice in early America.⁴²⁵ Hamburger's book repeatedly argued that eighteenth-century practice offered no "precedent" for modern administrative law, and this Article is not the place to resolve those well-traveled historical debates.⁴²⁶ The question is whether there is "precedent" for *judges to strike down a congressional statute* based on contested theories about "extralegality." Citing well-known sources, Hamburger showed that some eighteenth-century Americans feared an overwhelmingly powerful central government, and everyone understands on the other side that some Americans also feared an unsustainably weak central government.⁴²⁷ Separation of powers and federalism were structural principles that sought to alleviate fears of governmental overreach. Yet those principles were often enforced through everyday politics and voting structures rather than courts and abstract legal theories.⁴²⁸

The key doctrinal issue for current *Chevron* debates is whether the Constitution created enforceable limits on administrative deference based on the separation of powers, which historical and modern courts could use to invalidate democratic political decisions. Perhaps such principles were more analogous to political benchmarks than legal commands. Everyone can read the Constitution's provisions about juries, searches and seizures, and cruel punishments.⁴²⁹ But what did the Framers, the ratifying convention, eighteenth-century judges, or anyone else think about administrative governance under the National Labor Relations Board or the Federal Trade Commission?

Hamburger claimed that abstract notions of "extralegal" government yield an obvious answer: administrative law is categorically unlawful. But none of the episodes and debates that he collected from old England or new America is sufficient to show that his own twenty-first-century ideologies were quietly encapsulated in the eighteenth-century Constitution. Apparently, such principles were even more silently forgotten by the generations that followed. Regardless of whether Hamburger's thesis is evaluated as a purely historical narra-

425 *See id.* at 84–85 ("Legislative power naturally was the power to make binding rules The natural core of legislative power, however, was the power to make rules that bound or constrained subjects.").

426 *See id. passim.*

427 *See id.* at 329–30; MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE (2003).

428 HAMBURGER, *supra* note 25, at 325–28.

429 *See* U.S. CONST. amends. IV, VII, VIII.

tive or as a normative critique of modern institutions, this Article finds more reasons for skepticism than confidence.

3. *Timeless History*

A third problem with Hamburger's research is the timeless dimension that infects his ostensibly historical arguments. Hamburger did not identify particular eras when England was especially rigorous or lax in enforcing prohibitions against extralegal governance. Instead, he simply generalized that "English constitutional ideals went in divergent directions."⁴³⁰ Hamburger tentatively wrote that Englishmen "developed *at least some* constitutional ideals that rejected extralegal power" at an unspecified moment in the 1700s, but he also acknowledged that the practice of "administrative power could be in tension with these ideals."⁴³¹ Some historians might want more factual information about those sophisticated debates and contested issues, yet performing that kind of descriptive work—which has its own benefits and limitations—was not Hamburger's intellectual focus.

Hamburger also did not cite specific episodes from the American Revolution, the American Constitution, or the centuries of British North American colonialism in order to explain precisely when or how "Americans inherited some ideals that cut generally against extralegal power."⁴³² Instead, he argued without citation that "localized administrative power [e.g., state practice] was not a source of constitutional ideals but an awkward deviation from them."⁴³³ Several other "deviations" have been listed *supra*, including federal territorial government, regulation of Americans' contact with Native Americans, water transport, and other purportedly "cross-border matters."⁴³⁴

In this sense, even though Hamburger's book is brimming with facts and details, his objective was not to write a full history of extralegal power in Anglo-American governance. Such research would have required ten times more pages. Hamburger also did not write an intel-

⁴³⁰ Hamburger, *supra* note 28, at 959.

⁴³¹ *Id.* (emphasis added); *see also id.* at 976 ("[M]y argument is that some English constitutional principles were broad enough to be in tension with administrative power in England, but that such principles were not typically applied to administrative power."); *id.* at 954 ("The primary point about the English is not that they obliterated all extralegal power, but rather that they explored constitutional ideals that generally rejected such power. Such ideals barred at least centralized extralegal power—although there were exceptions (evident from general warrants, Privy Council duties on American goods, and the powers of excise commissioners and their officers).").

⁴³² *Id.* at 957.

⁴³³ *Id.* at 964.

