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The Origins of Judicial Deference to Executive Interpretation

ABSTRACT. Judicial deference to executive statutory interpretation—a doctrine now commonly associated with the Supreme Court's decision in *Chevron v. Natural Resources Defense Council*—is one of the central principles in modern American public law. Despite its significance, however, the doctrine's origins and development are poorly understood. The Court in *Chevron* claimed that the roots of judicial deference stem from statutory interpretation cases dating to the early nineteenth century. Others, by contrast, have sought to locate *Chevron*'s doctrinal roots in judicial review's origins in the writ of mandamus. According to the standard narrative, courts in the pre-*Chevron* era followed a multifactor and ad hoc approach to issues of judicial deference; there was little theory that explained the body of cases; and the holdings and reasoning of the cases were often contradictory and difficult to rationalize.

This Article challenges the standard account. It argues that the Supreme Court in *Chevron*, and scholarly commentators since, have misidentified nineteenth-century statutory interpretation cases applying canons of construction "respecting" contemporaneous and customary interpretation as cases deferring to executive interpretation as such. It further argues that, although the standard for obtaining a writ of mandamus was central to judicial review in the early Republic, statutory developments in the latter half of the nineteenth century (significantly, the enactment of general federal-question jurisdiction in 1875) ultimately mooted the relevance of that standard. Finally, it discusses the intellectual challenges to the traditional interpretive framework beginning in the early twentieth century; the Supreme Court's embrace of these intellectual challenges in the early 1940s; and Congress's attempt in the Administrative Procedure Act's (APA) standard-of-review provision to reject the Court's interpretive experimentation and corresponding deviation from the traditional canons. The Article thus seeks to establish—contrary to the suggestion in *Chevron* and recent cases—that there was no rule of statutory construction requiring judicial deference to executive interpretation *qua* executive interpretation in the early American Republic. And it contends that the governing statute of administrative law—the APA—was intended to codify the traditional interpretive approach and to reject the experimentation of the 1940s Court. Taken together, these conclusions cast doubt on much of the received wisdom on the doctrinal basis for the rule announced in *Chevron*.

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INTRODUCTION

The doctrine of judicial deference to executive interpretation casts a long shadow over the entire field of American public law. That doctrine—now commonly associated with the Supreme Court's opinion in *Chevron v. Natural Resources Defense Council*—provides that a reviewing court must "defer" to an administrative agency's reasonable interpretation of the organic statute that it administers.[1] It does not stretch the imagination to believe that, on every single working day of the year, there exists in the employ of the federal government a judge, an executive officer, or a legislator who expressly invokes or formulates policy premised on *Chevron*.

From where did the concept of judicial deference to executive interpretation originate? At first blush, the concept may appear inconsistent with Chief Justice Marshall's assertion, in *Marbury v. Madison*, that "[i]t is emphatically the province and duty of the judicial department to say what the law is"[2]—a tension that has prompted some to characterize *Chevron* as the "counter-*Marbury*" of the administrative state.[3] But *Chevron* itself claimed provenance in a series of precedents stretching back to the Marshall Court that demonstrated that the Court had "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[4] The perspective that *Chevron*'s origins date to the nineteenth century seems also to be a majority view among commentators, at least judging from the regular (though offhand) statements, even by critics of *Chevron*, conceding that there is a "long tradition of deference to agency interpretations."[5]

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1. 467 U.S. 837 (1984).

2. 5 U.S. (1 Cranch) 137, 177 (1803); *see, e.g.*, Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 538 & n.71 (2012) (describing *Chevron* as an "exception" to the proposition that "deferential review . . . does not extend to decisions on pure issues of law").

3. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2074-75 (1990).

4. 467 U.S. at 844 & n.14.

5. 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, 791 (2010) (citing Edward's Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827)); *see also* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 18 n.69 (2006) (claiming that "there are ample nineteenth-century examples of such [judicial] deference to executive officials within their areas of administration and expertise"); Peter M. Shane, Chevron *Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679, 687 (2014) ("The consistency of the judicial function with some institutional deference in legal interpretation is a very old idea.").

A separate doctrinal justification for judicial deference is set forth in Justice Scalia's dissent in *United States v. Mead Corp.*,[6] and, almost a half century earlier, in Justice Douglas's majority opinion in *Panama Canal Co. v. Grace Line, Inc.*[7] Judicial deference, on this view, can be understood as "in accord with the origins of federal-court judicial review."[8] That is because, to borrow Justice Scalia's words, "[j]udicial control of federal executive officers was principally exercised through the prerogative writ of mandamus" before the enactment of general federal-question jurisdiction in 1875, and mandamus "generally would not issue unless the executive officer was acting plainly beyond the scope of his authority."[9] Based on this history, statutory ambiguities should be "left to reasonable resolution by the Executive," as they ordinarily would have been when an Article III tribunal reviewed a writ of mandamus directed against an executive official.[10] As Justice Douglas put the point, the "principle at stake" in judicial deference cases "is no different than if mandamus were sought—a remedy long restricted, in the main, to situations where ministerial duties of a nondiscretionary nature are involved."[11]

In contrast to these two justifications seeking to situate judicial deference in nineteenth-century historical practice, a diametrically opposed perspective is offered by those who, like Cass Sunstein, believe that *Chevron* is best "understood as a natural outgrowth of the twentieth-century shift from judicial to agency lawmaking."[12] On this view, as Mark Tushnet explains, early twentieth-century "administrative law unquestioningly accepted" that "courts would have

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6. 533 U.S. 218 (2001) (Scalia, J., dissenting); *see also* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment) (repeating the point that *Chevron* "was in conformity with the long history of judicial review of executive action" by mandamus); *cf.* Michigan v. EPA, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) (referring to this aspect of the *Mead* dissent and noting that "[p]erhaps there is some unique historical justification for deferring to federal agencies").

7. 356 U.S. 309 (1958).

8. *Mead*, 533 U.S. at 241-42 (Scalia, J., dissenting).

9. *Id.* at 242.

10. *Id.* at 243. Remarkably, this analogy between the *Chevron* and mandamus standards has escaped serious attention in the years following *Mead*, notwithstanding the fact that it represents an intriguing attempt (not to mention one of the few attempts by anyone) "to reconcile *Chevron* with the text of the [Administrative Procedure Act]." John F. Manning, Chevron *and the Reasonable Legislator*, 128 HARV. L. REV. 457, 465 & n.68 (2014).

11. *Panama Canal Co.*, 356 U.S. at 318 (citations omitted); *see also id.* ("[W]here the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion.").

12. Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 205-06 (2006).

full power to review agencies' decisions interpreting the law those agencies were administering."[13] That perspective accords with the view, expressed by Ann Woolhandler, that "[t]he de novo model in its various manifestations, which left the final say to the judiciary rather than the executive, was the predominant form of judicial review of executive action in the early Republic."[14] *Chevron* (or at least, its twentieth-century precursors), on this perspective, is not an outgrowth of, but rather a break from, what came before it.

There is an element of truth to each of these competing perspectives about the development of the doctrine of judicial deference to executive interpretation. But there is an element of imprecision in each as well. If judicial deference to executive interpretation is rooted in eighteenth- and nineteenth-century approaches to interpretive theory, what explains the perspective that de novo, rather than deferential, review was the traditional model of interpretation? By contrast, if judicial deference is a phenomenon of the mid-twentieth century, what explains the holdings of the nineteenth-century cases on which *Chevron* relied? And where does judicial review's origins in the writ of mandamus fit within the historical picture? The fact that a wide spectrum of historical interpretation is possible—even at this late date, more than thirty years after the Court's decision in *Chevron*—suggests that the roots of the doctrine announced in that opinion remain poorly understood.

Layered on top of these varying interpretations of the case law are varying interpretations of the text of the Administrative Procedure Act (APA), which represented (in part) Congress's attempt in 1946 to codify and clarify the scope of judicial review of agency legal interpretations. The relevant text of the APA seems simple enough: it provides that a "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."[15] Yet, here too, disagreement over meaning reigns. Some argue that the text of the APA is too simple—deceptively simple. It was intended, in the words of the influential *Attorney General's Manual on the Administrative Procedure Act*, to "re-

13. Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1584 (2011).

14. Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 206 (1991).

15. 5 U.S.C. § 706 (2012); *see also id.* § 706(2)(A), (C) (authorizing the reviewing court to "set aside agency action, findings, and conclusions found to be . . . not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"); Sunstein, *supra* note 3, at 2080 (describing section 706 as "legislative endorsement" of "[t]he idea that courts, and not administrators, [a]re responsible for discerning the meaning of statutes").

stat[e] the [then-]present law as to the scope of judicial review"[16] and as a "general restatement of the principles of judicial review embodied in many statutes and judicial decisions."[17] The APA, on this view, incorporated the approach of pre-1946 cases expressing principles of judicial deference and, thereby, incorporated a doctrine akin to *Chevron*.

Courts and commentators tend to agree on at least one issue: prior to *Chevron*, there was widespread confusion over the proper scope of review.[18] That confusion could be seen in the various approaches that courts took in the years immediately preceding *Chevron*, and it dated back to the very earliest days of the nation.[19] The confusion is well expressed in a 1976 opinion by Judge Friendly that announced it was "time to recognize . . . two lines of Supreme Court decisions on th[e] subject" of judicial deference "which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand."[20] In his opinion, Judge Friendly contrasted a series of Supreme Court cases "supporting the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis" with a separate and "impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term."[21] Indeed, on one view, *Chevron*—if it had no oth-

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

17. *Id.* at 93.

18. *See, e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972 (1992) ("Prior to 1984, the Supreme Court had no unifying theory for determining when to defer to agency interpretations of statutes."); Sunstein, *supra* note 3, at 2082 ("Before 1984, the law . . . reflected a puzzling and relatively ad hoc set of doctrines about when courts should defer to administrative interpretations of law.").

19. That perspective on the nineteenth century's approach to judicial deference echoes the broader view that, in general, administrative law was undeveloped until the twentieth century. *See* Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829-1861*, 117 YALE L.J. 1568, 1688 (2008) (asserting that "[n]ot much administrative law that reflects our contemporary understandings was to be found in the courts" between the Jackson and Lincoln presidencies); *cf.* Woolhandler, *supra* note 14, at 198-99 (describing the nineteenth century as "something of a dark age" for administrative law, noting that the "work that has been done suggests that administrative law was incoherent," but seeking to "show[] that early administrative law was at once more coherent and less deferential than is commonly realized").

20. 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).

21. *Id.*

er beneficial aspects—at the very least cleared up the intellectual and jurisprudential disarray that had existed for over a century prior to 1984.[22]

Or did it? In this Article, I argue that commentators have misunderstood the pre-*Chevron* state of affairs. Although *Chevron* can claim an analog of sorts in early nineteenth-century cases about interpretive methodology, those cases addressed the "respect" that was due to executive interpretation *because of* the interpretation's nature—specifically, its articulation contemporaneous with the enactment of the controlling legal text or its ability to demonstrate a customary practice under that text. In this respect, four critical and hitherto neglected points are necessary to understand the intellectual and jurisprudential development of judicial deference to executive interpretation.

First, the charge of longstanding and uniform analytical disarray is mistaken. Far from being under-theorized, proper interpretive methodology in the seventeenth and eighteenth centuries received ample intellectual and judicial attention. Eighteenth-century England and America were no intellectual wastelands when it came to political theory. It should be unsurprising that they were not wastelands when it came to considering the proper relationship between the judiciary and executive in construing legal texts.

Second, the prevailing interpretive methodology of nineteenth-century American courts was not a form of judicial deference, as it has come to be understood in the post-*Chevron* era. Under the traditional interpretive approach, American courts "respected" longstanding and contemporaneous *executive* interpretations of law as part of a practice of deferring to longstanding and contemporaneous interpretation *generally*. It was the pedigree and contemporaneity of the interpretation, in other words, that prompted "respect"; the fact that the interpretation had been articulated by an actor within the executive branch was relevant, but incidental.

Nor was nineteenth-century mandamus practice based on any *interpretive* methodology that required judicial deference to the executive *qua* executive. While the modern reader may hear echoes of *Chevron* in mandamus—because the mandamus standard precluded judicial intervention when an executive official engaged in an "executive duty" (including statutory interpretation) that required the exercise of judgment and discretion[23]—the analogy is mistaken. As the Court put it in the foundational case of *Decatur v. Paulding*, if an issue of statutory construction were to arise outside of the mandamus context—where the standards for obtaining the writ did not apply—"the Court certainly would

22. *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (arguing that "*Chevron* is unquestionably better than what preceded it").

23. *See, e.g.*, Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 508 (1840).

not be bound to adopt the construction given by the head of a department."[24] Courts, in other words, applied the mandamus standard *only* because they were confronting a writ of mandamus (or another extraordinary writ). Where there was no writ of mandamus, there would be no comparable interpretive deference.

A window into nineteenth-century interpretive methodology can be found in a neglected passage from Justice Story's *Commentaries on the Constitution*. In the course of discussing how best to interpret legal texts, Justice Story explains that "the most unexceptionable source of collateral interpretation is from the practical exposition of the government itself in its various departments upon particular questions discussed and settled upon their own single merits."[25] The modern reader, reviewing this language and finding it familiar, might believe that he has stumbled upon an old and venerable friend—namely, the canon described in *Chevron*. That gloss on Justice Story's *Commentaries*, however, would be mistaken. Justice Story made these remarks in the context of an extended discussion on the proper role of "practical exposition" in construing the federal *Constitution*. Understanding the import of this passage, its intellectual antecedents, and the reason why Justice Story would have borrowed techniques of statutory construction to construe the Constitution will allow us to understand the respective roles of the executive and the judiciary in nineteenth-century interpretive methodology.

Third, when the modern trend toward generalized judicial deference to executive interpretation began during the fifth decade of the twentieth century, the Court did not rely primarily on the principle that courts "respected" contemporaneous and customary executive constructions, nor on the principle that the mandamus standard required deference to executive action. Instead, the Court invoked longstanding precedents addressing judicial deference to agency *factual* determinations and analogized questions of law requiring agency expertise to questions of fact. In doing so, the Court drew on preexisting scholarship suggesting that a formal distinction between "law" and "fact" in administrative review was illusory.[26] By embracing this legal-realist perspective on the law-fact distinction, and thereby blurring the line between factual determinations

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24. *Id.* at 515.

25. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 408, at 392 (Leonard W. Levy ed., Da Capo Press 1970) (1833).

26. JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 50-55, 312 (1927). Dickinson, as explained below, later became a critic of the Court's decisions expanding the scope of judicial deference to executive interpretation. *See infra* notes 367-370 and accompanying text.

and legal questions, the Court incrementally expanded the domain of agency discretion in a manner that ultimately led to the *Chevron* doctrine.[27]

Fourth, Congress enacted the APA in 1946 in part to stop this deviation from the traditional interpretive rules and to recapture the interpretive methodology that prevailed before the Court's experimentation with the law-fact distinction during the 1940s. The APA's text, drafting history, and early scholarly interpretations all point in this direction: they suggest that Congress sought to cabin the discretion that the Court had recently granted administrative agencies.[28] But the APA's text and drafting history were quickly forgotten. In the time between the APA's adoption and *Chevron*, courts relied interchangeably on cases applying the mandamus standard, cases applying the traditional contemporary and customary canons, and cases applying the 1940s approach breaking down the distinction between judicial review of questions of law and questions of fact. The result was, as Judge Friendly observed in *Pittston Stevedoring Corp. v. Dellaventura*, a bewildering and often contradictory set of rules to govern judicial review of agency statutory interpretation.[29] *Chevron* cleared up this confusion by departing from, rather than seeking out, the meaning of the APA's text and the traditional interpretive methodology.

The lacuna in the scholarship on the roots and historical development of judicial deference is no academic issue—for the validation of a legal rule, such as the interpretive rule announced in *Chevron*, is rightly viewed to be its pedigree.[30] Judicial deference's pedigree, moreover, is doubly relevant because Congress specified the proper scope of judicial review of executive legal interpretations when it provided in section 706 of the APA that a "reviewing court shall decide all relevant questions of law" and "interpret constitutional and statutory provisions."[31] The canon of construction that *Chevron* announced can be justi-

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27. *See, e.g.*, NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944); Gray v. Powell, 314 U.S. 402 (1941); *see also* Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 CARDOZO L. REV. 2241, 2243 (2011) ("The *Chevron* opinion's explicit merger of issues of policy with statutory interpretation is of a piece with the *Hearst* Court's fictional treatment of legal conclusions as questions of fact.").

28. *See infra* Section III.B.

29. *See* Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35 (2d Cir. 1976), *aff'd sub nom.* Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977); *infra* Section III.C (discussing Judge Friendly's view).

30. *See* Burnham v. Superior Court of Cal., 495 U.S. 604, 621 (1990) (plurality opinion); *see also* Woolhandler, *supra* note 14, at 199 ("[T]he background assumption that the first hundred years were an age of judicial deference to agencies implicitly undergirds current claims that the executive agencies can more legitimately exercise delegated lawmaking power than the courts.").

31. 5 U.S.C. § 706 (2012).

fied only if it is an appropriate gloss on Congress's articulation of the proper standard of review in section 706 of the APA.

Finally, judicial deference's pedigree is particularly salient today, in the wake of recent opinions addressing the doctrine's scope. In a recent case, Chief Justice Roberts remarked that "[t]he rise of the modern administrative state has not changed" *Marbury*'s directive that courts "say what the law is,"[32] nor has it altered the Court's "duty to police the boundary between the Legislature and the Executive," which is "firmly rooted in our constitutional structure" and is "as critical as [the] duty to respect that [boundary] between the Judiciary and the Executive."[33] And Justice Scalia, in another recent case, called for a rejection of another branch of the doctrine of judicial deference because the "purpose of interpretation is to determine the fair meaning of the rule—to 'say what the law is.'"[34] A consideration of *precisely* what history tells us about the proper relationship between courts and the executive on matters of statutory interpretation is therefore necessary and timely.

This Article traces the intellectual and jurisprudential origins and development of judicial deference to executive interpretation. Part I addresses recent opinions that have called into question the doctrine of judicial deference from a historical perspective. Part II describes the theory and practice of interpretation that prevailed in American courts throughout the nineteenth century. It also describes two associated doctrines that later proved relevant to the evolution of the doctrine of judicial deference—the standard for extraordinary writs, such as mandamus, and Article III review of agency factual determinations. Part III explains how the interpretive framework unraveled over the course of the twentieth century; how Congress sought in the APA to codify the prevailing interpretative approach; and how the attempted codification was unsuccessful, leading ultimately to the Court's decision in *Chevron*.

I. JUDICIAL DEFERENCE AT THE COURT AND THROUGH THE LENS OF HISTORY

Over the past three terms, a series of Supreme Court opinions have sought to address the relevance of historical practice to the legality of judicial deference to executive interpretation from a variety of perspectives, some invoking *Mar-*

32. City of Arlington v. FCC, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

33. *Id.* at 1886.

34. Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1340 (2013) (Scalia, J., concurring in part and dissenting in part) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

bury, other eighteenth-century sources, and the text of the Administrative Procedure Act. But the opinions have yet to grapple with relevant doctrine and the cases cited in *Chevron* itself. In Section I.A, I address the role that precedent played in the *Chevron* opinion. Section I.B then demonstrates that the Justices have since failed to engage seriously with that precedent on which *Chevron* relies, and Section I.C seeks to bring attention to the corresponding gap in the scholarly treatment of *Chevron*'s origins.