⁴³⁴ *Id.* at 966.

lectual history of lawyers from the past who supported and resisted such power over time. Most precisely, Hamburger carefully gathered evidence from diverse historical contexts in order to support his own peculiar vision of a philosophical struggle: “one of the most fundamental of legal problems” that can be found anywhere and everywhere.⁴³⁵ Hamburger claimed that “[i]n a system of law”—any system of law—“there is a persistent danger that rulers will be tempted to govern through other mechanisms, and this has led to a lasting tension between rule through the avenues of law (the acts of the legislature and the courts) and rule through other paths.”⁴³⁶ According to Hamburger, “[t]he problem of extralegal power is enduring,” maybe even immortal, “and it is a profound mistake to ignore this reality.”⁴³⁷

Like many other purportedly ageless truths, Hamburger’s claims about the enduring “reality” of “extralegal power” can be illustrated, but they can never be conclusively proven.⁴³⁸ Even in the American context, Hamburger admits that his aim “is not merely to understand the Constitution’s rejection of extralegal power Even more seriously, the goal is to recognize history as a form of experience, from which one can learn about recurring human dangers and the possible solutions.”⁴³⁹ Such dramatic language reveals Hamburger’s overarching purpose: describing timelessly universal articles of faith about human nature and political life. Despite Hamburger’s focus on Anglo-America, and to some extent Germany, it is important to understand that his book’s account of omnipresent “human dangers” is only loosely associated with specific particular moments, people, and places.⁴⁴⁰

Even for professional historians, timeless arguments are not always wrong, but there are well-known problems that typify the genre. For example, if Hamburger is correct that struggles over legal and extralegal power have lasted five hundred years, with unspecified ups and downs over time, why should today’s present moment be the right time to “reconsider the lawfulness of administrative law”?⁴⁴¹ If

⁴³⁵ *Id.* at 962.

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ *See id.*

⁴³⁹ *Id.*

⁴⁴⁰ *See* HAMBURGER, *supra* note 25, at 9 (“[T]he argument here, although partly doctrinal, is more substantively from the underlying danger.”); *id.* at 495 (characterizing the book’s theme as “persistent tendencies in human nature,” “a recurring danger,” and “confined neither to monarchies nor to the past”).

⁴⁴¹ *Id.* at 1.

Hamburger is correct that dozens of generations—in America and elsewhere—have survived without undertaking his prescribed reforms, the argument for political urgency might dissipate, somewhat like the bumper-sticker joke: “Stop Plate Tectonics Now!” Hamburger claimed with deliberately vivid prose that “prerogative power has crawled back out of its constitutional grave and come back to life in administrative form.”⁴⁴² But if one cannot know when administrative law was buried, nor the moonless night when it revived, it is impossible to guess what kind of “dangers” are truly at stake. If all Americans have lived their lives under the inherent “danger” of administrative law—just like their parents, grandparents, great-grandparents, and so on—then the rhetorical drama fades again. By contrast, if American governments have unwittingly violated the Constitution for a hundred years or more—building established institutions, societies, safeguards, and expectations—the costs of suddenly lunging toward Hamburger’s imagined purity and redemption might be enormous.

This Article suggests that questions of historical chronology are extremely important to deciding which institutions should undertake reform. As a constitutional matter, the framers did not explicitly codify Hamburger’s “systematic” opposition to extralegal governance. They did not incorporate such principles when it came to organizing state governments. They did not mention Hamburger’s exceptions for “local” and “cross-border” regulation. And apparently they did not succeed in transmitting such ideas to their contemporaries or successors, which is why Hamburger’s arguments until recently would have seemed radical and heterodox.

As each generation of Americans confronted new circumstances, pursued new liberties, and feared different “dangers,” federal and state politicians responded by creating legally interpretive agencies and administrative law. All of those entities have been authentic examples of American politics and democracy, despite their varied historical contexts and flawed practical results. That is why so many advocates and critics of the administrative state have argued—unlike Hamburger and other anti-*Chevron* critics—that the benefits and dangers of administrative deference should be addressed through institutions of political struggle instead of constitutional litigation.

Along with other anti-*Chevron* critics, Hamburger has twisted substantive attacks on “big government” from the Reagan era to support very anti-Reagan institutional conclusions. And even though his

⁴⁴² *Id.* at 494.

broad constitutional arguments seek to transcend space and time, that strategy itself has emerged from a very specific historical moment. It has only been a few years since legal conservatives started to radically reimagine separation of powers and constitutional structure. Like Hamburger, many conservatives have deflected Reagan-era charges of judicial activism by attaching their constitutional arguments to a vague and distant past that must be restored and redeemed, thus short-cutting burdensome delays associated with political struggle and debate. Unfortunately, the historical evidence supporting constitutional critiques of *Chevron* appears to be significantly weaker than such critiques' political support among certain circles of modern conservatives.⁴⁴³

CONCLUSION

Chevron's constitutional demise would have seemed nearly impossible a few years ago, but now the signs are everywhere. Justice Kennedy's concurrence in *Pereira* quickly prompted certiorari petitions that have questioned *Chevron's* constitutional validity.⁴⁴⁴ Hamburger has founded a public interest law firm to litigate the unconstitutionality of *Chevron* and administrative law, and Bamzai also filed a Supreme Court brief to litigate questions about *Chevron*.⁴⁴⁵ This Article cannot hope to stem the tide, which has extensive political support outside the world of courts and lawyers.⁴⁴⁶ Instead, the point is that trying to restrict or repeal *Chevron* on constitutional grounds is a very new development. Such arguments cannot promise a restoration of past governmental practice or tradition, and they have no adequate basis in existing principles of constitutional law.

From the very start, *Chevron* has been a judicial interpretation of statutory defaults and administrative practice, much like similar doctrines from the 1940s and diverse precedents before that. The success of political conservatives in the 1980s brought *Chevron* into the world,

⁴⁴³ See Green, *supra* note 13.

⁴⁴⁴ See Brief for the State of Texas et al. as Amici Curiae in Support of Petitioners, *Cal. Sea Urchin Comm'n v. Combs*, 139 S. Ct. 411 (2018) (No. 17-1636) (July 5, 2018); Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners, *Breckinridge Health, Inc. v. Azar*, (No. 17-1408) (May 8, 2018).

⁴⁴⁵ E.g., Brief of Amicus Curiae New Civil Liberties Alliance in Support of the Plaintiffs-Appellees on Rehearing En Banc, *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019) (No. 18-11479); Amicus Curiae Brief of the New Civil Liberties Alliance in Support of Petitioner, *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, No. 19-296 (Oct. 4, 2019); Brief of Professor Aditya Bamzai as Amicus Curiae in Support of Petitioners, *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019) (No. 17-1705).

⁴⁴⁶ See Green, *supra* note 13.

and a new generation of political conservatives may very well take it out. Whatever one thinks of reforming *Chevron* through ordinary mechanisms of judicial pragmatism or political choice, eliminating administrative deference as a matter of constitutional law would contradict established precedents, long traditions, and basic governmental stability. From that perspective, reliance on newfangled visions of constitutional “theory” or “structure” would not only transform the operation of administrative government, it would also change the fundamental nature of constitutional law itself.

APPENDIX

Year	Case	Quotations about Deference
1827	Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210	"In the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."
1832	United States v. State Bank of N.C., 31 U.S. (6 Pet.) 29, 39	"It is not unimportant to state, that the construction which we have given to the terms of the act, is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. . . . A practice so long and so general, would, of itself, furnish strong grounds for a liberal construction; and could not now be disturbed without introducing a train of serious mischiefs."
1833	United States v. Macdaniel, 32 U.S. (7 Pet.) 1, 14–15	"To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government, would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. . . . Usage cannot alter the law, but it is evidence of the construction given to it"
1850	Surgett v. Lapice, 49 U.S. 48, 68	"The manifest object of Congress was to disembarass public sales by barring preference rights that would be a cloud on the title of lands thus offered. The foregoing construction being the one adopted by the departments of public lands soon after the act of 1832 went into operation, we should feel ourselves restrained, unless the error of construction was plainly manifest, from disturbing the practice prescribed by the Commissioner of the General Land Office, acting in accordance with the opinion of the Attorney-General, and which had the sanction of the Secretary of the Treasury and of the

Year	Case	Quotations about Deference
		President of the United States.”
1870	United States v. Alexander, 79 U.S. (12 Wall.) 177, 179–81	“[W]hatever might be our opinions respecting the construction of the statute, were the matter <i>res nova</i> , we cannot regard the question as an open one. Immediately after the passage of the act, it was construed by the Commissioner of Pensions as granting pensions commencing only from and after its passage, and such construction has ever since been given to it by that bureau. . . . In view of [subsequent affirmation by] Congress, and the long-standing construction of the act given by the department whose duty it was to act under it, we are of opinion that the plaintiff’s intestate was not entitled to a pension commencing anterior to February 3d, 1853.”
1872	Peabody v. Stark, 83 U.S. (16 Wall.) 240, 243–44	“In the absence of a clear conviction on the part of the members of the court on either side of the proposition in which all can freely unite, we incline to adopt the uniform ruling of the office of the internal revenue commissioner It is made to appear to us in a very satisfactory manner that such has been the unvarying rule of that office since the act went into effect, and while we do not hold such ruling as in general obligatory upon us, we are content to adopt it in this case”
1874	Smythe v. Fiske, 90 U.S. (23 Wall.) 374, 382	“The construction we have indicated of these statutes, is that given to them in their practical administration by the Treasury Department ever since their enactment. This, though not controlling, is not without weight, and is entitled to respectful consideration.”
1877	United States v. Moore, 95 U.S. 760, 763	“The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.”
1878	United States v. Pugh, 99 U.S. 265, 269	“It is a familiar rule of interpretation that in the case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect. While, therefore, the question is one by no means free from doubt, we are not inclined to interfere, at this late day, with a rule which has been acted upon by the Court of Claims and executive for so long a time. . . . If [the government’s] practice is not supported by