A. The Role of Precedent in the Chevron *Opinion*

A close review of *Chevron* shows the central role that preexisting law played in the Court's holding. *Chevron*, it may be remembered, announced a now-canonical interpretive methodology for judicial review of an "agency's construction of the statute which it administers."[35] First, "employing traditional tools of statutory construction," the reviewing court must determine whether "Congress has directly spoken to the precise question at issue."[36] If it has, "that is the end of the matter" and the court "must give effect to the unambiguously expressed intent of Congress."[37] Second, if "Congress has not directly addressed the precise question at issue" because "the statute is silent or ambiguous," a reviewing court's task is to determine "whether the agency's answer is based on a permissible construction of the statute."[38] As a result, the "court need not con-

35. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

36. *Id.* at 842, 843 n.9. This language could be read to require courts to apply all tools of statutory construction, as "in an ordinary statutory interpretation case, with no agency involved," where "the court would proceed by applying whatever tools it thought appropriate to arrive at the best understanding of the statute—an understanding that the court would then ascribe to Congress." JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 776-77 (2d ed. 2013). Because, however, that interpretation "would render *Chevron* practically meaningless," the common approach is to understand *Chevron* instead to "mean that a reviewing court should defer to the agency if the application of the traditional tools of statutory construction fails to supply a *sufficiently clear* answer to the interpretive question." *Id.* at 777.

37. *Chevron*, 467 U.S. at 842-43.

38. *Id.* at 843. The *Chevron* opinion is somewhat inconsistent on the precise rule that it is announcing. In language reminiscent of *Marbury*, the Court remarked that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at n.9. In language suggesting that the Court's holding turned on a balancing of factors, the Court observed that, in the case before it, "the regulatory scheme [was] technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involve[d] reconciling conflicting policies." *Id.* at 865 (footnotes omitted). Finally, some of the language in the Court's opinion suggests that the Court believed the statute was ambiguous, not in the sense that

clude that the agency construction was the only one it permissibly could have adopted to uphold the construction."[39]

In reaching this conclusion, the Court relied on two rationales. The first was sound policy in the allocation of responsibilities among the branches of government. Article III judges, the Court noted, "have no constituency" and "are not experts in the field" or "part of either political branch."[40] Second, *Chevron* sought to ground the rule that it announced in precedent.[41] The Court asserted that it had "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[42] To support that proposition, the Court cited, though it did not analyze, several dozen cases[43] dating back to the Court's 1827 opinion in *Edward's Lessee v. Darby*.[44]

Under the rule announced by these precedents, the Court reasoned, it would be a "basic legal error . . . to adopt a static judicial definition" of a statutory term when "Congress itself had not commanded that definition."[45] Even if the agency's interpretation "represent[ed] a sharp break with prior interpreta-

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the agency selected an imperfect (but permissible) construction over a better (but not required) one, but rather in the sense that there was no superior reading of the statute that the Court could have adopted. *See id.* at 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."); *see also id.* (arguing that judges "have a duty to respect legitimate policy choices made by those who do [have a constituency]," because "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones"). In the text, I have tried to set forth the standard interpretation of the opinion, though there remains confusion on the precise test that *Chevron* establishes. *See* Barnhart v. Walton, 535 U.S. 212, 220 (2002) (clarifying that reenactment of language subject to longstanding agency interpretation reinforces interpretation); Solid Waste Agency v. Army Corps of Eng'rs, 531 U.S. 159, 168 (2001) (giving priority to original interpretation); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 146, 151, 156-57 (2000) (crediting, but not relying on, an agency's longstanding interpretation of a statute to bolster the Court's conclusion that Congress had spoken on a given issue).

39. *Chevron*, 467 U.S. at 843 n.11.

40. *Id.* at 865-66 (stating that judges are not competent to "resolv[e] the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities").

41. *See id.* at 843-44, 843 nn.9 & 11, 844 nn.12-14, 865-66, 865 nn.39-41.

42. *Id.* at 844.

43. *See id.* at 844-45 (quoting United States v. Shimer, 367 U.S. 374, 382, 383 (1961)); *id.* at 844 n.14 (listing the cases).

44. 25 U.S. (12 Wheat.) 206 (1827).

45. *Chevron*, 467 U.S. at 842.

tions of the Act," that break did not necessarily mean "that no deference should be accorded the agency's interpretation of the statute."[46] "An initial agency interpretation," according to the Court, "is not instantly carved in stone."[47] To the contrary, the Court embraced the claim that the "fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible."[48] The key point, according to the Court, was that, in a "technical and complex arena," the agency had "consistently interpreted [the Act] flexibly" rather than "in a sterile textual vacuum" and had properly considered "varying interpretations and the wisdom of its policy on a continuing basis."[49]

B. The Current Debate over Judicial Deference

In a number of recent concurrences and dissents, Justices on the Court have highlighted their interest in confronting judicial deference from a historical or separation-of-powers perspective, relying on an array of different sources from *Marbury* to James Madison to Montesquieu. But none of these opinions has addressed the cases that *Chevron* itself relied on to justify judicial deference as a matter of precedent.

The first avenue through which Justices have raised these issues is in a critique of *Chevron* itself. The Chief Justice's dissent (joined by Justices Kennedy and Alito) in *City of Arlington v. FCC*,[50] for example, attempted to re-evaluate *Chevron* in light of separation-of-powers first principles. While nominally accepting the *Chevron* framework,[51] the *City of Arlington* dissent stressed that its

46. *Id.* at 862; *see also id.* at 862-63 (canvassing a series of rules in which the agency had adopted "varying interpretations" of the statutory term).

47. *Id.* at 863. Although some passages from *Chevron* suggest that it was somehow relevant that the inconsistency in the agency's position was not directly attributable to the agency itself (but rather to earlier unfavorable court of appeals decisions), *see id.* at 864, later cases have stressed that "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework," Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005); *cf.* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1223 (2015) (Thomas, J., concurring) (noting that the Court has "granted *Seminole Rock* deference to agency interpretations that are inconsistent with interpretations adopted closer in time to the promulgation of the regulations").

48. *Chevron*, 467 U.S. at 864.

49. *Id.* at 863-64.

50. 133 S. Ct. 1863 (2013).

51. *See id.* at 1886 (Roberts, C.J., dissenting) (conceding that *Chevron* "guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive"); *id.* at 1880 (accepting that courts act consistently with the separation of powers

"disagreement" with the majority is "fundamental"[52] and premised on the notion that the "duty to police the boundary between the Legislature and the Executive" is "firmly rooted in our constitutional structure" and is "as critical as [the] duty to respect that [boundary] between the Judiciary and the Executive."[53] Fixing "the boundaries of delegated authority," according to the dissent, "is not a task" that courts can "delegate to the agency" because "[w]e do not leave it to the agency to decide when it is in charge."[54] Deference under *Chevron* is appropriate only if the court decides "whether Congress . . . has in fact delegated to the agency lawmaking power over the ambiguity at issue."[55] Accordingly, a congressional delegation of interpretive authority can support *Chevron* deference only when the delegation "extend[s] to the specific statutory ambiguity at issue," because the question *Chevron* requires a court to ask "is whether the delegation covers the 'specific provision' and 'particular question' before the court."[56] More recently, the Chief Justice revisited the proper application and

"when [they] afford an agency's statutory interpretation *Chevron* deference . . . *because* Congress has delegated to the agency the authority to interpret those ambiguities").

52. *Id.* at 1877.

53. *Id.* at 1886.

54. *Id.*

55. *Id.* at 1880; *see id.* at 1886 (stating that the judicial branch may "reconcile [its] competing responsibilities" under *Chevron* only after determining "that Congress has given interpretive authority to the agency"); *id.* at 1877 ("Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue."); *see also id.* at 1875-76 (Breyer, J., concurring in part and concurring in the judgment) (agreeing that "[t]he question whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently"; arguing that "context-specific[] factors will on occasion prove relevant" to whether an agency receives deference; and listing, among the factors, "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time" (quoting Barnhart v. Walton, 535 U.S. 212, 222 (2002))).

56. *Id.* at 1883 (Roberts, C.J., dissenting) (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)); *see also id.* ("A congressional grant of authority over some portion of a statute does not necessarily mean that Congress granted the agency interpretive authority over all its provisions."). For its part, the majority opinion claimed that the Chief Justice's dissent would work a "massive revision of our *Chevron* jurisprudence," *id.* at 1874 (majority opinion) with the "ultimate target [being] *Chevron* itself," *id.* at 1873. Echoing the *City of Arlington* dissent (which he did not join), Justice Thomas recently argued that "*Chevron* deference raises serious separation-of-powers questions" by "preclud[ing] judges from exercising [independent] judgment" and "forcing them to abandon what they believe is the best reading of an ambiguous statute in favor of an agency's construction." Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (quotation marks omitted); *see also* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2528-30

scope of judicial deference in his majority opinion in *King v. Burwell*, which casually dismissed the government's argument that the Internal Revenue Service should receive deference for its construction of the Affordable Care Act's tax-credit provisions. As the majority put it, the Court "often" applies *Chevron* in assessing statutory issues of this nature, but not in "extraordinary cases" of "deep 'economic and political significance' . . . central to th[e] statutory scheme."[57] Accordingly, it was the Court's—not the agency's—"task to determine the [statute's] correct reading."[58]

The second avenue through which the Justices have questioned judicial deference to the executive is through a critique of *Chevron*'s sister doctrine—commonly attributed to the Supreme Court's opinions in *Bowles v. Seminole Rock & Sand Co.*[59] and *Auer v. Robbins*[60]—under which courts "defer to an agency's interpretation of its own regulations."[61] In his partial dissent in *Decker v. Northwest Environmental Defense Center*, Justice Scalia relied on separation-of-powers first principles to argue that this doctrine should be abandoned and replaced with the rule that courts must give regulations their most "natural" and "fairest" construction, "using the familiar tools of textual interpretation," notwithstanding the agency's advocacy of a plausible but "unnatural reading."[62]

(2015) (Thomas, J., dissenting). For a recent court of appeals opinion that expresses similar concerns, see *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (explaining that "*Chevron* and *Brand X* permit 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 of the framers' design").

57. King v. Burwell, 135 S. Ct. 2480, 2488-89 (2015) (quoting Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014)).

58. *Id.* at 2489; *cf.* Mellouli v. Lynch, 135 S. Ct. 1980, 1989 (2015) ("Because it makes scant sense, the [Board of Immigration Appeals]'s interpretation, we hold, is owed no deference under the doctrine described in *Chevron* . . . .").

59. 325 U.S. 410 (1945).

60. 518 U.S. 452 (1997).

61. Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2265 (2011) (Scalia, J., concurring); *see also* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part) ("In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes.").

62. 133 S. Ct. at 1339, 1342 (Scalia, J., concurring in part and dissenting in part); *see also* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1225 (2015) (Thomas, J., concurring) ("By my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case."); *Decker*, 133 S. Ct. at 1338-39 (Roberts, C.J., concurring) (expressing an interest in revisiting *Auer* and *Seminole Rock* in a later case in which the issue has been more fully briefed and argued).

More recently, in a separate concurrence in *Perez v. Mortgage Bankers Ass'n*, Justice Scalia observed that the APA "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations" and that the Court's "elaborate law of deference to agencies' interpretations of statutes and regulations" was "[h]eedless of the original design of" section 706.[63] Despite this observation, however, Justice Scalia did not call for *Chevron*'s abandonment because interpretive deference on statutory questions "was in conformity with the long history of judicial review of executive action" under a writ of mandamus.[64] *Seminole Rock* and *Auer* should be rejected, he argued, because there was no "such history justifying deference to agency interpretations of its own regulations."[65] Justice Thomas likewise questioned the "legitimacy" of *Seminole Rock*, which (according to him) "effect[ed] a transfer of the judicial power to an executive agency" and "raise[d] constitutional concerns" by "undermin[ing]" the Court's "obligation to provide a judicial check on the other branches."[66] That was so because, according to Justice Thomas, "the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws."[67] In language that could apply just as easily to *Chevron* as to *Seminole Rock*, he claimed that

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63. 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment); *see also id.* at 1211-12 (arguing that the Court had "supplement[ed] the APA with judge-made doctrines of deference," thereby "revolutioniz[ing]" the APA's provision on interpretive rules, and claiming that this "problem is . . . perhaps insoluble if *Chevron* is not to be uprooted, with respect to interpretive rules setting forth agency interpretation of statutes").

64. *Id.* at 1212 (citing United States v. Mead Corp., 533 U.S. 218, 243 (2001) (Scalia, J., dissenting)). That position is in some tension with the Court's statement in an opinion (also authored by Justice Scalia) holding that the Supremacy Clause does not create a cause of action. The Court said that it had "long held" that federal courts may grant injunctive relief "with respect to violations of federal law by federal officials"—consistent with the traditional relief "given in a court of equity," which "reflects a long history of judicial review of illegal executive action, tracing back to England." Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015) (citing Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110 (1902)); *see also* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 152-96 (1965)); *infra* Section II.C (addressing this issue). The Court gave no explanation to square this tradition of (seemingly de novo) equitable relief against government officers with the opposing tradition of deferential mandamus review.

65. *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment); *see also id.* at 1210 (Alito, J., concurring) (claiming that separate opinions "offer substantial reasons why the *Seminole Rock* doctrine may be incorrect").

66. *Id.* at 1213 (Thomas, J., concurring in the judgment).

67. *Id.* at 1217.

"[w]hen courts refuse to decide what the best interpretation is under the law, they abandon the judicial check."[68]

What is notable about these recent opinions, taken together, is not merely the anti-deference position that they advocate, but also their failure to engage with the nineteenth-century cases on which *Chevron* relied. To be sure, the Justices have cited Chief Justice Marshall's directive in *Marbury* that courts must "say what the law is";[69] the text of the Vesting Clauses of Articles I and III;[70] James Madison's and Alexander Hamilton's statements on the importance of the separation of powers in *The Federalist*;[71] similar general statements by Montesquieu, William Blackstone, and other pre-Founding authors;[72] and the

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68. *Id.* at 1221.

69. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also* Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (quoting *Marbury* while contending that judicial deference "wrests from Courts the ultimate interpretive authority to 'say what the law is,' and hands it over to the Executive" (citation omitted)); *Perez*, 135 S. Ct. at 1222 (Thomas, J., concurring in the judgment) (citing *Marbury* for the proposition that "[j]udges are at least as well suited as administrative agencies to engage in [the interpretive] task"); Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1340 (2013) (Scalia, J., concurring in part and dissenting in part) (contending that the "purpose of interpretation is to determine the fair meaning of the rule—to 'say what the law is,'" and "to determine what policy has been made and promulgated by the agency, to which the public owes obedience" (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)).

70. *See Michigan*, 135 S. Ct. at 2712-13 (Thomas, J., concurring) (citing U.S. CONST. art. I, § 1; *id.* art. III, § 1).

71. *See Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment); *City of Arlington*, 133 S. Ct. at 1877-78 (Roberts, C.J., dissenting) (contending that, contrary to Madison's claim that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny," the modern administrative state has allowed agencies to "exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules" (internal quotation marks omitted) (quoting THE FEDERALIST NO. 47, at 324 (James Madison) (J. Cooke ed., 1961))); *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part) (contending that deference under *Auer* contradicts Hamilton's explanation for the Constitution's decision not to mimic British practice by using a House of Lords as a court of last resort, "due in part to the fear that he who has 'agency in passing bad laws' might operate in the 'same spirit' in their interpretation" (quoting THE FEDERALIST NO. 81, at 543-44 (Alexander Hamilton) (J. Cooke ed., 1961))).

72. *See Perez*, 135 S. Ct. at 1220 (Thomas, J., concurring in the judgment) (arguing that "[j]udges have long recognized their responsibility to apply the law" and appealing to Chief Justice Coke); *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part) (arguing that allowing agencies to both "prescribe" and "interpret" regulations violates the principle that "the power to write a law and the power to interpret it cannot rest in the same hands"; by appealing to Montesquieu's caution against uniting "the legislative and executive

text of section 706 of the APA.[73] But *Chevron*'s reliance on early nineteenth-century cases raises the possibility that each of these sources can, at the end of the day, be reconciled with the broad principle of judicial deference that the Court believed that it was rearticulating.

Cases like *Edward's Lessee*, on which *Chevron* itself relied, are completely missing from the recent opinions questioning judicial deference. In other words, though *Chevron* was premised on a jurisprudential tradition, that tradition plays no part in the current debate. That omission is a serious one, because (assuming *Chevron* properly understood the cases) their age suggests that separation of powers poses no barrier to judicial deference to executive interpretation. The import of those cases is thus key to assessing the recent judicial critiques of the *Chevron* opinion.[74]

C. The Scholarly Treatment of the Precedents Cited in Chevron

Scholars have previously addressed the cases on which *Chevron* relied, but here too the debate remains incomplete. In an article almost contemporaneous with the Court's opinion in *Chevron*, Henry Monaghan relied on the same basic set of precedents to conclude that "[h]istory, if not logic, is . . . squarely against the wide assertion . . . that article III courts can never yield to administrative

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powers . . . in the same person" for fear that "the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner"; and by appealing to Blackstone's condemnation of the ancient practice of resolving doubts about "the construction of the Roman laws" by "stat[ing] the case to the emperor in writing, and tak[ing] his opinion upon it" (quoting MONTESQUIEU, SPIRIT OF THE LAWS bk. XI, at 151-52 (O. Piest ed., T. Nugent trans., 1949) (1748); and 1 WILLIAM BLACKSTONE, COMMENTARIES *58)).

73. *See Perez*, 135 S. Ct. at 1211-12 (Scalia, J., concurring in the judgment); *City of Arlington*, 133 S. Ct. at 1880 (Roberts, C.J., dissenting).

74. The debate within the courts has been supplemented recently by legislative debate on the wisdom of judicial deference. Two Senate committees have held hearings with testimony questioning the continued role of judicial deference to agencies' statutory interpretations. *See Examining Agency Use of Deference, Part II: Hearing Before the Subcomm. on Regulatory Affairs and Fed. Mgmt. of the S. Comm. on Homeland Sec. and Governmental Affairs*, 114th Cong. (2016), http://www.hsgac.senate.gov/hearings/examining-agency-use-of-deference-part-ii [http://perma.cc/934T-2QLF]; *Examining the Federal Regulatory System To Improve Accountability, Transparency and Integrity: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015), http://www.judiciary.senate.gov/meetings/examining-the-federal-regulatory-system-to-improve-accountability-transparency-and-integrity [http://perma.cc/AZV6-5KVJ]. And the House of Representatives recently passed legislation, entitled the "Separation of Powers Restoration Act of 2016," that would add to section 706 an explicit requirement that courts review "de novo" all questions of law. *See* H.R. 4768, 114th Cong. (2016).

constructions of law."[75] He contended that "the Marshall court itself gave early sanction to deference principles," with "judicial expressions of deference increas[ing]" over the course of the nineteenth century and *Marbury* proving "no barrier to the development."[76]

Adopting a slightly different perspective, Thomas Merrill identified a tradition of deference that was "pragmatic and contextual" and based on "an eclectic cluster of considerations," such as the relative expertise of the agency, the consistency or contemporaneity of the agency's interpretation, and the depth of the agency's analysis.[77] In a similar vein, Peter Strauss observed that a court interpreting a statute referred to "the meanings attributed to it by prior (administrative) interpreters, their stability, and the possibly superior body of information and more embracive responsibilities that underlay them."[78] Like Strauss and Merrill, the most prominent administrative law scholars in the decades following the APA's passage, Kenneth Culp Davis and Louis Jaffe, both described the doctrine of judicial deference as turning on a host of factors.[79] According to Merrill, however, this pre-*Chevron* tradition "had no unifying theory for de-

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75. Henry Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 17 (1983). Notwithstanding the thirty-year passage of time, both the dissent and majority in *City of Arlington* cited Monaghan's article. Chief Justice Roberts quoted the article for the proposition that a "court is not abdicating its constitutional duty to 'say what the law is' by deferring to agency interpretations of law: it is simply applying the law as 'made' by the authorized lawmaking entity." 133 S. Ct. at 1880 (Roberts, C.J., dissenting) (quoting Monaghan, *supra*, at 27-28). Justice Scalia's majority opinion cited it for the proposition that "[a]dministrative application of law is administrative formulation of law whenever it involves elaboration of the statutory norm." *Id.* at 1870 (majority opinion) (quoting Monaghan, *supra*, at 29).