Year	Case	Quotations about Deference
		the exact letter of the law, it is by the spirit, and it is certainly just. We are not disposed to change it.”
	United States v. Burlington & Mo. R.R., 98 U.S. 334, 341	“That the amendment of the act of 1864, enlarging the grant of 1862 to the Union Pacific company, was intended to apply to the grants made to all the branch companies, there can be no doubt. . . . Such has been the uniform construction given to the acts by all departments of the government. Patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential, and as conclusive of the soundness of the construction, as if it had been declared by judicial decision. It cannot at this day be called in question.”
1881	Swift Co. v. United States, 105 U.S. 691, 695	“The right construction of the internal revenue acts, upon the point of the allowance of commissions to dealers in proprietary articles . . . is too clear to bring the case within the [government’s argument]. The rule which gives determining weight to contemporaneous construction, put upon a statute, by those charged with its execution, applies only in cases of ambiguity and doubt.”
1884	Kan. Pac. R.R. v. Atchison, Topeka & Santa Fe R.R., 112 U.S. 414, 418 Brown v. United States, 113 U.S. 568, 571	Quoting language, <i>supra</i> , from <i>United States v. Burlington & Mo. R.R.</i> “In <i>Edwards v. Darby</i> , it was said by this court that ‘in the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect.’ . . . In [<i>United States v. Moore, supra</i>] the court said that ‘the construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons. . . .’ These authorities justify us in adhering to the construction of the law under consideration adopted by the executive department of the government, and are conclusive against the contention of appellant, that § 23 of the act of August 3, 1861, did not apply to warrant officers.”

Year	Case	Quotations about Deference
	United States v. Graham, 110 U.S. 219, 221	“[In circumstances of statutory clarity], it matters not what the practice of the department smay [sic] have been or how long continued, for it can only be resorted to in aid of interpretation, and ‘it is not allowable to interpret what has no need of interpretation.’ If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and precise and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid. The cases to this effect are numerous.”
	Iowa v. McFarland, 110 U.S. 471, 484–85	“The conclusion to which the court is brought, upon a consideration of the language of the statutes relied on . . . accords with the contemporaneous and uniform construction given to them by the executive officers charged with the duty of putting them in force. If the court had a doubt of the true meaning of their provisions, this practical construction would be entitled to great weight.”
1887	United States v. Philbrick, 120 U.S. 52, 59	“A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and, since it is not clear that that construction was erroneous, it ought not now to be overturned.”
1888	United States v. Johnston, 124 U.S. 236, 253	“[This] case comes fairly within the rule often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous.”
	Hahn v. United States 107 U.S. 402, 406	“[The treasury department’s statutory] construction did not appear . . . unreasonable, and might well have been reached in the exercise of a sound judgment; [and] regarding the statute as ambiguous, all the circumstances of the case were such as to justify the application of the principle of interpretation sanctioned by this court . . . that, ‘in the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to car-

Year	Case	Quotations about Deference
		ry it into effect is entitled to great respect,' and where this court refused to interfere with such construction after it had been acted upon for a long time."
1889	Hastings & Dakota R.R. v. Whitney, 132 U.S. 357, 360, 366	"The question presented for our consideration is, whether, upon the facts found and admitted, the homestead entry of Turner upon the land in controversy excepted it from the operation of the land grant under which plaintiff in error claims title. . . . It is true that the decisions of the Land Department on matters of law are not binding upon this court, in any sense. But on questions similar to the one involved in this case they are entitled to great respect at the hands of any court. . . . [T]his court said: 'The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.'"
1891	Heath v. Wallace, 138 U.S. 573, 582	"[I]f the question be considered in a somewhat different light, viz. as the contemporaneous construction of a statute by those officers of the government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."
	Schell v. Fauché, 138 U.S. 562, 572	"In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."
1892	United States v. Ala. Great S. R.R., 142 U.S. 615, 621	"We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department,—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the