76. Monaghan, *supra* note 75, at 14-15.

77. Merrill, *supra* note 18, at 972-73. In a subsequent article, Merrill and his coauthor Kathryn Watts have suggested that Congress signals that judicial deference is appropriate when it grants an agency rulemaking authority with the "force of law" and that, conversely, agencies that lack such rulemaking authority ought not be given *Chevron* deference. Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002). Although their article uncovers significant evidence that the APA intended to tether its notice-and-comment requirements to the phrasing of rulemaking grants, I am not persuaded that the language of the grants was intended to trigger application (or non-application) of judicial deference.

78. Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*," 112 COLUM. L. REV. 1143, 1156 (2012); *see also* Peter L. Strauss, *In Search of* Skidmore, 83 FORDHAM L. REV. 789, 789 (2014) ("Ever since 1827, the U.S. Supreme Court has repeatedly observed that when a court is interpreting a statute that falls within the authority of an administrative agency, the court in reaching its own judgment about the statute's meaning should give substantial weight to the agency's view.").

79. *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW § 257, at 927 (1951); JAFFE, *supra* note 64, at 576 (1965).

termining when to defer"; had "no explicit rationale linking the various factors together," which "tended to be invoked unevenly"; and "did not comprise, either individually or collectively, what could be described as a coherent doctrine."[80] "No attempt," as he puts it, "was made to connect the various factors together or to explain their relevance in terms of a model of executive-judicial relationship."[81]

With respect to the argument that *Chevron* may be justified as consistent with "the origins of federal-court judicial review" in the writ of mandamus, scholars have had little to say.[82] Since *Chevron*, there has been no in-depth scholarly or jurisprudential attention to this issue, despite acknowledgement that it is one of the few attempts "to reconcile *Chevron* with the text of the APA."[83]

The failure to engage with *Chevron*'s precedential origins and the nature of mandamus review has left an important gap in the administrative law literature. In the remainder of this Article, my goal is not only to fill this gap, but also to provide a richer and deeper understanding of the doctrinal underpinnings of judicial deference and an explanation of how the *Chevron* Court misinterpreted the precedents on which it relied.

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80. Merrill, *supra* note 18, at 972, 974.

81. *Id.* at 974; *see also* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 (1985) (describing various "divergent strains in the Court's administrative review jurisprudence"); Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1025-26 (2005) ("[T]he judicial deference doctrine of the pre-*Chevron* era did not constitute a coherent body of law, and one must treat generalizations about it with care."); Woolhandler, *supra* note 14, at 234 ("The Court's deference to long-standing constructions of statutes by the executive seems to have been similarly influenced by the need for reliability in land patents to avoid obstructions on the sale and use of land.").

82. *See* United States v. Mead Corp., 533 U.S. 218, 241-42 (Scalia, J., dissenting). Justice Scalia refers to, and derives his view from, Jaffe's observation that the standard for mandamus can "be taken to mean that if the applicable rule of law is disputable (in the opinion of the judge), then the court will not make an independent determination of the law upon which to base a command to the officer," which Jaffe analogizes to a deferential "theory of judicial review generally." JAFFE, *supra* note 64, at 183.

83. Manning, *supra* note 10, at 465 & n.68. Two recent (albeit fleeting) treatments of mandamus' relevance to judicial deference can be found in PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 293-94, 308-09 (2014), and JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 212-13, 302 (2012).

II. THE THEORY AND PRACTICE OF INTERPRETATION FROM THE EARLY AMERICAN REPUBLIC TO THE END OF THE NINETEENTH CENTURY

Interpretive theorists of the seventeenth and eighteenth centuries routinely applied two interpretive canons to eliminate the problem of ambiguity: a reliance on the contemporaneous understanding of a text (what was called the "*contemporanea expositio*") and a reliance on the customary understanding of that text (the "*interpres consuetudo*"). The nineteenth-century cases on which *Chevron* relied apply these two canons of construction, which form the critical theoretical underpinnings for the case law and the interpretive methodology of the era. In this Part, I explore the interpretive methodology used by nineteenth-century courts and commentators, beginning in Section II.A with a review of the intellectual foundations of the interpretive approach, before turning in Section II.B to an examination of how American courts applied the interpretive methodology in practice. I then turn in Section II.C to two related issues: the articulation of the standard for obtaining a writ of mandamus, and the proper scope for reviewing factual issues previously adjudicated by executive branch officers. These issues illuminate how nineteenth-century courts viewed the proper relationship between the judicial and executive branches. They were also instrumental in the development of doctrines of deference during the twentieth century. Finally, in Section II.D, I offer a "view from 1900" through the lens of nineteenth-century treatises.

A. *The Theory of Interpretation: The* Contemporanea Expositio *and* Interpres Consuetudo *Canons of Construction*

In a recent opinion respecting the denial of certiorari, Justice Scalia remarked that King James I, England's monarch at the turn of the seventeenth century, "did not have the benefit of *Chevron* deference."[84] James I governed a nation with an administrative apparatus far different in kind and scope from the American administrative state. But the smaller size and dissimilar ambitions of the seventeenth-century English state did not eliminate the need for English judges to interpret ambiguous legal text. Rather than adopting a *Chevron*-like framework, however, judges adhered to customary canons of construction in the face of statutory ambiguity. Two of those canons—the *contemporanea*

84. Whitman v. United States, 135 S. Ct. 352, 353 (2014) (Scalia, J., concurring in the denial of certiorari). James I was the primary royal antagonist of Sir Edward Coke, whose views shaped English law and the legal perspective of eighteenth- and nineteenth-century American lawyers. *See infra* notes 99-101 and accompanying text.

expositio and *interpres consuetudo*—were central to the development of judicial deference.

1. The Problem of Ambiguity

It takes no genius to recognize that legal text can, for a variety of reasons, be difficult to interpret. Not surprisingly, seventeenth- and eighteenth- century legal theorists (some of whom could fairly be described as geniuses) identified the problems that ambiguity, in its various guises, posed for an ordered legal system.[85]

Writ large, the goal of interpretation was straightforward: understanding the meaning and intention of the text's "speaker." In the words of John Selden, a well-known seventeenth-century scholar and parliamentarian, "a mans wryting has" the "sense" that "the Author meant when he write it."[86] Or as John Locke put the same point, a man speaks so "that he may be understood" and to "make known his ideas to the hearer."[87] The "signification" of the speaker's words, therefore, "is limited to his ideas, and they can be signs of nothing else"—lest they end up "hav[ing] no signification at all."[88]

That commonsense approach, however, could break down in significant cases. One difficulty was the inherent ambiguity of human language and the constant concern that an author had expressed himself imprecisely—a problem only exacerbated by the fact that legal documents were often created for application to future circumstances not fully anticipated.[89] The amount of time between the text's creation and the text's application often meant, as Blackstone pointed out, that the precise issue to be adjudicated "probably . . . did not occur

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85. *Cf.* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment) ("Those who ratified the Constitution knew that legal texts would often contain ambiguities.").

86. THE TABLE TALK OF JOHN SELDEN 12-13 (Frederick Pollock ed., 1927).

87. JOHN LOCKE, AN ESSAY CONCERNING THE HUMAN UNDERSTANDING bk. III, ch. II, § 2, at 204 (Raymond Wilburn ed., 1947) (1689).

88. *Id.*; *id.* § 8, at 206.

89. *See* 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 21, at 24 b (photo. reprt. 2008) (Francis Hargrave & Charles Butler eds., 1809) (observing that "the law-makers could not possibly set downe all cases in expresse terms"); THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 8 (3d ed. 1724) (observing that "[l]aw-makers cannot comprehend all Cases"); *cf.* Edrich's Case (1603) 77 Eng. Rep. 238 (CP) 239 (holding that the words of a statute are followed "when the meaning of the makers doth not appear to the contrary, and when no inconvenience will thereupon follow").

to the legislators when they framed the . . . Act."[90] A second difficulty was the change in the conventional usages of language over time—otherwise known as semantic drift. Even where a legal text's meaning was unambiguously known and established at the time of its adoption, the passage of years could change and obscure the sense of the words used. "Laws operate at a distance of time," wrote the English cleric and academic Thomas Rutherforth in an influential treatise—a distance that could hinder the search for "true meaning" by interpreters "who live many years, after the laws were made."[91]

And a third difficulty arose in the case of legal texts created by more than one party.[92] In such cases, the various "authors" may not have intended to express the same idea in creating the text, and asking them for their meaning after the fact could be problematic because their perspectives could become unreliable. At the time when judicial interpretation was generally necessary—after a dispute between parties could not be resolved outside of the courts—a fair-minded interpreter could not simply ask the parties what they meant to say, because each party's interpretation of the text was likely colored by present interests.[93] For that reason, Blackstone argued that "[t]o interrogate the legislature

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90. Gerard's Case (1777) 96 Eng. Rep. 663 (CP) 665 (opinion of Blackstone, J.).

91. 2 THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW 336 (1756); *see also* 3 EMMERICH DE VATTEL, THE LAW OF NATIONS 202 (Charles G. Fenwick trans., Carnegie Inst. 1916) (1758) ("Languages are constantly varying in form; the force and meaning of terms change in the course of time.").

92. A DISCOURSE UPON THE EXPOSICION & UNDERSTANDINGE OF STATUTES WITH SIR THOMAS EGERTON'S ADDITIONS 151 (Samuel E. Thorne ed., 1942) [hereinafter EXPOSICION & UNDERSTANDINGE OF STATUTES] (describing the problem as involving the existence of "so manie heades as there were, so many wittes; so manie statute makers, so many myndes").

93. *See* 3 DE VATTEL, *supra* note 91, at 200 ("[I]f I am allowed to explain my promises after my own pleasure I shall have it in my power to render them meaningless and of no effect by giving them a meaning quite different from that they had for you when you accepted them."); *see also* 1 JEAN DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER TOGETHER WITH THE PUBLICK LAW xlix (William Strahan trans., 2d ed. 1737) (1722) (advising that, in the formation of contracts, "the Intention of the one Party, ought to answer to that of the other, and it is necessary that they understand each other, and that they agree together," lest one party "hath made use of an ambiguous Expression"); HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 352 (Jean Barbeyrac ed., Innys et al. 1738) (1625) (reasoning that "there would be no Obligation at all by Promises, if every Man were left to his Liberty, to put what Construction he pleased upon them"); 1 JOHN JOSEPH POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS 372-73 (Garland 1978) (1790) ("[W]hatever difference there may be between a man's internal sentiments and external expression, he must, in his ordinary transactions with mankind, be concluded to use signs according to their common acceptation . . . . Therefore he, in whose favor an obligation is incurred, has a right to compel him, from whom it is due, to perform it in that sense, which the ordinary interpretation of the signs made use of import."); SAMUEL VON PUFENDORF, THE LAW OF NATURE AND NATIONS: OR, A

to decide particular disputes, is not only endless, but affords great room for partiality and oppression."[94] Like parties to a contract, legislators could give biased testimony, perhaps as a result of influence by persons interested in and capable of corrupting the bargain struck in the statute's text.[95]

2. *Solutions to the Problem of Ambiguity*

The goal of interpretation was to mitigate these difficulties through the application of neutral rules—the canons of construction—that approximated, in Blackstone's words, the legislature's "intentions at the time when the law was made, by signs the most natural and probable."[96] Many of these canons were nothing more than rules of thumb for good English. Others were of a more legal bent and remain familiar to us today, such as the canon that an interpreter should "construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers."[97]

Two of those canons are central to the development of judicial deference. The first canon was distilled in the Latin maxim *contemporanea expositio est optima et fortissima in lege*—or "a contemporaneous exposition is the best and most powerful in law." The rule had deep-rooted origins. As early as the

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GENERAL SYSTEM OF THE MOST IMPORTANT PRINCIPLES OF MORALITY, JURISPRUDENCE, AND POLITICS 534 (Bonwicke et al. eds., Basil Kennet trans., 5th ed. 1749) (1672) ("[T]here would be no such Thing as *Obligation*, if any one might free himself, by affixing what Sense he pleased to his *Signs*, and by pretending that he meant different from their true Signification.").

94. 1 WILLIAM BLACKSTONE, COMMENTARIES *58.

95. *Cf.* 2 RUTHERFORTH, *supra* note 91, at 308 (reasoning that it would be unfair to require a person "to comply with [a legislator's] will" when he did "not know what [that] will is," but could see only an "outward sign or mark [namely, the enacted law], by which this will is expressed or declared").

96. 1 BLACKSTONE, *supra* note 94, at *59 (emphasis omitted); *see also* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment) (observing that during the ratification debate, Federalists expected courts to apply "principles of interpretation that had been set out by jurists for centuries"); Simon v. Metivier or Motivos (1766) 96 Eng. Rep. 347 (KB) 347 (opinion of Mansfield, C.J.) ("[W]hat the Legislature meant, is the rule both at law and equity; for, in this case, both are the same. The key to the construction of the Act is the intent of the Legislature . . . ."). In discussing the interpretive approach of this era, I do not mean to suggest that all theorists shared a common vision on all legal matters. Far from it. *See, e.g.*, Emily Kadens, *Justice Blackstone's Common Law Orthodoxy*, 103 NW. U. L. REV. 1553, 1598-1604 (2009) (describing Blackstone as the anti-Mansfield because of the former's advocacy of common-law orthodoxy and the latter's advocacy of change). My summary of the interpretive methodology is intended to canvass the shared legal ground upon which the various authors conducted their legal debates.

97. 2 COKE, *supra* note 89, § 728, at 381 a.

fifteenth century, Chief Justice Frowyck claimed that, in the absence of legislators' "declaracion of theire myndes" in statutory text, the "authoritye" of those who "were mooste neerest the statute" would "persuade us."[98]

For the generation of the Constitution's Framers, the canon's most famous proponent was the eminent Elizabethan-era jurist Edward Coke. "Great regard," he is believed to have explained,

> [O]ught, in construing a statute, to be paid to the construction which the sages of the law, who lived about the time, or soon after it was made, put upon it; because they were best able to judge of the intention of the makers at the time when the law was made.[99]

Early expositors of legal text were often "best able to judge of the intention" of the text's drafters, thereby allowing a later interpreter to approximate the drafters' meaning. For that reason, Coke explained in the *Magdalen College Case* that "Acts of Parliament . . . are to be construed according to the intent and meaning of the makers of them, the original intent and meaning is to be observed."[100] In particular, "ancient acts and graunts," like the Magna Carta, "must be construed and taken as the law was holden at that time when they were made."[101] Other legal scholars advocated the same general approach.[102] Rutherforth, for exam-

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98. EXPOSICION & UNDERSTANDINGE OF STATUTES, *supra* note 92, at 152; *see also* THEODORE F.T. PLUCKNETT, STATUTES & THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 49-50 (1st ed. 1922) (describing an early case in which the judge, who also served as a member of the legislature, proclaimed, "[d]o not gloss the statute for we know better than you; we made it").

99. 2 FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES 562 (2d ed. 1848) (ascribing this language to Coke).

100. The Case of the Master and Fellows of Magdalen Coll. in Cambridge (1615) 77 Eng. Rep. 1235, 1245; 11 Co. Rep. 66 b, 73 b.

101. 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 1 (photo. reprt. 2008) (1797); *see also* Rex v. Bishop of London (1694) 89 Eng. Rep. 714, 715; 1 Show. K.B. 493, 495 ("[I]n any construction of Acts of Parliament, the original intent and meaning of the makers of the law is to be observed . . . .").

102. *See, e.g.*, S.B. CHRIMES, ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY 293 (1936) (stating that the "rule of reference to the intention of the legislators . . . was certainly established by the second half of the fifteenth century"). The point was made repeatedly by the authors of legal treatises. *See* GROTIUS, *supra* note 93, at 353 ("The best Rule of Interpretation is to guess at the Will by the most probable Signs . . . ."); SIR CHRISTOPHER HATTON, A TREATISE CONCERNING STATUTES, OR ACTS OF PARLIAMENT: AND THE EXPOSITION THEREOF 14 (1677) (asserting that "when the intent is proved, that must be followed"); VON PUFENDORF, *supra* note 93, at 535 ("The true End and Design of Interpretation is, to gather the Intent of the Man from most probable Signs."); 2 RUTHERFORTH, *supra* note 91, at 309 ("The end, which interpretation aims at, is to find out what was the intention of the writer;

ple, advocated that, to "remov[e] any doubts about the sense" of a law "owing only to our remoteness from its original establishment," an interpreter should "look[] back into the contemporary practice . . . which the law produced in the first instance" to "see in what sense it was then understood."[103]

Jurists applied the *contemporanea expositio* rule of thumb in a wide variety of cases. In 1591, for example, the King's Bench observed that "when [an] ancient grant is general, obscure, or ambiguous, it shall not be now interpreted as a charter made at this day, but it shall be construed as the law was taken at the time when such ancient charter was made, and according to the ancient allowance on record."[104]

And the canon was not directed at statutes alone: it was viewed as a generalized method of proper interpretation, applicable to all manner of legal instruments. Vattel, for example, argued that, in seeking the meaning of a treaty's words at the time it "was entered into and its terms drawn up," the interpreter should consult "deeds of the same period and . . . contemporary writers, by a careful process of comparison."[105]

Precisely how to implement the canon was the subject of debate. On the one hand, in what may be one of the early uses in the common-law tradition of some sort of "legislative history" to arrive at the *contemporanea expositio*, Chief Justice Frowycke wrote in the fifteenth century that "those that were the penners & devisors of statutes [have] bene the grettest lighte for exposicion of statutes."[106] That suggested that the interpretation expressed by the authors of

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to clear up the meaning of his words . . . ."); 3 DE VATTEL, *supra* note 91, at 201 (asserting that the rules for interpreting treaties and contracts should be "adapted to determining the meaning of the contract as it was naturally understood by the parties when drawn up and accepted" (emphasis omitted)). For examples of sources using the Latin formulation of the canon, see 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 648 (5th ed. 1786); HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 683 (8th ed. 1882); 2 DWARRIS, *supra* note 99, at 562; and WOOD, *supra* note 89, at 8.

103. 2 RUTHERFORTH, *supra* note 91, at 336-37.

104. The Case of the Abbot of Strata Mercella (1591) 77 Eng. Rep. 765, 772; 9 Co. Rep. 24 a, 28 a (footnotes omitted).

105. 3 DE VATTEL, *supra* note 91, at 202.

106. EXPOSICION & UNDERSTANDINGE OF STATUTES, *supra* note 92, at 151-52. It may be that Chief Justice Frowycke's perspective on the appropriateness of referring to the personal knowledge and intent of a law's draftsman predated (and was hence superseded by) the separation of judicial and governmental functions in the King's Council. *See* S.E. Thorne, *The Equity of a Statute and* Heydon's Case, 31 ILL. L. REV. 202, 203 (1936) ("It is only after the middle of the fourteenth century, when judges find themselves no longer able to draw either upon the actual intention of the legislator or upon the royal dispensing power, that they are forced to construct a body of rules of statutory interpretation . . . ."); *see also* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case*

the statute—albeit intentions not expressed in the statute itself—would be somehow privileged above the interpretation of others. A number of cases, such as Chief Justice Mansfield's opinion in *Atcheson v. Everitt*, "looked into the debates of th[e] days" during which a law was enacted.[107] On the other hand, the English majority view appeared to preclude the use of legislative debates to aid statutory construction. As Christopher Hatton, Lord Chancellor under Elizabeth I, observed, parliamentarians had no special authority over the interpretation of legal text because "their Authority is returned to the Electors so clearly" even "if they were altogether assembled again for interpretation by a voluntary meeting."[108] More to the point, other judges asserted that "[t]he sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the house where it took its rise."[109] As a result, "[p]arliamentary doubts, debates, or conferences, ought to have no weight in directing judicial determinations."[110]

But whether the interpreter was permitted to use sources akin to what we now call legislative history—or only other sources indicating the author's intent, such as contemporaneous dictionaries or scholarly works—the ultimate

Against Construction, 103 NW. U. L. REV. 751, 790, 791 n.135 (2009) (reasoning that, in the eighteenth and nineteenth centuries, an "increasing emphasis on statutory text was due in part to the emergence of a stricter separation of legislative and judicial powers" and in part to the appearance of "more careful drafting" by legislators).

107. Atcheson v. Everitt (1775) 98 Eng. Rep. 1142, 1147; 1 Cowp. 382, 390; *see also* Earl of Leicester v. Heydon (1571) 75 Eng. Rep. 582, 602; 1 Plowden 384, 398 (citing legislative history that was "well known, the affair happening but of late time" and that may "discover to us the intent of the makers of the Act"); Partridge v. Strange (1553) 75 Eng. Rep. 123, 130; 1 Plowden 77, 82 (reasoning that, because "words" are "no other than the verberation of the air," they are only "the image" of the statute; that "the life of the statute rests in the minds of the expositors of the words"; and that if those expositors "are dispersed, so that their minds cannot be known, then those who may approach nearest to their minds shall construe the words"); CHRIMES, *supra* note 102, at 293-95 (discussing judicial reference to legislative intent in the fifteenth century).

108. HATTON, *supra* note 102, at 29-30.

109. Millar v. Taylor (1769) 98 Eng. Rep. 201, 217; 4 Burr. 2303, 2332 (Willes, J., concurring) (reasoning that the legislative "history is not known to the other house, or to the Sovereign"); *cf. id.* at 256 (opinion of Mansfield, C.J.) (relying on legislative history by observing that "[a]n alteration was made in the committee"); *id.* at 248 (Yates, J., dissenting) (relying on legislative history). During the course of the nineteenth century, the British courts' aversion to relying on legislative history hardened. *See* Regina v. Hertford Coll., [1878] 3 QB 693 at 707 (Eng.) ("The statute is clear, and the parliamentary history of a statute is wisely inadmissible to explain it . . . .").

110. Evans v. Harrison (1762) 97 Eng. Rep. 51, 62; Wilm. 130, 159.

point was the same: the faithful interpreter of an ambiguous statute resorted to contemporaneous sources to determine the *contemporanea expositio*.[111]

The second rule of thumb was also distilled into a Latin phrase—*optimus interpres legum consuetudo*, or "usage is the best interpreter of laws."[112] The *interpres consuetudo* canon, as I will call it, had equally deep-rooted origins. The Roman jurist Julius Paulus Prudentissimus—the praetorian prefect to the Emperor Alexander Severus and the most excerpted authority in Justinian's *Digest*—had expressed the point as early as the third century.[113] Like the *contemporanea expositio* canon, the *interpres consuetudo* canon was routinely applied by courts.[114] Coke applied it in *Lord Cromwel's Case*.[115] John Vaughan, the Chief Justice of the Court of Common Pleas and a friend of John Selden's, remarked in *Sheppard v. Gosnold* that "[w]here the penning of a statute is dubious, long usage is a just medium to expound it by"—because "the meaning of things spoken or written must be, as it hath constantly been receiv'd to be by common acceptation."[116]

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111. In short, the timeworn question of whether "legislative history," or the expressed subjective "intention" of the authors of a legal text, may properly be used as a tool to interpret statutes is outside the scope of this Article. For recent treatments of the historical practice, see PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 54 (2008) (arguing that common lawyers started with "an initial presumption that the intent could be discerned from the words," but "recogni[zed] that when the words remained unclear it was necessary to inquire more broadly about the act's intent"); and Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239, 1259-73 (2007) (concluding that the English rule precluding reliance on legislative history did not appear until the nineteenth century).

112. *See* 1 COKE, *supra* note 101, at 18, 282 (setting forth the canon); *see also id.* at 25 (contending that "the best expositors of this and all other statutes are our bookes and use or experience"); EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 75 (5th ed., Streater et al. 1671) (1644); 2 JOHN LILLY, THE PRACTICAL REGISTER: OR A GENERAL ABRIDGMENT OF THE LAW 649 (2d ed. 1745) (stating that "long Usage is a just Medium to expound [an Act of Parliament] by").

113. THE DIGEST OF JUSTINIAN 1.3.37 (Paulus, Quaestiones 1) ("[O]ptima enim est legum interpres consuetudo."); *see also* DIG. 1.3.23 (Paulus, Ad Plautium 4) ("Minime sunt mutanda, quae interpretationem certam semper habuerunt."); DIG. 1.3.26 (Paulus, Quaestiones 4) ("Non est novum, ut priores leges ad posteriores trahantur.").

114. The maxim appeared in a variety of formulations. *See, e.g.*, Stevens v. Duckworth (1664) 145 Eng. Rep. 486, 487; Hardres 338, 340 ("[U]sus optimus magister & interpres." ("Use is an excellent teacher and interpreter.")); Molyn's Case (1590) 77 Eng. Rep. 261, 261; 6 Co. Rep. 5 b, 6 a ("[C]onsuetudo est optima interpres legum.").

115. Lord Cromwel v. Andrews (1601) 76 Eng. Rep. 574, 597; 2 Co. Rep. 69 b, 81 a.

116. Sheppard v. Gosnold (1672) 124 Eng. Rep. 1018, 1023; Vaugh. 159, 169; *see also* 4 BACON, *supra* note 102, at 653 (repeating Chief Justice Vaughan's language). Custom did not trump plain legal text. As Vaughan explained, usage that was "against the obvious meaning of an

Nobody harbored the illusion that reference to contemporary or customary practices allowed the interpreter to capture perfectly the meaning of the speaker. But as the British judge and politician James Mansfield observed, "It is of greater consequence that the law should be as uniform as possible, than that the equitable claims of an individual should be attended to."[117] There was, in other words, utility in not disturbing the expectations of parties who had come to rely on the customary interpretation. If the "uniformity" produced by the customary interpretation did not reflect the legislature's wishes—perhaps because "the subtle and nice Wits of learned Lawyers" had obscured parliamentary intent—the legislators, "who best knew their own Sense and Meaning," could enact explanatory statutes "to direct and guide the Judges."[118]

3. American Perspectives

American lawyers at the time of the Constitution's adoption were familiar with these theoretical debates and the resulting interpretive framework.[119] For example, in the widely circulated *The Federalist*, James Madison and Alexander Hamilton analyzed how these interpretive principles would be applied to construe a newly adopted Federal Constitution and concluded that constitutional

Act of Parliament" and was practiced solely "by the vulgar and common acceptation of the words" was "an oppression," rather than an "exposition of the Act." *Sheppard*, 124 Eng. Rep. at 1023; Vaugh. at 170; *see also* Molyn's Case, 77 Eng. Rep. at 262 ("Quod licet consuetudo est magnae authoritatis nunquam tamen praejudicat veritati." ("While custom is of great authority, it never . . . prejudices the truth.")); 4 BACON, *supra* 102, at 653 ("But if the Usage have been, to construe the Words of a Statute contrary to their obvious Meaning, such Usage is not to be regarded . . . .").

117. Hammond v. Anderson (1804) 1 Bos. & Pul. 69, *reprinted in* 2 LEADING CASES IN THE COMMERCIAL LAW OF ENGLAND AND SCOTLAND 148, 150 (George Ross ed., 1855).

118. WILLIAM PEYT, JUS PARLIAMENTARIUM 55 (2d ed. 1741).

119. *See, e.g.*, Julius Goebel, *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 563 (1938) ("It is the tradition of Coke's time that passes over to the American colonies, for it is upon the methods and constitutional views of Coke that the colonial lawyers were nurtured."). Thomas Jefferson, to take just one example, told Madison that "a sounder whig" than Coke "never wrote, nor of profounder learning in the orthodox doctrines of the British constitution, or in what were called English liberties." Letter from Thomas Jefferson to James Madison (Feb. 17, 1826), *in* 12 THE WORKS OF THOMAS JEFFERSON 455, 456 (Paul Leicester Ford ed., 1905). It should be noted, however, that as a nineteen-year-old law clerk, Jefferson rendered a somewhat less favorable verdict of Coke's scholarship. *See* Letter from Thomas Jefferson to John Page (Dec. 25, 1762), *in* 3 THE PAPERS OF THOMAS JEFFERSON, 1760-1776, 3, 5 (Julian P. Boyd ed., 1950) ("Well, Page, I do wish the Devil had old Cooke, for I am sure I never was so tired of an old dull scoundrel in my life.").

interpretation should mimic ordinary statutory interpretation.[120] Thus, Hamilton equated the task that Article III judges would have in interpreting the Constitution with their ordinary role in applying tools of statutory construction to congressional enactments. Without suggesting a bright demarcation between deferential statutory review and de novo constitutional review, he observed that the judiciary would "ascertain [the Constitution's] meaning, as well as the meaning of any particular act proceeding from the legislative body."[121]

Second, in articulating that generalized interpretive approach, Madison acknowledged the pervasive problem of legal ambiguity, and the specific criticisms of the anti-Federalists that the language of the Constitution was ambiguous,[122] in terms that would have been familiar to legal theorists of the seventeenth and eighteenth centuries. Madison observed that "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas."[123] Due to inherent deficiencies in language, "new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal."[124]

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120. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985) ("Early interpreters usually applied standard techniques of statutory construction to the Constitution."); *see also* Donaldson v. Harvey, 3 H. & McH. 12, 19 (Md. 1790) ("In expounding the [F]ederal [C]onstitution, the same rules will be observed which are attended to in the exposition of a statute.").

121. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

122. *See* Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 307 n.254 (1989) (citing examples of anti-Federalist complaints about the Constitution's vagueness). *But see id.* at 308 nn.260-61 (citing examples of Federalist contention that "the Constitution was clear or at least as clear as possible in light of both linguistic and political difficulties").

123. THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).

124. *Id.* Madison's private correspondence further reveals that he was generally aware of then-current European debates on proper interpretive methodology and specifically aware of the special problems posed by semantic drift. *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 521, 525 (2003) (observing that "James Madison and other prominent founders did not consider the Constitution's meaning to be fully settled at the moment it was written," but rather "recognized that it contained ambiguities"); *see also id.* at 551 n.137 (touching briefly on the connection between early interpretive methodology and *Chevron* by making the "limited" analogy that the "canon of statutory construction reflected in [*Chevron*] illustrates how legal texts that do not explicitly delegate interpretive authority to anyone might nonetheless be understood to include an implicit delegation as part of . . . their 'meaning,'" but stressing that *Chevron* and founding-era interpretive principles are not "identical" given that "the terms of the delegation inferred by *Chevron* give administrative agencies substantially more freedom to depart from settled understandings than the Madisonian concept of 'liquidation'").

Third, Hamilton considered, but rejected, the possibility that the political branches would fill in the ambiguities in the Constitution's text. He addressed the likelihood that the "[l]egislative body [would] themselves [be] the constitutional judges of their own powers," making the "construction they put upon them . . . conclusive upon the other departments."[125] He rejected that view as not being "the natural presumption, where it is not to be collected from any particular provisions in the Constitution."[126] In light of the Constitution's separation of powers, Hamilton noted, it would be "far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority," with "[t]he interpretation of the laws [as] the proper and peculiar province of the courts."[127]

Fourth, both Madison and Hamilton adopted the proposed solutions to the problem of legal ambiguity advocated by seventeenth- and eighteenth-century legal theorists. They stressed, in other words, the role of custom and contemporaneity in construing those parts of the Constitution's text that may otherwise be susceptible to a range of permissible interpretations. In the words of Hamilton, customary practice that developed over time would "liquidate the meaning" of the Federal Constitution.[128] Or as Madison put it, the meaning of constitutional provisions would be "liquidated and ascertained by a series of particular discussions and adjudications."[129]

Commentators of the era echoed Madison's and Hamilton's views in polemics, scholarly works, and legislative debates. Law professor and jurist Theophilus Parsons, for example, declared that the people would have "no permanent security of . . . person and property" if "the executive and judicial powers be united," because "[t]he executive power would interpret the laws and bend them to his will; and, as he is the judge, he may leap over them by artful constructions, and gratify, with impunity, the most rapacious passions."[130] In a more sober vein, James Wilson declared that "[t]he first and governing maxim in the interpretation of a statute is, to discover the meaning of those, who made it."[131] Similarly, writing under the pseudonym Brutus, the well-known anti-

125. THE FEDERALIST NO. 78, *supra* note 121, at 467.

126. *Id.*

127. *Id.*

128. THE FEDERALIST NO. 82, at 491 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

129. THE FEDERALIST NO. 37, *supra* note 123, at 229.

130. THEOPHILUS PARSONS, MEMOIR OF THEOPHILUS PARSONS 374 (1859).

131. James Wilson, *Of the Study of the Law in the United States* (1804), *reprinted in* 1 THE WORKS OF JAMES WILSON 69, 75 (Robert Green McCloskey ed., 1967).

Federalist Robert Yates assumed that the Supreme Court would "fix[], by a course of decisions" the "meaning and construction of the constitution."[132] During the First Congress, various congressmen repeatedly referenced the contemporaneous and customary interpretation given to constitutional provisions in advancing their positions in debates over the Bill of Rights, the removal of federal officers, and the First National Bank.[133] As Madison put it during the consideration of the First National Bank, the participants of these debates shared the assumption that "[c]ontemporary and concurrent expositions" of the Constitution were "reasonable evidence of the meaning of the parties."[134]

B. The Interpretive Theory in Practice

Looking from the vantage point of the Framers and early theorists, one can better understand the nineteenth-century cases on which *Chevron* relied. In particular, these sources highlight that courts' repeated assertions that certain executive interpretations of legal text should receive "respect" were in fact applications of the theory that an ambiguous legal text should be given its contemporaneous and customary meaning. The courts' assertions were, in both constitutional and statutory cases alike, applications of the *contemporanea expositio* and *interpres consuetudo* canons, not of judicial deference to the executive as such. A look into early American practice demonstrates courts' use of the can-

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132. *Brutus XII*, N.Y.J., Feb. 7, 1788, *reprinted in* 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 72, 73 (John P. Kaminski et al. eds., 1986). This notion was repeated throughout the early Republic. *See, e.g.*, NATHANIEL CHIPMAN, PRINCIPLES OF GOVERNMENT: A TREATISE ON FREE INSTITUTIONS INCLUDING THE CONSTITUTION OF THE UNITED STATES 254 (1833) (observing that the "meaning of words or terms" may change over time, but the "meaning of the constitution is not therefore changed"); GULIAN C. VERPLANCK, SPEECH WHEN IN COMMITTEE OF THE WHOLE, IN THE SENATE OF NEW-YORK, ON THE SEVERAL BILLS AND RESOLUTIONS FOR THE AMENDMENT OF THE LAW AND THE REFORM OF THE JUDICIARY SYSTEM 28 (1839) (noting that the meaning of legal text is unclear "until usage and precedent have fixed it").

133. *See* Natelson, *supra* note 111, at 1298-1305.

134. 2 ANNALS OF CONG. 1946 (1791). Once again, the precise contemporaneous sources that could be consulted, and the circumstances under which consultation would be appropriate, was the subject of debate. *See, e.g.*, Ex'rs of Rippon v. Ex'rs of Townsend, 1 S.C.L. (1 Bay) 445, 449 (1795) (observing that "it would be wrong for us to give [a] different meaning than the law affixes to a legal technical term . . . merely from an idea that the legislature meant to do so, which perhaps they did not, though some particular member might have had such an intention"); *see also* ALEXANDER HAMILTON, *Final Version of an Opinion on the Constitutionality of an Act To Establish a Bank* (Feb. 23, 1791), *in* 8 THE PAPERS OF ALEXANDER HAMILTON 97, 111 (Harold C. Syrett ed., 1965) ("[W]hatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself . . . .").

ons in both constitutional and statutory interpretation, and their willingness to invalidate executive action on the basis of the canons.

1. The Generality of the Canons in American Practice

Early courts routinely invoked the two canons to construe the Constitution's text. In the leading case, *Stuart v. Laird* (decided the same year as *Marbury*),[135] the Supreme Court addressed the constitutionality of the practice of Supreme Court Justices "riding circuit" without distinct commissions as circuit judges. The Court explained that, because the "objection" to circuit riding was of "recent date," it was "sufficient to observe, that practice and acquiescence under [the Constitution] for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction."[136] "This practical exposition" was, the Court reasoned, "a contemporary interpretation of the most forcible nature" that was "too strong and obstinate to be shaken or controlled."[137]

A number of seminal cases followed this mode of analysis by giving weight to early and longstanding constructions of ambiguous constitutional provisions. In *McCulloch v. Maryland*, Chief Justice Marshall reasoned that "[a]n exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."[138] In *Cohens v. Virginia*, Marshall observed that "[g]reat weight has always been attached, and very rightly attached, to contemporaneous exposition."[139] And in *Field v. Clark*, the Court reasoned that "the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land."[140]

Opinions in somewhat more obscure cases tied the formulations of the canons to the justifications given for them by Madison and other interpretive theorists. In *The Passenger Cases*, Chief Justice Taney's dissent (echoing Madi-

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135. 5 U.S. (1 Cranch) 299 (1803).

136. *Id.* at 309.

137. *Id.*; *see also* The Laura, 114 U.S. 411, 416 (1885) (quoting *Stuart*, 5 U.S. (1 Cranch) at 309).

138. 17 U.S. (4 Wheat.) 316, 401 (1819).

139. 19 U.S. (6 Wheat.) 264, 418 (1821); *see also id.* at 420 (reasoning that the act at issue in the case was constitutional in part because "in the Congress which passed that act were many eminent members of the Convention which framed the constitution").