Year	Case	Quotations about Deference
		department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. . . . These principles were announced as early as 1827 . . . and have been steadily adhered to in subsequent decisions.”
1893	United States v. Tanner, 147 U.S. 661, 663	“If it were a question of doubt, the construction given to this clause prior to October, 1885, might be decisive; but, as it is clear to us that this construction was erroneous, we think it is not too late to overrule it. It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material.”
1894	United States v. Alger, 152 U.S. 384, 397	“If the meaning of that act were doubtful, its practical construction by the navy department would be entitled to great weight; but, as the meaning of the statute, as applied to these cases, appears to this court to be perfectly clear, no practice inconsistent with that meaning can have any effect.”
1895	Bate Refrigerating Co. v. Sulzberger, 157 U.S. 1, 34	“[I]f there be reasonable ground for adopting either one of two constructions; this court, without departing from sound principle, may well adopt that construction which is in harmony with the settled practice of the executive branch of the government, and with the course of judicial decisions in the Circuit Courts of the United States; especially, if there be reason to suppose that vast interests may have grown up under that practice and under judicial decisions, which may be disturbed or destroyed by the announcement of a different rule.”
1896	Webster v. Luther, 163 U.S. 331, 342	“The practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the Executive Departments of the government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. But this court has often said that it will not permit the practice of an Executive Department to defeat the obvious purpose of a statute.”

Year	Case	Quotations about Deference
1901	Fairbank v. United States, 181 U.S. 283, 307–08, 311	<p>“[E]xamination of the [Court’s] opinions . . . will disclose that they may be grouped in three classes: First, those in which the court, after seeking to demonstrate the validity or the true construction of a statute, has added that if there were doubt . . . the practical construction placed by Congress, or the department charged with the execution of the statute, was sufficient to remove the doubt; second, those in which the court has either stated or assumed that the question was doubtful, and has rested its determination upon the fact of a long continued construction by the officials charged with the execution of the statute; and, third, those in which the court, noticing the fact of a long continued construction, has distinctly affirmed that such construction cannot control when there is no doubt as to the true meaning of the statute. . . . From this <i>résumé</i> of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. . . . Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning is doubtful. We have no disposition to belittle the significance of this matter. It is always entitled to careful consideration, and in doubtful cases will, as we have shown, often turn the scale”</p>
1904	Houghton v. Payne, 194 U.S. 88, 99–100	<p>“[I]t is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. Contemporaneous [governmental] construction is a rule of interpretation, but is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the department, however, long continued by successive officers, must yield to the positive language of the statute.”</p>

Year	Case	Quotations about Deference
	Bates & Guild Co. v. Payne, 194 U.S. 106, 107–10	<p>“[W]e think that, although the question [of second- or third-class mail] is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion left in the Postmaster General with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong. The Postmaster General is charged with the duty of examining these publications and of determining to which class of mail matter they properly belong; and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied. . . . [W]here Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong. . . . [E]ven upon mixed questions of law and fact, or of law alone, [the head of a department’s] action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.”</p>
1911	United States v. Grimaud, 220 U.S. 506, 517	<p>“From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions ‘power to fill up the details’ by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.”</p>

Year	Case	Quotations about Deference
	United States v. Hammers, 221 U.S. 220, 225–26, 228–29	<p>“It was conceded that the Interior Department had uniformly placed upon the act of 1891 a different construction in five decisions⁴⁴⁷ . . . and it was also conceded that the rule often authoritatively announced is that ‘where a court is doubtful about the meaning of an act of Congress, the construction placed upon the act by the department charged with its enforcement is in the highest degree persuasive if not controlling.’ Such decision, however, it was said, only determined in cases of doubt, and, as the court found no ambiguity in the act, decided against the ruling of the Department and the contention of the Government. It recognized the force of such a uniform practice in the Land Office and of the fact which was urged upon its attention, that a large number of reclamations had been effected by assignees in the very valley where the entry in controversy had been made, and said that such fact and practice would resolve doubts in favor of the Government, if it, the court, had any. We do not find the act of 1891 as clear as the learned District Court did, and must give to decisions of the Land Department the weight to which in such case, the court acknowledged, they are entitled. . . . [I]t may be granted that there is strength in the argument, and in that based on the words of the statute. They are, however, opposed by arguments of equal, if not greater strength. Conceding, then, that the statute is ambiguous, we must turn as a help to its meaning, indeed in such case, as determining its meaning, to the practice of the officers whose duty it was to construe and administer it. . . . [T]heir practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive. We are constrained, therefore, to reverse the order of the District Court”</p>
1912	Kindred v. Union Pac. R.R., 225 U.S. 582, 596	<p>“[The statutory term ‘public lands’ is arguably] used to designate such lands as are subject to sale or other disposal under general laws. No</p>

⁴⁴⁷ *Hammers*, 221 U.S. at 225 (“[T]he earliest of these was rendered on December 22, 1895, and the last in June of 1900.”).