140. 143 U.S. 649, 691 (1892).

son) noted that "[i]f in this court we are at liberty to give old words new meanings when we find them in the Constitution, there is no power which may not, by this mode of construction, be conferred on the general government and denied to the States."[141] In *Burrow-Giles Lithographic Co. v. Sarony*, the Court said that "[t]he construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive."[142] And in *Boyd v. United States*, the Court expressly tied its interpretive approach to the Latin formulations of the interpretive canons, observing that "long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for [an interpretation] in the law," because "[i]t is a maxim that, *consuetudo est optimus interpres legum*; and another maxim that, *contemporanea expositio est optima et fortissima in lege*."[143]

Cases interpreting statutes applied precisely the same canons of construction as constitutional cases. Judges "deferred" to or "respected" executive statutory constructions because they were contemporaneous to enactment or customary, not because they were executive as such. The leading case for many years was *Edwards' Lessee v. Darby*,[144] which *Chevron* cited as the earliest example of a case holding that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[145] *Edwards' Lessee* addressed a statute enacted by the North Carolina legislature to settle disputes over certain land boundaries. The Court held that it would not disturb the construction of the statute previously given by appointed land commissioners because "[i]n 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."[146] The Court observed that the North Carolina statute "was not only thus construed by the commissioners, but that construc-

141. 48 U.S. (7 How.) 283, 478 (1849).

142. 111 U.S. 53, 57 (1884); *see also* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 290 (1827) (Johnson, J., concurring) (invoking the contemporaneity canon and justifying reference to Framing-era materials on the theory that the contemporaries of the Constitution "had the best opportunities of informing themselves of the understanding of the framers . . . and of the sense put upon it by the people when it was adopted by them").

143. 116 U.S. 616, 622 (1886).

144. 25 U.S. (12 Wheat.) 206 (1827).

145. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 & n.14 (1984).

146. *Edwards' Lessee*, 25 U.S. (12 Wheat.) at 210.

tion seems to have received, very shortly after, the sanction of the legislature" in a later enactment that "must be construed as recognising the validity of, and as ratifying the surveys which had been made by the commissioners."[147]

2. The Use of the Canons To Invalidate Executive Action

The clearest sign that *Edwards' Lessee* announced a doctrine of deference to *contemporaneous* and *customary* interpretations, not a doctrine of deference to *executive* interpretations, is that the principle in the case was repeatedly invoked to reject the executive branch's changed construction of a statute and to require that statutory interpretation be consistent and uniform—and, hence, customary or contemporaneous with enactment. In *Merritt v. Cameron*, for example, the Court reasoned that "a construction of a statute by a department charged with its execution [is not] held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time."[148] The Court's precedents "go to that extent and no further."[149] Along the

147. *Id.* at 210-11. There is voluminous jurisprudence applying this principle to uphold a continuous and longstanding practice. *See, e.g.*, United States v. Philbrick, 120 U.S. 52, 59 (1887) (upholding the Secretary of the Navy's longstanding construction of a naval benefits statute because the Secretary's interpretation was not clearly erroneous and had been relied upon for decades); Brown v. United States, 113 U.S. 568, 571 (1884) ("This contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in a case of doubt ought to turn the scale."); Hahn v. United States, 107 U.S. 402, 406 (1883) (noting that "congress had not interfered with [a preexisting] construction"); United States v. Burlington & Mo. River R.R. Co., 98 U.S. 334, 341 (1878) ("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."); Garfielde v. United States, 93 U.S. 242, 246 (1876) (agreeing with an agency interpretation because it was "in conformity to the usages . . . for many years past"); Atkins v. Fibre Disintegrating Co., 85 U.S. (18 Wall.) 272, 306 & n.60 (1873) (citing *Edward's Lessee* and finding it "significan[t]" that a particular legal proposition "does not seem to have occurred to any one" in a series of prior cases, and declaring that this silence was "hardly less effectual than an express authoritative negation upon the subject"); Harrington v. Smith, 28 Wis. 43, 68 (1871) ("Long and uninterrupted practice under a statute, especially by the officers whose duty it was to execute it, is good evidence of its construction, and such practical construction will be adhered to, even though, were it res integra, it might be difficult to maintain it.").

148. 137 U.S. 542, 552 (1890).

149. *Id.* The Court noted that because the Treasury Department's construction of the statute at issue had "not been uniform," "[t]here is no such long and uninterrupted acquiescence in a regulation of a department, or departmental construction of a statute, as will bring the case within the rule . . . that in case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect." *Id.* Courts have applied this doctrine in numerous other cases. *See, e.g.*, Robertson v. Downing, 127 U.S. 607, 611, 613 (1888); United States v. Johnston, 124 U.S. 236, 253 (1888);

same line, in *United States v. Healey*, writing for the Court, Justice Harlan reasoned that, as a result of the lack of "uniform[ity]" in the "practice of the Department," the Court was obligated "to determine the true interpretation of the act of 1877, without reference to the practice in the Department."[150] Justice Harlan observed that the outcome may have been otherwise if "the Interior Department had uniformly interpreted the act," in which case the Court would have "accept[ed] that interpretation as the true one, if, upon examining the statute, we found its meaning to be at all doubtful or obscure."[151] And in *United States v. Alabama Great Southern Railroad Co.*, a unanimous Court relied on the "contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department" in rejecting a "sudden change" in favor of the executive branch's litigating interpretation.[152] The Court previously reasoned in

Iowa v. McFarland, 110 U.S. 471, 489 (1884) (Miller, J., dissenting) (disputing that "previous construction of the government" was sufficiently longstanding); United States v. Pugh, 99 U.S. 265, 269 (1878); Dollar Savings Bank v. United States, 86 U.S. (19 Wall.) 227, 237 (1873); Peabody v. Stark, 83 U.S. (16 Wall.) 240, 242-44 (1872); United States v. Dean Linseed-Oil Co., 87 F. 453, 456 (6th Cir. 1898) ("The importance of adherence to a long-continued and reasonable construction of a statute by the officers of the department whose duty it has been to execute it, when the statute is of an ambiguous character, has been frequently commented upon by the supreme court ever since the case of *Edwards v. Darby*."); United States v. Union Pac. Ry. Co., 37 F. 551, 555 (C.C.D. Colo. 1889) (Brewer, J., riding circuit) (reasoning that "[i]nnocent parties have bought on the faith of the title" and that "at this late day something more than a mere doubt must exist to justify the divesting of titles thus sanctioned, and sanctioned for so long a time"). For internal executive branch documents applying the same principle, see War-Revenue Act—Export Bills of Lading, 23 Op. Att'y Gen. 3, 8 (1900), which notes that "[w]hen there is added to this departmental construction the subsequent readoption of the same language by Congress in another act, it is conclusive that Congress, in the absence of language to the contrary, intended the same construction and effect to be given to the words in the latter as in the former instance"; Arrears of Pension—Statutory Construction, 21 Op. Att'y Gen. 408 (1896), which reasons that "[d]epartmental practice under an act of Congress has an effect similar in this respect to Congressional practice under an ambiguous statutory provision"; and Compensation of United States Attorney at New York, 19 Op. Att'y Gen. 354, 357 (1889), which states that "I do not see how, in the face of these circulars, and of such uniform practice for so many years, any other interpretation can now be given the statutes, whatever might be said if the question were an original one."

150. 160 U.S. 136, 145 (1895).

151. *Id.*

152. 142 U.S. 615, 621 (1892). The Court also noted that "[i]t is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government." *Id.*

United States v. Hill that the interpretive principle of contemporaneous construction "has been applied, as a wholesome one, for the establishment and enforcement of justice, in many cases in this court, not only between man and man, but between the government and those who deal with it, and put faith in the action of its constituted authorities, judicial, executive, and administrative."[153]

The cases, moreover, cited constitutional, statutory, and even contractual precedents applying the canons interchangeably, while nowhere suggesting that the rule varied depending on the legal instrument at issue in the case. For example, in *Schell's Executors v. Fauché*, the Court held that a past "practice" that had "grown up throughout the country" made it "too late for us to be called upon to overrule it . . . notwithstanding [a] treasury regulation," relying on both *Stuart v. Laird* (which addressed deference to legislative practice under the Constitution) and *Edwards' Lessee* (which addressed deference to administrative practice under a statute).[154] "In all cases of ambiguity," the Court claimed, "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."[155]

Over a century after the American Revolution, the traditional canons of construction continued to have relevance in the interpretation of ambiguous legal text. As the Court explained in *The "City of Panama,"* when an act is ambiguous, "the contemporaneous construction of such a statute is entitled to great respect, especially where it appears that the construction has prevailed for

153. 120 U.S. 169, 182 (1887).

154. 138 U.S. 562, 572 (1891).

155. *Id.* State court cases took the same approach. *See* Commonwealth v. Lockwood, 109 Mass. 323, 339 (1872) (citing *Edward's Lessee* for the proposition that the interpretation of an ambiguous constitutional provision is "settled by the contemporaneous construction and the long course of practice in accordance therewith" and holding that government's current interpretation conflicted with the Constitution's contemporaneous construction); Barney v. Leeds, 51 N.H. 253, 265-66 (1871) (citing *Edward's Lessee*, in stating that "contemporaneous construction . . . is entitled to great respect," and applying principle to "the construction given to this form of expression, or its equivalent terms, in analogous statutes, by the courts in other jurisdictions"); Attorney Gen. v. Bank of Cape Fear, 40 N.C. (5 Ired. Eq.) 71, 72 (1847) (observing that a "cotemporary exposition practiced and acquiesced in for a period of years fixes the construction" unless it "is contrary to the obvious meaning of the words of the Act"—and that "[t]his is also a rule in the construction of contracts"); Boyden v. Town of Brookline, 8 Vt. 284, 286 (1836) (stating that "long established construction of [a] statute should now have the force of a judicial determination" because "[s]uch has always been the deference paid by courts to such an exposition of statute or constitutional law").

a long period, and that a different interpretation would impair vested rights—*contemporanea expositio est fortissima in lege*."[156]

C. Two Related Issues: The Mandamus Standard and Questions of Fact

Before turning from the legal framework of the nineteenth century to that of the twentieth, it is necessary to address two additional aspects of early American public law, both of which played a large role in the development of doctrines of deference. The first—the nature and scope of judicial review in cases brought using a writ of mandamus or other extraordinary writ—has been cited by Justices of the Supreme Court as a precursor to modern doctrines of deference and a possible doctrinal basis for *Chevron*.[157] As explained below, however, the nineteenth-century cases addressing the scope of the mandamus writ support the contrary proposition. Those cases distinguished between, on the one hand, the standard for obtaining the writ and, on the other, the appropriate interpretive methodology that would be applied in cases not brought using the writ. The second—the nature and scope of judicial review of *factual* determinations by executive branch officials—would prove to be critical in the early intellectual justifications for, and the subsequent development of, the doctrine of judicial deference in the mid-twentieth century.

1. Mandamus Review

The immediately preceding discussion of the nineteenth-century Court's use of a de novo standard of review for statutory questions (accompanied by application of the *contemporanea expositio* and *interpres consuetudo* canons) may suggest that judges were routinely involved in directly reviewing the interpretive decisions of executive branch officials. But judicial review of executive action was for a portion of the nineteenth century often accomplished using a writ of mandamus (or other extraordinary writ), which carried with it a deferential standard of review. That standard of review witnessed a significant shift from the Marshall Court to the Taney Court, then began to lose its salience with the advent of federal-question jurisdiction in 1875. More importantly, the

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156. 101 U.S. 453, 461 (1879) (citing THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 213 (2d ed. 1874)).

157. *See* United States v. Mead Corp., 533 U.S. 218, 242 (2001) (Scalia, J., dissenting) (noting that "[j]udicial control of federal executive officers was principally exercised through the prerogative writ of mandamus"); Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318 (1958) (noting that "[t]he principle at stake is no different than if mandamus were sought").

standard was a function of the writ used—and the remedy sought—rather than the interpretive theory that the Court was applying.

Because federal courts lacked general federal-question jurisdiction until 1875, parties arguing that an executive official violated federal law had to find another source of jurisdiction to challenge the executive branch's interpretation and application of law. In the absence of general federal-question jurisdiction—and where a claim did not "arise under" one of the specific grants of federal-question jurisdiction that Congress enacted during this period[158]—parties normally had two options: (1) common-law actions in which the interpretation of a statute was an ancillary step in the analysis; and (2) extraordinary writs, such as the writ of mandamus, against the executive branch official charged with enforcing the action.[159] The interpretive method applied in cases involving either of these two bases for jurisdiction tells us much about the proper role that courts and executive officers played in construing statutes.[160]

Some statutory issues were reviewable in the context of tort or contract actions against the responsible executive officer or another party.[161] In such cases, as demonstrated above, the Court's interpretive role was essentially de novo.[162] Not all statutory issues, however, could readily be adjudicated in the context of a common-law action.[163] Where a common-law action was unavailable, plaintiffs sometimes resorted to seeking a writ of mandamus directed at the respon-

158. *See* Ann Woolhandler & Michael G. Collins, *Federal Question Jurisdiction and Justice Holmes*, 84 NOTRE DAME L. REV. 2151, 2157-68 (2009) (describing early pockets of "arising under" jurisdiction).

159. *Cf.* JAFFE, *supra* note 64, at 155 (noting that nineteenth-century courts generally controlled administrative action "by the prerogative writs—certiorari, mandamus, etc.—or by permitting common-law actions against officers alleged to have exceeded their authority"); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 947 (2011) ("[T]he key to understanding nineteenth-century judicial review starts with the observation that administrative action could be reviewed only through certain forms of action."); Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 885-86 (1970) (observing that nineteenth-century judges had "greater reverence for the integrity of the pleadings," such that "[i]f the sovereign was not named, the sovereign was not sued").

160. *Cf.* Merrill, *supra* note 159, at 947 ("The form of action dictated the nature of the 'review.'").

161. *See id.* (noting that "[c]ustoms, revenue, and prize cases tended to be reviewed by tort actions against the officer responsible for the taking").

162. *See supra* Section II.B.

163. *See, e.g.*, Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1299 (2014) ("[T]he erroneous deprivation of a government benefit—a military pension, for instance—was not considered a common law wrong and thus gave rise to no cause of action.").

sible executive officer.[164] But the writ imposed its own standard for obtaining relief. As Chief Justice Marshall explained in *Marbury*, mandamus would issue only if the claimant could show that he had a vested right and that the executive official had violated a nondiscretionary, ministerial legal duty.[165] Other comparable writs were subject to similar limitations.[166]

The application of that abstract standard to concrete cases ebbed and flowed significantly over the course of the early nineteenth century beginning with *Marbury* and the interventionist impulses of the Marshall Court. While *Marbury* recognized that "there may be such cases" in "which[] the injured individual has no remedy" (because the statutory duty called for the exercise of discretion),[167] the opinion tended to disregard the mandamus standard in order to elevate the right-remedy connection. As Chief Justice Marshall put it, "[t]he very essence of civil liberty certainly consists in the right of every indi-

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164. The only court authorized to issue the writ to federal officers (and only to those within the District of Columbia) was the Circuit Court for the District of Columbia. *See* Kendall v. United States *ex rel*. Stokes, 37 U.S. (12 Pet.) 524, 615-26 (1838). The Marshall Court had previously held that state courts did not have authority to issue mandamus to federal officials, *see* McClung v. Silliman, 19 U.S. (6 Wheat.) 598, 604-05 (1821), and that "the power of the Circuit Courts to issue the writ of mandamus, [was] confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction," McIntire v. Wood, 11 U.S. (7 Cranch) 504, 506 (1813).

165. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170-71 (1803). For an exploration of the relationship between this aspect of *Marbury* and *Chevron*, see Aditya Bamzai, Marbury v. Madison *and the Concept of Judicial Deference*, 84 MO. L. REV. (forthcoming 2017). *See also* JAFFE, *supra* note 64, at 332 (noting that a "series of [English] cases in the years 1700-1740 developed the principle that mandamus would not lie when the respondent's function was 'judicial' but only when it was 'ministerial'" and characterizing this distinction as meaning that there was "an area of 'discretion' free from control by the King's Bench").

166. *See* Litchfield v. Register, 76 U.S. (9 Wall.) 575, 577 (1869) (declining to issue a writ of injunction because the officer's action was discretionary); Gaines v. Thompson, 74 U.S. (7 Wall.) 347, 352-53 (1868) (holding that prohibition on review of discretionary acts "is as applicable to the writ of injunction as it is to the writ of mandamus" and that an injunction would not issue where the Secretary's discretion rested on "a question which requires the careful consideration and construction of more than one act of Congress"); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866) (holding that the Court "has no jurisdiction of a bill to enjoin the President in the performance of his official duties"). For an explanation of the difference between the "writ of injunction" and the equitable remedy of an injunction, see James E. Pfander & Nassim Nazemi, Morris v. Allen *and the Lost History of the Anti-Injunction Act of 1793*, 108 NW. U. L. REV. 187, 229-34 (2014). For a contrary view, see DICKINSON, *supra* note 26, at 65 n.82, which surmises that *Gaines* and *Litchfield* are in part "a legacy from cases like *Decatur v. Paulding* . . . embodying the Jeffersonian doctrine that the principle of separation of powers forbids judicial interference with the duties of the other departments by means of mandamus."

167. *Marbury*, 5 U.S. (1 Cranch) at 164.

vidual to claim the protection of the laws, whenever he receives an injury."[168] Statutory remedies, in other words, were to be implied when there were statutory wrongs, consistent with the Blackstonian notion that "where there is a legal right, there is also a legal remedy"—language quoted with approval in *Marbury* itself.[169] Elaborating on a similar theme some thirty years later, the Chief Justice claimed that "[i]t would excite some surprise if, in a government of laws and of principle," a person would be left with "no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust."[170] "[T]his anomaly does not exist," Chief Justice Marshall claimed, because "this imputation cannot be cast on the legislature of the United States."[171]

Chief Justice Marshall's conception of rights and remedies had a sound intellectual pedigree—as his citation of Blackstone suggests. What it lacked, however, was a sound basis in positive law. In the wake of the Jeffersonian victory in 1800, Congress repealed the general grant of federal-question jurisdiction, leaving mandamus review as one of the limited avenues by which private parties could compel executive officials to comply with statutory duties.[172] That repeal necessarily meant that not every executive violation of a statute would have a remedy. Contrary to the Chief Justice's assertion, the "anomaly" (as he saw it) *did* exist—unless, that is, the mandamus standard was interpreted to be the functional equivalent of de novo review.

The high-water mark for Chief Justice Marshall's robust vision of mandamus review occurred in *Kendall v. United States ex rel. Stokes*,[173] a case argued

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168. *Id.* at 163.

169. *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

170. United States v. Nourse, 34 U.S. (9 Pet.) 8, 28-29 (1835). Years later, the Court cited *Nourse* in support of the presumption of reviewability of statutory questions. *See* Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986); Bagley, *supra* note 163, at 1291-92 (arguing that *Bowen* confirmed the "presumption of reviewability"); *cf.* Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) (applying the principle that an aggrieved individual is entitled to judicial review of an agency's actions).

171. 34 U.S. (9 Pet.) at 29.

172. *See* An Act to Repeal Certain Acts Respecting the Organization of the Courts of the United States; and for Other Purposes, ch. 8, 2 Stat. 132 (1802); *see also* David E. Engdahl, *Federal Question Jurisdiction Under the 1789 Judiciary Act*, 14 OKLA. CITY U. L. REV. 521, 532-38 (1989) (documenting the history of changing federal jurisdiction and explaining the motivations behind the repeal of the Judiciary Act of 1801); Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 LAW & HIST. REV. 205, 208 (2012) (observing that the post-election repeal had "utterly stymied" "the Federalists' drive to expand the scope of federal cases over which the inferior federal courts could exercise original jurisdiction").

173. 37 U.S. (12 Pet.) 524 (1838).

and decided three years after his death.[174] *Kendall* reaffirmed the ministerial/executive distinction drawn in *Marbury*. Granting mandamus where the executive officer acted in a ministerial capacity, the Court concluded in *Kendall*, would not "interfere[] . . . with the rights or duties of the executive" or "involve[] any conflict of powers between the executive and judicial departments of the government."[175] That was because the mandamus did not "direct or control the [executive officer] in the discharge of any official duty, partaking in any respect of an executive character," but rather "enforce[d] the performance of a mere ministerial act."[176]

After *Kendall*, however, the interventionist tide receded. Only two years later, in *Decatur v. Paulding*,[177] Chief Justice Taney (who was, of course, Chief Justice Marshall's replacement) authored an opinion for the Court's majority denying a writ of mandamus. In *Decatur*, the Court considered the cumulative effect of two pension provisions enacted on the same day in 1837: a general statute conferring on the widow of a naval officer killed in service a pension at half the pay to which the officer would have been entitled, and a specific resolution granting a pension to the widow of Stephen Decatur, a naval hero. The question was whether Decatur's widow could recover two pensions. The Secretary of Navy, on the Attorney General's advice, said she could not recover twice, and Decatur sought mandamus relief.[178]

Chief Justice Taney concluded that mandamus was inappropriate because the Secretary's interpretation of the two statutory provisions was an "executive duty" requiring the exercise of judgment and discretion, not a mere "ministerial act."[179] That particular holding—applying the mandamus standard to the facts of the case—may have been unexceptional, but Chief Justice Taney's reasoning was broad. He observed that executive officials are "continually required

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174. *Cf.* JAFFE, *supra* note 64, at 178-79 (observing that the "Taney Court was much more guarded" on this issue than the Marshall Court); Woolhandler, *supra* note 14, at 216 ("[T]he judicially activist de novo method of review was at its height during the Marshall years, whereas the deferential res judicata model of review was at its height during the Taney years.").

175. 37 U.S. (12 Pet.) at 610.

176. *Id.*

177. 39 U.S. (14 Pet.) 497 (1840). The story of the famous naval hero Stephen Decatur's exploits and death, and his widow Susan's attempts to obtain a federal spousal benefit are told more fully in JAMES TERTIUS DE KAY, A RAGE FOR GLORY: THE LIFE OF COMMODORE STEPHEN DECATUR, USN 209-10 (2004), and Kristin A. Collins, *"Petition Without Number": Widows' Petitions and the Early Nineteenth-Century Origins of Public Marriage-Based Entitlements*, 31 LAW & HIST. REV. 1, 15-20 (2013).

178. 39 U.S. (14 Pet.) at 513-14.

179. *Id.* at 515.

to exercise judgment and discretion," including "in expounding the laws and resolutions of Congress."[180] Such interpretive decisions, according to the Chief Justice, were "[i]n general . . . not mere ministerial duties."[181] Interpretation, from this perspective, *generally* involved discretion not subject to mandamus.

Chief Justice Taney's opinion made clear, however, that the standard for mandamus applied in *Decatur* was distinct from the appropriate methodology for interpreting statutes in non-mandamus cases: "If a suit should come before this Court, which involved the construction of any of these laws," the Chief Justice reasoned, "the Court certainly would not be bound to adopt the construction given by the head of a department."[182] To the contrary, in such cases, the Justices would be bound to determine whether the executive official's "decision" was "wrong" and "of course, so pronounce their judgment."[183] That explained why, in common-law cases, the Court gave de novo review to legal questions: a judgment "upon the construction of a law" in a common-law suit would occur "in a case in which [the Court] ha[d] jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them."[184] Article III judges could not "*by mandamus*, act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties."[185]

Decatur's underlying reasoning, in other words, rested on the standard for mandamus actions: the case did not purport to turn on appropriate interpretive methodology. The Court's holding in the case made that point crystal clear. The Court held it lacked "jurisdiction over the acts of the Secretary," while at

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180. *Id.*

181. *Id.*

182. *Id.* Dickinson, Jaffe, and Monaghan allude to this aspect of *Decatur*, but each in passing. *See* DICKINSON, *supra* note 26, at 42 n.13 (observing that the Court applied deference because "these were cases of application for mandamus" and "[t]he fact that the courts will not issue a writ of mandamus in a given situation hardly means that they would not review the executive action taken if the question could be got before them in some other way"); JAFFE, *supra* note 64, at 179 ("The Secretary's construction of the law, argued Taney, would not bind the Court in a case in which it had jurisdiction . . . ."); Monaghan, *supra* note 75, at 17 n.97 ("Note, however, that even if direct review were not permissible, it appears that the legal issue could have been litigated in a private action where the [C]ourt would not have been bound by prior administrative decisions on law.").

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

184. *Id.*; *see also id.* (characterizing a mandamus action as akin to "an appeal from the decision of one of the Secretaries" or a revision of "his judgment in any case where the law authorized him to exercise discretion, or judgment").

185. *Id.* (emphasis added).

the same time "forbear[ing] to express any opinion upon the construction of the resolution in question."[186]

Chief Justice Taney's reasoning in *Decatur* effectively closed any avenue for mandamus relief against executive officials for four decades. The Court repeatedly denied mandamus relief against executive branch officials on the ground that the officials were performing discretionary, rather than ministerial, duties.[187] The next time that the Court approved the issuance of a writ of mandamus to a federal executive officer was in 1880.[188]

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186. *Id.* at 517. Parts of *Decatur* suggest a broader sweep based on Chief Justice Taney's notions of sound policy. The Chief Justice reasoned, for example, that "[t]he interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." *Id.* at 516. Later cases repeated this sentiment, either in the context of extraordinary writs, such as, for example, *Gaines v. Thompson*, 74 U.S. (7 Wall.) 347, 352-53 (1868); and *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866); or where a statute or constitutional provision was best read as conferring discretion upon an executive officer, such as, for example, *Keim v. United States*, 177 U.S. 290, 292-93, 296 (1900), which quotes language from *Decatur* and reasons, with respect to removal of officers, that "[t]hese are matters peculiarly within the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers"; *Bartlett v. Kane*, 57 U.S. 263, 272-73 (1853); and JAFFE, *supra* note 64, at 178, which states that "[i]n some of the mandamus cases in the middle of the [nineteenth] century, particularly the federal, one senses a question whether mandamus is consistent with the American doctrine of separation of powers." As *Decatur* demonstrates, however, even the Taney Court, which "was clearly committed to protecting executive action from judicial interference," sought to protect executive discretion by relaxing the standard for issuing the writs of mandamus and injunction, rather than by altering proper interpretive methodology. Mashaw, *supra* note 19, at 1683.

187. *See* 4 WILLIAM WAIT, A TREATISE UPON SOME OF THE GENERAL PRINCIPLES OF THE LAW 365-66 (1878) (summarizing case law as providing that, where a federal executive official possesses discretion concerning the action sought to be enforced by mandamus, the remedy will be denied); *see also* Bagley, *supra* note 163, at 1298 & nn.78-79 (observing that "[a]fter *Decatur*, it took another forty years for the Court to find a federal officer who had failed to discharge a ministerial duty," and that, "[i]n the meantime, the Court repeatedly found administrative action—even action that appeared to thwart straightforward legal commands—to be discretionary in nature and outside the purview of mandamus"). For examples of Supreme Court decisions discussing mandamus, see *United States ex rel. International Contracting Co. v. Lamont*, 155 U.S. 303, 308 (1894); *United States ex rel. Carrick v. Lamar*, 116 U.S. 423, 426 (1886); *United States v. Commissioner of General Land Office*, 72 U.S. 563 (1866); *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284 (1854); and *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 129 (1849).

188. *See* United States v. Schurz, 102 U.S. 378, 395, 399 (1880) (relying on *Marbury* in issuing a writ of mandamus); *see also* Noble v. Union River Logging R.R. Co., 147 U.S. 165, 171-77 (1893) (citing *Marbury*, *Kendall*, and *Schurz* to support the issuance of a writ of injunction restraining the Secretary of Interior and the Commissioner of the General Land Office from

But even while denying the writ, the Court's cases distinguished between the jurisdictional standard for mandamus and the proper method for interpreting statutes. The Court's 1888 decision in *United States ex rel. Dunlap v. Black*,[189] to take one example, echoed Chief Justice Taney's distinction in *Decatur*. While noting that courts could "not interfere *by mandamus* with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law," the Court simultaneously made clear that "[w]hether, if the law were properly before us for consideration, we should be of the same opinion [as the executive officer], or of a different opinion, is of no consequence in the decision of this case."[190] The Court's earlier decision in the non-mandamus case of *Johnson v. Towsley* made the same point.[191] There, the Court explained that, while it had "frequently and firmly refused to interfere with [executive officers] in the discharge of their duties, either by mandamus or injunction," it had "constantly asserted the right of the proper courts to inquire" into legal questions concerning private land disputes "according to the established rules of equity and the acts of Congress concerning the public lands," even where executive branch officials had previously ex-

revoking a railroad's right of way); Butterworth v. United States *ex rel.* Hoe, 112 U.S. 50, 64-68 (1884) (holding that mandamus will issue if an executive officer refuses to perform a ministerial duty); *cf.* Bd. of Liquidation v. McComb, 92 U.S. 531, 541 (1875) (issuing an extraordinary writ against a state officer).

189. 128 U.S. 40 (1888).

190. *Id.* at 48 (emphasis added); *see also* United States *ex rel.* Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 324-25 (1903) (denying mandamus and reasoning that "[m]andamus has never been regarded as the proper writ to control the judgment and discretion of an officer," and observing that "[w]hether [the executive branch officer] decided right or wrong, is not the question"); *id.* at 325 ("The writ [of mandamus] never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this . . . furnish any foundation for the claim that mandamus may therefore be awarded."); United States v. Lynch, 137 U.S. 280, 286 (1890) (describing *Decatur* as holding that, "while the court would not be bound to adopt the construction given, when departmental decisions are under review in a proper case, the court would not by mandamus control the exposition of statutes by direct action upon executive officers"); *cf.* Comm'r of Patents v. Whiteley, 71 U.S. (4 Wall.) 522, 534-35 (1866) ("The main question passed upon by the commissioner, and which was supposed to underlie this case, is not before us for consideration. If it were, as at present advised, we are not prepared to say that the decision of the commissioner was not correct.").

191. 80 U.S. (13 Wall.) 72 (1871). *Johnson* arose in the context of a common-law land dispute and is discussed below. *See infra* notes 222-227 and accompanying text. For a subsequent case with essentially the same reasoning, see *United States ex rel. Ness v. Fisher*, 223 U.S. 683, 691-92 (1912) ("[W]e are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law, and involving the exercise of judgment and discretion, may be reviewed by mandamus . . . .").

pressed a contrary view of the legal question.[192] "[T]he relations thus established between the courts and the land department," the Court explained, "are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law."[193]

By the time many of these cases were decided, however, the relevance of the scope of the mandamus standard had begun to fade for reasons that Chief Justice Taney could not have foreseen when he wrote *Decatur* in 1840. In 1875, Congress enacted a statute containing a general federal-question jurisdiction provision. In relevant part, the provision conferred on circuit courts (subject to an amount-in-controversy requirement) jurisdiction over "all suits of a civil nature at common law or in equity . . . arising under the . . . laws of the United States."[194] During the years that followed, the Court inferred the authority to enjoin unlawful executive-branch action from the general grant of "equity" jurisdiction, a process that eliminated (in those cases) the need for plaintiffs to pigeonhole their federal claims into a common-law action or to pursue an extraordinary writ.[195]

The modern observer reviewing the 1875 Act might wonder why the enactment of federal-question jurisdiction by itself would have been interpreted to create causes of action for statutory violations.[196] In John Duffy's words, "[g]iven the structure of the law then, the 1875 grant of jurisdiction is best interpreted as an authorization for federal equity courts to . . . continue applying the preexisting federal equity law (developed prior to 1875 under other federal

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192. *Johnson*, 80 U.S. (13 Wall.) at 87.

193. *Id.*; *see also* JAFFE, *supra* note 64, at 338 (noting that in cases like *Johnson* "there are strong echoes of the reasoning in *Decatur v. Paulding* that the judiciary may not direct or control executive actions, but in a private litigation properly cognizable by the judiciary a court is not bound by prior executive decisions on the law").

194. An Act To Determine the Jurisdiction of Circuit Courts of the United States, and To Regulate the Removal of Causes from State Courts, and for Other Purposes, ch. 137, § 1, 18 Stat. 470, 470 (1875) (codified as amended at 28 U.S.C. § 1331 (2012)).

195. *See* Scalia, *supra* note 159, at 890 (noting that, by the turn of the twentieth century, "there had been hundreds of cases in the federal courts seeking mandamus or injunction against land-office officials" and that "federal jurisdiction had been easily provided in most such cases arising after 1875 by the existence of a federal question"); Woolhandler, *supra* note 14, at 239 ("The common-law tradition of de novo actions against officers received new support in the Reconstruction era with the passage of the general federal question statute in 1875, and with the passage of the 1871 Civil Rights Act." (citation omitted)).

196. *See, e.g.*, Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-41 (1981) ("The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law."); *see also* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 121-22 (1998) (observing that it "may seem incorrect today" to infer "authority to create common law" in equity from "a grant of federal jurisdiction").

jurisdictions)."[197] Earlier specific "arising-under" statutes had been interpreted to create equitable causes of action, most notably in the areas of patent and copyright law, but also for claims relating to the revenue and postal acts.[198] In addition, drawing on preexisting notions of equity and chancery, some courts had articulated a background norm in which remedies followed the violation of statutory rights.[199] As a result, the 1875 grant of jurisdiction ultimately put an end to the necessity of relying on mandamus jurisdiction, and made "equity" and "chancery" the touchstones for review of executive branch action,[200] although pockets of mandamus review would continue to exist well into the twentieth century.[201]

The canonical precedent of this era is the 1902 case of *American School of Magnetic Healing v. McAnnulty*.[202] Pursuant to a statute allowing him to block "fraudulent" schemes executed through the U.S. mails, the Postmaster General

197. Duffy, *supra* note 196, at 122. Whether the Court's inference from the 1875 Act was correct or undisputed is a separate question. *See id.* at 125 (stating that, in the late-nineteenth and early-twentieth centuries, there were many "critic[s] of the federal equity jurisprudence" because "federal equity courts were aggressively enjoining labor strikes").

198. *See* Woolhandler & Collins, *supra* note 158, at 2158-62.

199. *See* Duffy, *supra* note 196, at 124-25.

200. *See id.* at 118-19 (noting that "statutes conferring equity jurisdiction" were interpreted to "vest the federal courts with a power to fashion and administer a judge-made law of equity" and that, consequently, "[j]udicial review in the early administrative era grew up in the federal equity jurisdiction"); Merrill, *supra* note 159, at 949 ("After Congress created federal question jurisdiction in 1875, federal courts began entertaining bills of equity that sought to enjoin allegedly unlawful administrative action. They did so on the theory that federal courts needed only a grant of jurisdiction, not a statutory cause of action, in order to exercise the powers of a court of equity in ruling on a request to enjoin agency action."); *see also* 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 23.04, at 307 (1st ed. 1958) (describing action in equity as "the mainstay for review of federal administrative action"); JAFFE, *supra* note 64, at 193 (referring to action for injunction in equity as a "catchall"). *See generally* GEO. TUCKER BISPHAM & JOSEPH D. MCCOY, THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY § 1, at 1 (10th ed. 1922) (noting that equity is "that system of justice which was administered by the High Court of Chancery in England").

201. *See* Scalia, *supra* note 159, at 870 & nn.11-13.

202. 187 U.S. 94 (1902); *see* Scalia, *supra* note 159, at 913-14 & n.215 (observing that "[n]ot until the early years of the present century does there begin the well-known line of Supreme Court cases . . . against post-office officials" seeking "to overcome their allegedly incorrect interpretation of the mail-carriage statutes" and citing *McAnnulty* as having "given the first clear expression to the 'presumption of reviewability' of administrative action"); G. Joseph Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443, 1465 (1971) ("At least since the decision in [*McAnnulty*], a petition to a district court for an injunction has been viewed as the creation of a 'case' in which an agency position could be reviewed." (footnote omitted)).

determined that the American School of Magnetic Healing's creed that the "the mind of the human race is largely responsible for its ills" (including physical illnesses) was "fraudulent" and prohibited the School from using the mails.[203] Although no statute specifically created a cause of action allowing the School to enjoin the erroneous withholding of "fraudulent" mail, the Court held that the School could sue a local postmaster to stop him from implementing the Postmaster General's order.[204] Justice Peckham's opinion for the Court reasoned that "in case an official violates the law to the injury of an individual the courts *generally* have jurisdiction to grant relief."[205] Congress had not entrusted "the administration of these statutes wholly to the discretion of" the executive branch such that the Postmaster General's "determination is conclusive upon all questions arising under those statutes."[206] To the contrary: courts "must have power in a proper proceeding to grant relief," lest "the individual [be] left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual."[207] As in the days of Chief Justice Marshall, remedies were generally assumed to accompany rights.

More to the point, in language that is often ignored, Justice Peckham analogized the case to land disputes adjudicated in common-law actions and reasoned that, although the Land Department is "administrative in its character," the Court had repeatedly "held that the decisions of the officers of the department upon questions of law do not conclude the courts, and they have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by department officers."[208] The same logic applied here: the Postmaster General's "right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them."[209] Assuming that "the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any Federal law, the determination of that official that such violation existed [was] . . . a pure mistake of law on his part."[210] And the Postmaster General's determination, "being a legal error[,] does not bind the

203. 187 U.S. at 103.

204. *Id.* at 101-02, 108.

205. *Id.* at 108 (emphasis added).

206. *Id.*

207. *Id.* at 110.

208. *Id.* at 108.

209. *Id.* at 109.

210. *Id.*

courts."[211] The ministerial-discretionary boundary went unmentioned. In important ways and crucial cases, the 1875 creation of federal-question jurisdiction had (seemingly) rendered the mandamus standard a relic of the past.[212]

The critical point of the foregoing analysis is that because federal courts lacked general federal-question jurisdiction before 1875, many statutory questions could be resolved only in the context of a mandamus action brought against an executive official. In mandamus proceedings, courts applied the mandamus standard. Following *Decatur*, the mandamus standard afforded great leeway to executive discretion in interpreting legal text—akin, in some respects, to the zone of interpretive discretion under the modern *Chevron* doctrine. But application of the mandamus standard was a consequence solely of the form of relief requested, not the consequence of the interpretive theory used. Therefore, a change in positive law on the cause of action would necessitate the abandonment of the mandamus standard. The Court's use of de novo review in non-mandamus cases made that clear, as did Chief Justice Taney's opinion in *Decatur* itself. As the Chief Justice explained, "[T]he Court certainly would not be bound to adopt the construction given by the head of a department" in non-mandamus cases over which the federal courts had jurisdiction, but rather would have the "duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them."[213] Thus, when the general federal-question-jurisdiction statute in 1875 gradually eliminated the need to rely on mandamus jurisdiction to challenge executive action, the mandamus standard and *Decatur* line of cases became less relevant. As then-Judge (and later President and Chief Justice) Taft put the point in 1898:

> In *Decatur v. Paulding*, it was expressly stated by the court that while, as between the United States and the pensioner, the secretary of navy was the final tribunal for the construction of the statute, yet, if the question were to arise between two litigants in such a way that the court would have jurisdiction over the controversy, the court would not feel bound to follow the construction of the secretary.[214]

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211. *Id.* at 111.