Year	Case	Quotations about Deference
		<p>doubt such is its ordinary meaning, but it sometimes is used in a larger and different sense. We think that is the case here; first, because the provision in the same section . . . implies that Indian lands as to which Congress properly could grant a right of way were intended to be included, and, second, because the section was so interpreted by the Executive Department charged with the administration of the act, as also of affairs pertaining to the Indians and public lands, and rights acquired thereunder ought not lightly to be disturbed after the lapse of so many years.”</p>
1914	<p>Logan v. Davis, 233 U.S. 613, 626–27</p>	<p>“Whether § 4 [of the adjustment act of 1887] was confined to purchases made prior to the date of the act, or equally included subsequent purchases, where made in good faith, is one of the controverted questions in the case. Both views have support in the terms of the act, and if the question were altogether new there would be room for a reasonable difference of opinion as to what was intended. Certainly, resort to interpretation would be necessary. But the question is not altogether new. It has often arisen in the administration of the act, and successive Secretaries of the Interior uniformly have held that the remedial sections embraced purchases after the date of the act, no less than prior purchases, if made in good faith. Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results. The situation, therefore, calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons.”</p>
1915	<p>United States v. Smull, 236 U.S. 405, 412</p>	<p>“[H]ere the statute is silent as to the mode of proving the particular fact. Still it is an essential fact; Congress made it the duty of the Department to enforce the condition prescribed, and in the absence either of inhibition or of a requirement of some other procedure we are unable to find any ground for saying that Con-</p>

Year	Case	Quotations about Deference
		gress debarred the Department from availing itself of the natural and appropriate course in examining the applicant. It has been the long established departmental practice to insist upon a verified statement by him whether or not he has made an earlier entry, and we are of the opinion that the practice is authorized.”
1917	United States v. Morehead, 243 U.S. 607, 613–14	“Since the Land Department is expressly charged with the duty of enforcing the public land laws by appropriate regulations and the regulation in question was duly promulgated, the assertion of its invalidity must be predicated either upon its being inconsistent with the statutes or upon its being in itself unreasonable or inappropriate.”
1920	Md. Cas. Co. v. United States, 251 U.S. 342, 349	“It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision.”
1921	McLaren v. Fleischer, 256 U.S. 477, 480–82	“The sole question for decision is whether the officers of the land department erred in matter of law in holding that under the Act of May 14, 1880, Fleischer was entitled to thirty days after the land was restored to entry within which to exercise his preferred right of entry. . . . Does the act mean that the preferred right to enter the land is lost if not exercised within thirty days after the notice issues, even though the land is not open to entry during that period? Or does it mean that the contestant shall have thirty days during which the land is open to entry within which to exercise his preferred right, and therefore that if the land is not open to entry at the date of the notice the time during which that situation continues shall be eliminated in computing the thirty-day period? In the practical administration of the act the officers of the land department have adopted and given effect to the latter view. They adopted it before the present controversy arose or was thought of, and, except for a departure soon reconsidered and corrected, they have adhered to and followed it ever since. Many outstanding titles are based upon it and much can be said in support

Year	Case	Quotations about Deference
		of it. If not the only reasonable construction of the act, it is at least an admissible one. It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years will not be disturbed except for cogent reasons. . . . We conclude that the state courts rightly refused to disturb the construction which the officers of the land department had put on the act.”
1924	Swendig v. Wash. Water Power Co., 265 U.S. 322, 331	Quoting language, <i>supra</i> , from <i>Logan v. Davis</i> .
1930	Brewster v. Gage, 280 U.S. 327, 336	“These regulations were prepared by the department charged with the duty of enforcing the Acts. The rule so established is reasonable and does no violence to the letter or spirit of the provisions construed. A reversal of that construction would be likely to produce inconvenience and result in inequality. It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons.”
1931	Fawcus Mach. Co. v. United States, 282 U.S. 375, 378	“The regulations were made pursuant to express authority (see § 1309 of the Revenue Act of 1918). They are valid unless unreasonable or inconsistent with the statute. They constitute contemporaneous construction by those charged with the administration of the act, are for that reason entitled to respectful consideration, and will not be overruled, except for weighty reasons.”
1932	Norfolk & W. Ry. Co. v. United States, 287 U.S. 134, 141	“Plainly, the Commission, under the authority conferred upon it by Congress, must draw a line between the two sorts of property [i.e., transportation and nontransportation,] owned by the railroads. Within broad limits that body’s determination is necessarily beyond revision and correction by the courts. . . . Whether the Commission should make special classifications to fit exceptional cases lies within the discretion conferred, and courts ought not to be called upon to interfere with or correct alleged errors