212. Seemingly, but not entirely. *See infra* Section III.A.

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

214. D.M. Ferry & Co. v. United States, 85 F. 550, 557 (6th Cir. 1898) (citation omitted); *see also* United States v. Cornell Steamboat Co., 202 U.S. 184, 192 (1906) (citing *D.M. Ferry* but avoiding the issue). The Court in *D.M. Ferry* nevertheless denied relief (and applied the mandamus standard) because no appellate power was given to review the decision of the executive official, thereby leaving mandamus as the sole available remedy. *See* Stone & Downer Co. v. United States, 11 Ct. Cust. 484, 487 (Ct. Cust. App. 1923) (giving *D.M. Ferry* this

2. *The Distinction Between Law and Fact*

Whereas mandamus required a deferential standard of review as a matter of jurisdictional boundaries and executive discretion, a second doctrine incorporated a form of deference as a matter of interpretive theory. Specifically, courts distinguished between questions of "law," which were subject to generally de novo review, and questions of "fact," which were reviewed deferentially. The doctrine originated from the notion, expressed in the famous case of *Murray's Lessee v. Hoboken Land & Improvement Co.*, that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."[215] Using the authority granted by

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gloss); *see also* Mills & Gibb v. United States, 8 Ct. Cust. 31, 52-53 (Ct. Cust. App. 1917) (De Vries, J., dissenting) (describing *Decatur* as a case "applicable solely in cases where no review is provided by law of the power granted the [executive official]," thereby leaving mandamus the sole remedy, and relying on then-Judge Taft's opinion in *D.M. Ferry*). Coincidentally, Taft's opinion in *D.M. Ferry* was joined by another future Justice of the Supreme Court, Horace Harmon Lurton, who was also then a judge on the Sixth Circuit. Later, as Chief Justice, Taft would summarize the law of mandamus as follows:

> Mandamus issues to compel an officer to perform a purely ministerial duty. It cannot be used to compel or control a duty in the discharge of which by law he is given discretion. The duty may be discretionary within limits. He cannot transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them. The power of the court to intervene, if at all, thus depends upon what statutory discretion he has. Under some statutes, the discretion extends to a final construction by the officer of the statute he is executing. No court in such a case can control by mandamus his interpretation, even if it may think it erroneous. The cases range, therefore, from such wide discretion as that just described to cases where the duty is purely ministerial, where the officer can do only one thing which on refusal he may be compelled to do.

Work v. United States *ex rel.* Rives, 267 U.S. 175, 177 (1925).

215. 59 U.S. (18 How.) 272, 284 (1855). I do not mean to suggest that *Murray's Lessee* originated the idea that executive bodies receive deference from courts on factual determinations. *See* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31-32 (1827) ("Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."); *see also* West v. Cochran, 58 U.S. (17 How.) 403, 415-16 (1854) (upholding, prior to *Murray's Lessee*, commission determinations on claims derived from former governments in Louisiana Territory); Woolhandler, *supra* note 14, at 214 n.86 (noting that "cases giving deferential review to executive actions did not frequently rely explicitly on *Murray's Lessee*"). That issue, as well as the proper metes and bounds of when Congress may have a non-Article III body determine a factual issue, are outside the scope of this Article. *See, e.g.*, Stern v. Marshall, 564 U.S. 462 (2011). For present purposes, it is sufficient to

this doctrine, Congress created administrative bodies that "adjudicated" various factual issues in a manner that bound other parties. A notable example of such an agency was the Land Department, which disbursed various public lands to claimants. These disbursements often triggered common-law property disputes between rival claimants, particularly when the issued land patents were unclear or premised on erroneous understandings of the law or facts. When the Court heard these cases, it did not defer to the Land Department's interpretations of law, but instead reviewed those questions de novo, applying the contemporary and customary canons of construction. As for factual issues previously resolved by the Department, the Court sometimes treated certain of them as "conclusive" absent an indication that the proceeding was tainted by fraud.[216] Over time, the Court refined this standard to include review to ensure that the agency's decision was supported by "substantial evidence" in the record.[217]

The standard of judicial review, therefore, turned on whether a particular issue was characterized as one of "law" or one of "fact." As one might expect, the distinction between law and fact in this context mirrored the law-fact line traditionally drawn in the law of evidence. And as one might expect, just as in the context of the law of evidence, the distinction between "law" and "fact" could pose line-drawing problems. In an influential treatise on the law of evi-

establish that the nineteenth-century Court understood that executive branch actors could find facts, with the result that certain of those factual determinations would receive deference when a case or controversy before an Article III court later presented the same issue.

216. *See* Gardner v. Bonestell, 180 U.S. 362, 369-70 (1901) ("[T]he determination of the Land Department in a case within its jurisdiction of questions of fact depending upon conflicting testimony is conclusive, and cannot be challenged by subsequent proceedings in the courts."); Johnson v. Drew, 171 U.S. 93, 99 (1898) (stating that "the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts"); *cf. Gardner*, 180 U.S. at 370 ("Both of these findings were matters of fact and based upon the testimony. No proposition of law controlled such findings, and no error of law is apparent.").

217. *See* Burfenning v. Chi., St. Paul, Minn. & Omaha Ry. Co., 163 U.S. 321, 323 (1896) (invalidating patent because "the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof," while observing that the Court would not review whether "a certain tract is swamp land or not, saline land or not, mineral land or not," because those issues "present[] a question of fact"); *see also* Interstate Commerce Comm'n v. Union Pac. R.R., 222 U.S. 541, 547-48 (1912) (noting "mixed questions of law and fact" would not be "examine[d] . . . further than to determine whether there was substantial evidence to sustain the order"); E. Blythe Stason, *"Substantial Evidence" in Administrative Law*, 89 U. PA. L. REV. 1026, 1040-41 (1941) (identifying *Union Pacific* as one of the leading pre-APA cases to use the term "substantial evidence" in the administrative-law context). These cases crystallized into the "substantial evidence" standard ultimately codified in the APA.

dence, James Bradley Thayer observed that the application of a legal rule to facts had been incorrectly characterized by others as a "mixed question of law and fact," whereas the jury "always . . . must reason, and must 'judge the facts.'"[218] According to Thayer, there was no bright-line rule separating "law" from "fact" because the difference between cases involving the application of a legal term—such as "reasonableness"—to unique facts "is simply one of more or less."[219] "The reasons for leaving questions as to the meaning and construction of [contract] writing to the judges," Thayer reasoned, is not "that these are questions of law, for, mainly, they are not," but rather "ground[s] of policy."[220] The same problem could arise in administrative law. In *Marquez v. Frisbie*, for example, the Court reasoned that "where there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."[221]

The prevailing approach in Land Department cases by the turn of the twentieth century was encapsulated in the Court's opinion in *Johnson v. Towsley*.[222] In that case, the Court interpreted a statute providing that the decision of the Commissioner "shall be final, unless appeal therefrom be taken to the Secretary

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218. JAMES BRADLEY THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 249-50 (1898).

219. *Id.* at 251; *cf. id.* at 202 ("The judges have always answered a multitude of questions of ultimate fact, of fact which forms part of the issue. It is true that this is often disguised by calling them questions of law.").

220. James Bradley Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147, 160-61 (1890); *see also id.* at 161 (noting that "[s]uch things, so important, so long enduring, should have a fixed meaning; should not be subject to varying interpretations; should be interpreted by whatever tribunal is most permanent, best instructed, most likely to adhere to precedents"); *cf.* Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 11-12 (1922) ("[W]hether a particular question is to be treated as a question of law or a question of fact is not in itself a question of fact, but a highly artificial question of law."). For a modern treatment of the same issue, see Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1806 (2003), which argues that the "doctrinal distinction between 'law' and 'fact' . . . must be decided functionally rather than by reference to purported ontological, epistemological, or analytical differences between the concepts."

221. 101 U.S. 473, 476 (1879); *see also id.* ("But if it can be made entirely plain to a court of equity that on facts about which there is no dispute, or no reasonable doubt, those officers have, by a mistake of the law, deprived a man of his right, it will give relief."). While the import of the Court's use of this language was unclear—the Court ultimately held that the contention at stake was "a very forced inference from facts not found in the record," *id.* at 477—*Marquez* would subsequently be relied on by one of the foundational twentieth-century cases on judicial deference, *see infra* notes 239-249 and accompanying text.

222. 80 U.S. (13 Wall.) 72 (1871).

of the Interior"[223] as establishing only that a decision would be final *within* the Executive Branch.[224] Congress, in the Court's view, had no "intention to give to the final decision of the Department of the Interior . . . any more conclusive effect than what belonged to it without its aid."[225] The Court "fully conceded that when [executive] officers decide controverted questions of fact, in the absence of fraud, or impositions, or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department," but claimed that when, "in the application of the facts as found by them they, by misconstruction of the law," affected the property rights of private parties, the courts had "power to give . . . relief."[226] In language reminiscent of *Marbury*, the Court claimed that "it is of the very essence of judicial authority to inquire whether this has been done in violation of law, and, if it has, to give appropriate remedy."[227]

D. The View from 1900

At the turn of the twentieth century, a reader of the available treatises would have concluded executive interpretations of statutes were relevant to judicial determinations only insofar as they embodied understandings made roughly contemporaneously with the statute's enactment and stably maintained and practiced since that time.

With respect to constitutional interpretation, the rule was expressed by Justice Story in his *Commentaries on the Constitution*: "The most unexceptionable source of collateral interpretation is from the practical exposition of the government itself in its various departments upon particular questions discussed,

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223. *Id.* at 82 (citing Act of June 12, 1858, ch. 154, § 10, 11 Stat. 319, 327).

224. *Id.* at 83.

225. *Id.*

226. *Id.* at 86.

227. *Id.* at 85; *see also id.* at 87-88 (observing that "but for [the executive officer's] construction of the statute," the legal issue would have turned out differently and that the Court "must therefore inquire whether the statute, rightly construed, defeated Towsley's otherwise perfect right to the patent"); *cf.* Wis. Cent. R.R. Co. v. Forsythe, 159 U.S. 46, 61 (1895) (stating that it was "doubtless true" that a "question of title has been determined in the land department adversely to the claim of the plaintiff," but finding that prior determination irrelevant because it was "not upon any question of fact, but upon a construction of the law; and such matter, as we have repeatedly held, is not concluded by the decision of the land department"); Minnesota v. Bachelder, 68 U.S. 109, 115 (1863) ("A court of equity will look into the proceedings before the register and receiver, and even into those of the land office or other offices, where the right of property of the party is involved, and correct errors of law or of fact to his prejudice."); JAFFE, *supra* note 64, at 337-38 nn.68-69.

and settled upon their own single merits."[228] Thus, in the words of a more contemporary (from the vantage point of 1900) treatise writer, G.A. Endlich, "[t]he greatest deference is shown by the courts to the interpretation put upon the constitution by the Legislature in the enactment of laws and other practical application of constitutional provisions to the legislative business, when that interpretation has had the silent acquiescence of the people, including the legal profession and the judiciary, and especially when injurious result would follow the disturbing of it."[229]

Justice Story also found a role for contemporary construction of the Constitution, which "is properly resorted to, to illustrate and confirm the text, to explain a doubtful phrase, or to expound an obscure clause."[230] Thomas Cooley expressed the same point: "Great deference has been paid in all cases to the action of the executive department, where its officers have been called upon, under the responsibilities of their official oaths, to inaugurate a new system, and where it is to be presumed they have carefully and conscientiously weighed all considerations, and endeavored to keep within the letter and the spirit of the constitution."[231]

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228. 1 STORY, *supra* note 25, § 408, at 392.

229. G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES: FOUNDED ON THE TREATISE OF SIR PETER BENSON MAXWELL §§ 527-28 (1888); *see also* THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 67 (1868) ("Where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist . . . . [A] strong presumption exists that the construction rightly interprets the intention. Especially where this has been given by officers in the discharge of their duty, and rights have accrued in reliance upon it, which would be divested by a decision that the construction was erroneous, the argument *ab inconvenienti* is sometimes allowed to have great weight."); *id.* at 66-71 (providing examples of judicial deference to contemporaneous and customary constructions of the Constitution).

230. 1 STORY, *supra* note 25, § 407, at 390-92; *see also id.* § 405, at 387-88 ("Much . . . may be gathered from contemporary history, and contemporary interpretation, to aid us in just conclusions."); *cf.* 2 STORY, *supra* note 25, § 1089, at 536 (relying on "contemporaneous exposition, and the uniform and progressive operations of the government itself" to interpret the Commerce Clause).

231. COOLEY, *supra* note 229, at 69 (observing that, "[i]f the question involved is really one of doubt, the force of their judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale of the judicial mind"); *see* J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 307 (1891) ("A construction of a constitution, if nearly contemporaneous with its adoption, and followed and acquiesced in for a long period of years afterwards, is never to be lightly disregarded, and is often conclusive.").

With respect to statutory interpretation, Theodore Sedgwick observed that "[i]n seeking aid to construe an obscure or doubtful statute, considerable weight is attached to the opinions in regard to it entertained, by persons learned in the law, at the time of its passage."[232] "Of a similar value," Sedgwick stated, "in regard to the construction of statutes is usage, or the construction which custom or practice has put on them."[233] Likewise, Endlich emphasized that "usage," including "acts done under" a statute, "may determine the meaning of the language, at all events when the meaning is not free from ambiguity."[234]

These passages addressing constitutional and statutory interpretation sound similar, and use the same terminology, for a simple reason: they express the same interpretive methodology, which was used in constitutional and statutory cases alike. There was no stark distinction drawn between de novo constitutional and deferential statutory interpretation. An ambiguous constitutional provision would be given the meaning that early Congresses had given it in practice.[235] And courts "respected" agency interpretations for the same reasons James Madison had believed that a series of "adjudications" in the political branches would "liquidate[]" the meaning of constitutional provisions.[236] As J.G. Sutherland explained, "[t]he uniform legislative interpretation of doubtful

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232. THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 250-51 (1857).

233. *Id.* at 255.

234. ENDLICH, *supra* note 229, § 34; *see also id.* §§ 49, 357, 360 (discussing usage as it relates to the repealed portions of acts, contemporaneous exposition, and government implementation).

235. For modern examples, see Chief Justice Taft's opinion in *Myers v. United States*, 272 U.S. 52, 175 (1926), which explains that "a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions." *See also* Printz v. United States, 521 U.S. 898, 905 (1997) ("[E]arly congressional enactments provide contemporaneous and weighty evidence of the Constitution's meaning . . . ." (internal quotation marks and alterations omitted)); Bowsher v. Synar, 478 U.S. 714, 723-24 (1986) ("This Decision of 1789 provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." (internal citation omitted)); *Ex parte* Quirin, 317 U.S. 1, 41-42 (1942) (reasoning that the 1776 act allowing spies to be tried by court-martial "must be regarded as a contemporary construction" of the Constitution "which has been followed since the founding of our Government" and, hence, "is entitled to the greatest respect"); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 329 (1936) ("The uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which, even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb.").

236. THE FEDERALIST NO. 37, *supra* note 123, at 229.

constitutional provisions, running through many years, *and a similar construction of statutes*, has great weight."[237] The treatises thus echoed what the cases held—the executive branch's construction of an ambiguous statute would be "respected" where that construction reflected an interpretation that was described as either contemporary with the statute's enactment, or longstanding or customary, or both.

From the vantage point of the legal community in 1900, there was thus no general rule of statutory construction requiring "deference" to executive interpretation *qua* executive interpretation. But the landscape would change fundamentally during the course of the twentieth century, when the interpretive methodology for statutes and other legal texts began to diverge dramatically. And, as the passage of time obscured the intellectual roots of the Court's nineteenth-century precedents privileging the executive's customary and contemporary interpretations of statutory text, those cases would be reimagined and recycled as precedents privileging the interpretation advanced by executive actors.

III. THE STEPS TO *CHEVRON*

The narrative now turns to the intellectual and jurisprudential steps during the twentieth century that led to the forgetting, and ultimately the unravelling, of the traditional interpretive framework. In Section III.A, I canvass the developments from approximately 1900 through the New Deal Court, when judicial cracks in the glass began to emerge and, more importantly, scholarly critiques of the prevailing interpretive methodology began to take hold. In Section III.B, I address the new jurisprudence of deference that emerged in the early 1940s in the wake of the appointment of new Justices sympathetic to the critiques of judicial review of questions of law. I also explain that, after a backlash against the New Deal, Congress enacted the APA in 1946 to codify the traditional interpretive approach and repudiate the increased deference courts gave to agencies in the 1940s. In Section III.C, I discuss the proliferation of interpretive tests in the years after the APA's enactment and the bewildering state of the law prior to the Court's opinion in *Chevron*. Finally, in Section III.D, I return to and reassess the Court's opinion in *Chevron* in light of the Article's historical analysis.

237. SUTHERLAND, *supra* note 231, § 311 (emphasis added).

A. The Traditional Canons of Construction from 1900 Through the New Deal Court

In this Section, I discuss challenges to the prevailing interpretive methodology—most academic, though some judicial—that emerged in the early twentieth century. I explain, however, that courts during this era, by and large, adhered to traditional interpretive techniques—a fact that critics of those techniques acknowledged. Those who advocated for greater judicial deference to executive interpretation during this era understood that they were seeking a departure from prevailing doctrine.

1. A Crack in the Glass

Each of the doctrines that has been discussed thus far played a role in the now-obscure, but once-important 1904 case of *Bates & Guild Co. v. Payne*.[238] In *Bates*, the Court considered whether the Postmaster General improperly refused to recognize a monthly musical publication, *Masters in Music*, as a periodical and hence entitle it to second-class mail rates.[239] The Postmaster General had determined that because each issue of the periodical was "complete in itself" (each treated the works of a single master musician) and "had no connection with other numbers save in the circumstance that they all treated of masters in music," the mailings "were in fact sheet music disguised as a periodical, and should be classified as third[-]class mail matter."[240] The government conceded that its position in the case conflicted "with the construction placed upon the statute by the Department for more than sixteen years continuously prior to the present ruling of the Department."[241]

In his opinion for the Court, Justice Brown acknowledged that the statutory question at issue "may be one of doubt" and that it was "largely one of law."[242] He nevertheless concluded that "there is some discretion left in the Postmaster General . . . and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong."[243] Thus, "even upon mixed questions of law and fact, or of law alone, [an agen-

238. 194 U.S. 106 (1904).

239. *Id.* at 106-07.

240. *Id.* at 107.

241. *Id.* at 111 (Harlan, J., dissenting).

242. *Id.* at 107 (majority opinion); *see also id.* at 110 (stating that the "question involved one of law rather than of fact").