Year	Case	Quotations about Deference
		with respect to accounting practice. If we were in disagreement with the Commission as to the wisdom and propriety of the order, we are without power to usurp its discretion and substitute our own."
1933	Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315	"True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."
1934	FTC v. R.F. Keppel & Bro., 291 U.S. 304, 314	"While this Court has declared that it is for the courts to determine what practices or methods of competition are to be deemed unfair . . . , in passing on that question the determination of the Commission is of weight. It was created with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected,' and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would 'give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.'"
	Miss. Valley Barge Line Co. v. United States, 292 U.S. 282, 286-87	"The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. It is not the province of a court to absorb this function to itself. The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."
1936	AT&T v. United States, 299 U.S. 232, 236-37	"This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or

Year	Case	Quotations about Deference
		burdensome or inferior to another. Error or un wisdom is not equivalent to abuse. What has been ordered must appear to be ‘so entirely at odds with fundamental principles of correct accounting’ as to be the expression of a whim rather than an exercise of judgment.”
1937	Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 304	“Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment. Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic.”
1939	Rochester Tel. Corp. v. United States, 307 U.S. 125, 145–46	“The record amply justified the Communications Commission in making such findings [about corporate control]. Investing the Commission with the duty of ascertaining ‘control’ of one company by another, Congress did not imply artificial tests of control. . . . So long as there is warrant in the record for the judgment of the expert body it must stand. . . . Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. ‘The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.’”
1940	S. Chi. Coal & Dock Co. v. Bassett, 309 U.S. 251, 260–61	“Regarding the word ‘crew’ in this statute as referring [only to common seamen], we think there was evidence to support the finding of the deputy commissioner. . . . Even if it could be said that the evidence permitted conflicting inferences, we think that there was enough to sustain the deputy commissioner’s ruling.”
1940	United States v. Am. Trucking Ass’ns, 310 U.S. 534, 549	“The Commission and the Wage and Hour Division, as we have said, have both interpreted § 204(a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve ‘contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently

Year	Case	Quotations about Deference
		and smoothly while they are yet untried and new.”
1941	Gray v. Powell, 314 U.S. 402, 411–12	“In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here by [Sections 4, part II(1) and 4-A], the function of review placed upon the courts . . . is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner. Such a determination as is here involved belongs to the usual administrative routine. Congress, which could have legislated specifically as to the individual exemptions from the code, found it more efficient to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable, adjustment of the conflicting interests of price stabilization upon the one hand and producer consumption upon the other.”
	Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 246	“Granting that more than one possible conclusion could have been reached upon the evidence, we think it was clearly sufficient to support the Deputy Commissioner’s finding that Armistead was acting in the course of his employment. The Circuit Court of Appeals should therefore have accepted it as final.”
	Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 152–53	“The Labor Act places upon the Board the responsibility of determining the appropriate group of employees for the bargaining unit. In accordance with this delegation of authority, the Board may decide that all employees of a single employer form the most suitable unit for the selection of collective bargaining representatives, or the Board may decide that the workers in any craft or plant or subdivision thereof are more appropriate. The petitioners’ contention that § 9(a) grants to the majority of employees in a unit appropriate for such purposes the absolute right to bargain collectively through representatives of their own choosing is correct only in the sense that the ‘appropriate unit’ is the one declared by the Board under § 9(b), not one that might be deemed appropriate under other circumstances.”

Year	Case	Quotations about Deference
1942	Bd. of Trade of Kan. City v. United States, 314 U.S. 534, 548	“[T]he problem [of deciding whether separating primary grain markets and other markets is ‘unlawful discrimination’ under the Interstate Commission Act] is enmeshed in difficult judgments of economic and transportation policy. Neither rule of thumb, nor formula, nor general principles provide a ready answer. We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission.”
1943	NBC v. United States, 319 U.S. 190, 224	“What was said in <i>Board of Trade v. United States</i> [<i>supra</i>] is relevant here: ‘We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission.’ Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say [under the Federal Communications Act] that the ‘public interest’ will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.”
	Dobson v. Comm’r, 320 U.S. 489, 502	“In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter. The Tax Court is informed by experience and kept current with tax evolution and needs by the volume and variety of its work. While its decisions may not be binding precedents for courts dealing with similar problems, uniform administration would be promoted by conforming to them where possible.” ⁴⁴⁸
1944	NLRB v. Hearst Publ’ns, Inc., 322 U.S. 111, 130	“It is not necessary in this case to make a completely definitive limitation around the term ‘employee.’ That task has been assigned primarily to the agency created by Congress to administer the Act. . . . Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds

⁴⁴⁸ The Tax Court was part of the executive branch until 1969, and review of its decisions was legislatively amended in 1948. See *Battat v. Comm’r*, 148 T.C. 32, 35 (2017).

Year	Case	Quotations about Deference
		of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board."
1945	Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798	"The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus a 'rigid scheme of remedies' is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation."
1946	Unemployment Comp. Comm'n of Alaska v. Aragon, 329 U.S. 143, 153-54	"To sustain the Commission's application of [the statutory term 'active progress'], we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The 'reviewing court's function is limited.' All that is needed to support the Commission's interpretation is that it has 'warrant in the record' and a 'reasonable basis in law.' . . . [W]e are unable to say that the Commission's construction was irrational or without support in the record. The Commission apparently views a dispute as 'active' during the continuance of a work stoppage induced by a labor dispute. That agency might reasonably conclude that the unemployment resulting from such work stoppage is not of the 'involuntary' nature which the statute was designed to alleviate, as indicated by the statement of public policy incorporated in the Act by the Territorial Legislature. We see nothing in such a view to require our substituting a different construction from that made by the Commission entrusted

Year	Case	Quotations about Deference
		with the responsibility of administering the statute.” <i>Cf. id.</i> at 150–51 (discussing term “labor dispute”).
1947	SEC v. Chenery Corp., 332 U.S. 194, 202–03, 207–09	<p>“[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. . . . The facts being undisputed, we are free to disturb the Commission’s conclusion only if it lacks any rational and statutory foundation. In that connection, the Commission has made a thorough examination of the problem, utilizing statutory standards and its own accumulated experience with reorganization matters. In essence, it has made what we indicated in our prior opinion would be an informed, expert judgment on the problem. . . . The very breadth of the statutory language precludes a reversal of the Commission’s judgment save where it has plainly abused its discretion in these matters. . . . The Commission’s conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process. Whether we agree or disagree with the result reached, it is an allowable judgment</p>

Year	Case	Quotations about Deference
		which we cannot disturb.”
1948	FTC v. Cement Inst., 333 U.S. 683, 720	“We sustain the Commission’s holding that concerted maintenance of the basing point delivered price system is an unfair method of competition prohibited by the Federal Trade Commission Act. In so doing we give great weight to the Commission’s conclusion, as this Court has done in other cases.”
1949	SEC v. Cent.-Ill. Sec. Corp., 338 U.S. 96, 127	“Administrative determinations of policy, often based upon undisputed basic facts, in an area in which Congress has given the agency authority to develop rules based upon its expert knowledge and experience, are exemplified by <i>Securities and Exchange Commission v. Chenery Corp.</i> , <i>supra</i> This holding was . . . [based] upon the ground that the Commission’s determination was made in an area in which Congress had delegated policy decisions of this sort to the Commission, and therefore that the agency determination was ‘consistent with the authority granted by Congress.’”
1953	NLRB v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344, 347–48	“For fifteen years the Board followed the practice it had laid down . . . and calculated back pay on the basis of the entire period between discharge and offer of reinstatement. [Then] the Board said: ‘The cumulative experience of many years discloses that this form of remedial provision falls short of effectuating the basic purposes and policies of the Act.’ To avoid these consequences the Board laid down its new method of computation. It is not for us to weigh these or countervailing considerations. . . . As is true of many comparable judgments by those who are steeped in the actual workings of these specialized matters, the Board’s conclusions may ‘express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions . . .’; and they are none the worse for it. It is as true of the Labor Board as it was of the agency in [<i>Chicago, Burlington & Quincy Ry. Co. v. Babcock</i> , 204 U.S. 585, 598 (1907)] that ‘(t)he board was created for the purpose of using its judgment and its knowledge.’”