243. *Id.* at 107-08.

cy'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."[244] That was particularly so because "the Postmaster General *may have been*, to a certain extent, guided by extraneous information obtained by him, so that the question involved would not be found merely a question of law, but a mixed question of law and fact."[245]

The Court analogized this curiously speculative holding to two lines of precedents: (1) those "treat[ing] the findings of the Land Department upon questions of fact as conclusive" (notwithstanding the Court's description of the case as "largely one of law") and (2) those, like *Decatur*, in which the Court had held, in applying the mandamus standard, that the executive official's action "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" (notwithstanding the fact that the case did not involve an extraordinary writ).[246] The Court distinguished *McAnnulty* by claiming that the Court's opinion in that case "intimated that something must be left to the discretion of the Postmaster General."[247] In a dissenting opinion, Justice Harlan (joined by Chief Justice Fuller) noted that the government's then-current position conflicted with its longstanding one. He contended that the Court's opinion had "overthrown" the "settled" principle that "the established practice of an Executive Department charged with the execution of a statute will be respected and followed—especially if it has been long continued—unless such practice rests upon a construction of the statute which is clearly and obviously wrong."[248]

Precisely what motivated the Court to retreat to a deferential standard in *Bates* after reviewing the Postmaster General's decision de novo in *McAnnulty* is hard to untangle.[249] One reasonable speculation is that the Court was still adjusting to the shift in its authority prompted by the creation of general federal-question jurisdiction. Having applied the mandamus standard for so many years, it may have been natural for the Justices to view narrow legal questions through a deferential lens. Justice Brown's articulation of a "floodgates" issue were the Court to review the agency de novo reveals a hint of this concern: "The consequence of a different rule," according to the Court, "would be that

244. *Id.* at 109-10 (relying in part on *Marquez v. Frisbie*).

245. *Id.* at 110 (emphasis added).

246. *Id.* at 109.

247. *Id.* at 108.

248. *Id.* at 111 (Harlan, J., dissenting).

249. *See* DAVIS, *supra* note 79, § 237, at 827 (contrasting *McAnnulty* and *Bates* and claiming that "[t]he results in both cases flowed from practical considerations, not from interpretation").

the court might be flooded by appeals of this kind to review the decision of the Postmaster General in every individual instance."[250] Another reasonable speculation is that the Court found the line between "law" and "fact" in this area to be difficult to draw—hence, Justice Brown's imprecise descriptions of the issue before the Court as "largely one of law" and a "mixed question of law and fact."[251]

Whatever the Court's reasons for the rule announced in *Bates*, two additional points are notable. First, Justice Harlan argued in dissent that the Court's opinion violated the contemporary and customary canons of construction.[252] But the Court did not respond to Justice Harlan's argument. It did not dispute Justice Harlan's characterization of the precedents, nor did it rely on those cases to justify the rule of judicial deference that it adopted. Second, at least immediately, the rule that *Bates* announced swung in a relatively narrow arc. As the Court said in *Silberschein v. United States*, *Bates* allowed judicial review when the agency's decision was "wholly dependent upon a question of law."[253]

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250. *Bates*, 194 U.S. at 108; *see also id.* at 110 (stating that past judicial review of the Postmaster General's classification "is not intended to intimate that in every case hereafter arising the question whether a certain publication shall be considered a book or a periodical shall be reviewed by this court").

251. *Id.* at 107, 110.

252. *See id.* at 111-12 (Harlan, J., dissenting).

253. 266 U.S. 221, 225 (1924); *see* Leach v. Carlile, 258 U.S. 138, 139-40 (1922) (citing *Bates* for the proposition that the Court would not second-guess "a question of fact which the statutes . . . committed to the decision of the Postmaster General"); Houston v. St. Louis Indep. Packing Co., 249 U.S. 479, 484 (1919) (citing *Bates* and reasoning that "[w]hether or not the term 'sausage,' when applied to [a] product . . . [containing] more than the permitted amount of cereal and water . . . is false and deceptive is a question of fact" that could not be disturbed "where it is fairly arrived at with substantial evidence to support it"); Cent. Tr. Co. v. Cent. Tr. Co. of Ill., 216 U.S. 251, 261 (1910) (citing *Bates* to observe that "[w]e have had occasion to consider the effect of findings of fact by officers in charge of the several departments of government, and the accepted rule is that those findings are conclusive, unless palpable error appears"); *see also* Brougham v. Blanton Mfg. Co., 249 U.S. 495, 499-500 (1919) (citing *Bates* for the proposition that "the power of determining whether a trade name is 'false or deceptive' given by the law to the Secretary of Agriculture is, when exercised, conclusive of the falsity or deception of the name"); Nat'l Life Ins. Co. of United States v. Nat'l Life Ins. Co., 209 U.S. 317, 325 (1908) (refusing to review a determination made by the post office because the petitioner was "appealing from the discretion of the department to the discretion of the court, and . . . has no clear legal right to obtain the order sought"). Justices Brown and Holmes appear to have been the only Justices to have written opinions realizing the implication of *Bates* on questions of law, but they circumscribed the holding of the case to matters decided by the Postmaster General. *See* Smith v. Hitchcock, 226 U.S. 53, 58 (1912) (Holmes, J.) (characterizing *Bates* as "suggest[ing]" that, even on a "question of law," the Court would "not interfere with the decision of the *Postmaster-General* unless clearly of opinion that it was wrong" (emphasis added)); Pub. Clearing House v.

Perhaps because of its lack of immediate impact, *Bates* has been neglected in modern scholarship. But it was later an influential opinion among those who sought to justify a reduced role for judges in reviewing legal questions. When Jaffe wrote his magisterial summary of administrative law in 1965, for example, he responded to the contention that the Supreme Court's deference jurisprudence in the 1940s was "an abdication of the customary power and responsibility of the judiciary" by claiming that the doctrine of judicial deference "is as traditional as it is sound"—citing, as his supporting authority, Justice Brown's opinion in *Bates*.[254] "As long ago as 1904," Jaffe wrote, "Mr. Justice Brown with complete frankness stated [in *Bates*] the function of a reviewing court in the terms" of late-twentieth century judicial deference.[255]

2. *Persistence of the Traditional Approach*

Notwithstanding the expansion in the size, scope, and responsibility of the federal government, courts in the first few decades of the twentieth century generally hewed to the traditional interpretive formulations. The Court viewed its role as requiring de novo review of questions of law and deferential review of questions of fact,[256] with mandamus a diminishing (but continuing) avenue

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Coyne, 194 U.S. 497, 509 (1904) (Brown, J.) (citing *Bates* for the proposition that determinations made by the Postmaster General were presumed constitutional and the only question was whether the Court should "accept the findings of the Postmaster General as to the classification of the mail matter as final under the circumstances of the case").

254. JAFFE, *supra* note 64, at 575.

255. *Id.* at 593. *Bates* was also a key precedent for John Dickinson, *see infra* notes 365-372 and accompanying text, and was cited by the Court in *Gray v. Powell*, 314 U.S. 402, 412 n.7 (1941). For other judicial deference cases relying on *Bates*, see *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 9 (1968); *United States v. Drum*, 368 U.S. 370, 376 (1962); and *United States v. Shimer*, 367 U.S. 374, 382 (1961). *See also* Crowell v. Benson, 285 U.S. 22, 51 n.13 (1932) (citing *Bates* as an example of the Court upholding an agency's action when it was issuing a determination of fact); DAVIS, *supra* note 79, § 236, at 817 & n.27 (citing *Bates* for the proposition that "[e]ven when the scope of review is exceedingly broad, the Supreme Court may talk in terms of non-reviewability").

256. *See* United States v. Bush & Co., 310 U.S. 371, 380 (1940) ("It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review."); Morgan v. United States, 298 U.S. 468, 477 (1936) ("When the Secretary acts within the authority conferred by the statute, his findings of fact are conclusive. But, in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive." (citations omitted)); United States v. Chem. Found., Inc., 272 U.S. 1, 15 (1926) (reasoning that "the basis of fact on which [administrative orders] rest will not be reviewed

for obtaining relief from agency action.[257] The canonical statement of the de novo standard in this era came from a concurring opinion—Justice Brandeis's concurrence in *St. Joseph Stock Yards Co. v. United States*.[258] Brandeis argued that "[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly."[259] The "inexorable safeguard" of the Due Process Clause, he contended, required that there "be opportunity for a court to determine whether the applicable rules of law . . . were observed" and that an administrative order "may be set aside for any error of law, substantive or procedural."[260]

For a generation of scholars, Justice Brandeis's concurrence set forth the "classic statement" on the scope of judicial review over questions of law.[261] There was, however, something ahistorical about Justice Brandeis's perspective on the "supremacy of law." For law to be supreme, Justice Brandeis reasoned, an Article III court must pass upon all questions of law and process. Yet he did not acknowledge that, through much of the nineteenth century, the absence of general federal-question jurisdiction necessitated, in many cases, resorting to

by the courts"); Zakonaite v. Wolf, 226 U.S. 272, 275 (1912) (collecting cases and holding, in immigration proceedings, that "the findings of fact reached by [executive branch] officials, after a fair though summary hearing, may constitutionally be made conclusive, as they are made by the provisions of the act in question").

257. *See, e.g.*, Lane v. Hoglund, 244 U.S. 174, 179-81 (1917) (approving of a writ of mandamus when the Land Department changed its "view and practice" under statute).

258. 298 U.S. 38, 73 (1936) (Brandeis, J., concurring); *see also* Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289 (1920) ("In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment.").

259. *St. Joseph Stock Yards*, 298 U.S. at 84 (Brandeis, J., concurring).

260. *Id.* at 73, 74.

261. JAFFE, *supra* note 64, at 343; *see, e.g.*, DAVIS, *supra* note 79, § 8 at 33-34 (arguing that "[t]he only significant recognition of the doctrine" of the "supremacy of law" in "a Supreme Court opinion comes from a surprising quarter," namely, the "concurring opinion of Mr. Justice Brandeis"); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 124 (1938) (interpreting Brandeis as meaning that the "supremacy of law" requires the "right of a party to a judicial determination as to the appropriate rule of law applicable to his particular case, and the right to a judicial determination as to the regularity of the procedure employed by the administrative"); John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 ABA J. 434, 516 (1947) (arguing that "[a] very broad statement of th[e] principle" that "questions of law are for the determination of the reviewing Court" is "contained in a classic passage of Mr. Justice Brandeis' concurring opinion in the *St. Joseph Stock Yards* case").

an extraordinary writ like mandamus, under which an Article III court would *not* resolve questions of law de novo. A better (or at least, more historically grounded) description of the concept of "supremacy of law" in the American tradition would have acknowledged that Congress has the authority to select the cause of action—deferential mandamus or de novo federal-question review—by which Article III courts would review questions of law. Where Congress provided solely for mandamus jurisdiction, deferential review was consistent with the "supremacy of law." Where Congress created federal-question jurisdiction, however, the application of independent judgment was consistent with traditional rules of interpretation and, hence, appropriate.

An example of the continued vitality of the canons of construction can be found in a 1932 opinion by Chief Justice Hughes, *Burnet v. Chicago Portrait Co*.[262] In *Burnet*, Chief Justice Hughes alluded to the "familiar principle . . . that great weight is attached to the construction consistently given to a statute by the executive department charged with its administration."[263] But he rejected application of judicial deference based on a "qualification of that principle" that, he argued, was "as well established as the principle itself": "The Court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons."[264] Deference was due, in other words, because of an interpretation's consistency and uniformity, which would in most instances render the agency construction customary or contemporaneous with a statutory enactment. Non-uniform interpretations, by contrast, would be persuasive "only to the extent" they are "supported by valid reasons."[265]

Burnet is an obscure decision today, and it has been all but ignored by modern cases and commentators, with one important exception: in *Chevron* itself, the Court cited *Burnet*, but neglected to explain or to engage in any way with the "qualification" identified in Chief Justice Hughes' opinion.[266]

3. Intellectual Challenges to the Traditional Interpretive Method

In the 1927 book *Administrative Justice and the Supremacy of Law in the United States*, John Dickinson, at the time a thirty-three-year-old lecturer at Harvard, pointed out that, as a descriptive matter, the scope of judicial review over

262. 285 U.S. 1 (1932).

263. *Id.* at 16.

264. *Id.*

265. *Id.*

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

administrative decision making "focus[ed] ultimately upon the distinction which the courts draw between 'questions of law' and 'questions of fact.'"[267] Dickinson recognized that, under prevailing case law, courts "review[ed] for error[s] of law, but not findings of fact, at least where, on the evidence, the findings are within the bounds of reason."[268] "The statutes and cases," he noted, "are full of this distinction between 'law' and 'fact,' which is taken for granted, and has formed the basis of decision in so many instances that it becomes important to see what there is in it."[269]

Dickinson's answer was that there was not much to it. Because "any factual state or relation which the courts . . . regard as sufficiently important to be made decisive for all subsequent cases of similar character becomes thereby a matter of law," it was impossible "to establish a clear line between so-called 'questions of law' and 'questions of fact.'"[270] Standards inevitably "bridged [the gap] between the special subsidiary facts . . . and the ultimate [legal] conclusion."[271] Any formal distinction between "law" and "fact" was illusory, because the legal bridge was tantamount to fact finding. As Dickinson put it:

> In truth, the distinction between "questions of law" and "questions of fact" really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction. They are not two mutually exclusive *kinds* of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law. The knife of policy alone effects an artificial cleavage at the point where the court chooses to draw the line between public interest and private right. It would seem that when the courts are unwilling to review, they are tempted to explain by the easy device of calling the ques-

267. DICKINSON, *supra* note 26, at viii. For another take on Dickinson's book, see Merrill, *supra* note 159, at 972-79, which emphasizes Dickinson's embrace of the appellate-review model rather than the slipperiness of the law-fact distinction. *See also* Jeffrey A. Pojanowski, *Neoclassical Administrative Common Law*, NEW RAMBLER REV. (Sept. 26, 2016), http://newramblerreview.com/book-reviews/law/neoclassical-administrative-common-law [http://perma.cc/EYC4-JX29] (reviewing Dickinson's book).

268. DICKINSON, *supra* note 26, at 50 (footnote omitted).

269. *Id.* at 50-51 (footnote omitted).

270. *Id.* at 312.

271. *Id.* at 315. Dickinson expressly noted that this model of review differed from the "ultra vires" model present in the mandamus line of cases and also that the model mirrored "review by a court of error of the verdict of a jury." *Id.* at 312.

> tion one of "fact"; and when otherwise disposed, they say that it is a question of "law."[272]

Dickinson's analytical move, in the context of the law of judicial review, echoed Thayer's similar move in the law of evidence three decades earlier—an intellectual debt that Dickinson acknowledged by repeatedly citing Thayer on this point and describing Thayer's treatise as "contain[ing] the most profound analysis that I know of the relation between 'matters of fact' and 'matters of law.'"[273] It also echoed the Court's 1904 decision in *Bates*, which, Dickinson observed, held that "on a 'mixed question of law and fact' the finding of an administrative body ought not to be disturbed."[274]

Dickinson's central thesis had the good fortune of being incredibly timely and proved to be hugely influential.[275] In the years following publication of the

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272. *Id.* at 55; *see also* Merrill, *supra* note 159, at 975-76 (noting that Dickinson "reconceptualized" the law-fact distinction to say that "[t]he more the principle for decision becomes one of widespread generality, the more appropriate it is to call it a question of law" and "[t]he more it tends toward factors unique to a particular controversy, the more appropriate it is to call it a question of fact," and characterizing this paragraph as "perhaps the most frequently quoted passage from the book" (footnotes omitted)).

273. DICKINSON, *supra* note 26, at 151 n.79; *see also id.* at 53, 55 n.55, 153 n.79, 207 n.16, 316 n.20, 319 n.27 (acknowledging Thayer's contributions on the relationship between matters of fact and matters of law). The conceptual connection between the *Chevron* doctrine and Thayer's *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), which advocates a deferential standard of review for questions of constitutional law, is well known. *See, e.g.*, Monaghan, *supra* note 75, at 7-14. But the direct connection between Thayer's views on evidence and the development of judicial deference, once similarly well understood, has been long forgotten. *See* DAVIS, *supra* note 79, § 250, at 902 (observing that "[s]ome writers have suggested that courts should substitute judgment on general propositions but not on questions that are peculiar to a particular case"; that "[t]his idea seems to have originated with Thayer"; and that "[i]n administrative law it largely stems from John Dickinson's book"); *cf.* Posner, *supra* note 2, at 522 (stating that Thayer "seems not have been concerned with judicial review of executive action" in part because "the executive branch was of course much smaller and weaker when he wrote than it is today").

274. DICKINSON, *supra* note 26, at 54 (footnote omitted).

275. Two Supreme Court opinions cited the book. First, Justice Brandeis cited it in his dissent in *Crowell v. Benson*, 285 U.S. 22, 85 n.55, 93 n.61 (1932) (Brandeis, J., dissenting), written five years after the book's publication; and second, Justice Jackson cited it in his majority in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37 n.3 (1950), written more than two decades after the book's publication. *See also* DAVIS, *supra* note 79, § 250, at 902 (observing that Dickinson's view on the law-fact distinction "has been quoted with approval by a number of important writers and without doubt has substantially influenced thought on the subject"); JAFFE, *supra* note 64, at 546-47 & n.4 (noting that "[p]erhaps the most famous expression" of the view that "it is difficult, perhaps indeed impossible, to make a clean distinction between fact and law" is found in Dickinson); George L. Haskins, *John Dickinson: 1894-1952*, 101 U. PA. L. REV. 1, 6 n.6 (1952) ("Dickinson's ideas attracted particularly the attention of

book in 1927, the expansion of the American administrative state during the New Deal brought the executive branch and the Justices of the Supreme Court increasingly into conflict on questions of both constitutional and statutory interpretation. Some critics (and even supporters) of the administrative state sought to articulate a manner in which agency discretion could be cabined. Ernst Freund, a professor at the University of Chicago Law School, believed that administrative action worked best when "procedural guaranties and other inherent checks" were established that would "in course of time, if not immediately, substitute principle for mere discretion" and would "evolve principle out of constantly recurrent action."[276] More dramatically, Roscoe Pound, as the lead author of a Special Committee on Administrative Law for the American Bar Association, criticized an emerging "administrative absolutism" that was repugnant to the idea of traditional law in the United States.[277]

But the dominant approach within the academy—and the Roosevelt executive branch—embraced administrative discretion.[278] Dickinson criticized Freund for viewing administrative discretion as "of necessity inherently bad, and [assuming] that all questions can be justly decided by the yard-stick of fixed rules."[279] More administrative discretion, however, required less judicial review. In the words of Walter Gellhorn, a law professor at Columbia, "the burning question was whether and how much a court could review (and, in reviewing, revise) administrative judgments," given that judges "were sometimes less than supermen and were therefore themselves capable of erring" and that judges could not "reach more than a tiny segment of the administrative output."[280]

Mr. Justice Cardozo, who frequently referred to them in his printed works." (citing SELECTED WRITINGS OF CARDOZO 13, 15, 288 (Hall ed., 1947))).

276. Ernst Freund, *The Substitution of Rule for Discretion in Public Law*, 9 AM. POL. SCI. REV. 666, 669, 671-72 (1915).

277. *Report of the Special Committee on Administrative Law*, 63 ANN. REP. ABA 331, 339-46 (1938).

278. *See* Tushnet, *supra* note 13, at 1590, 1637 (observing that New Deal Progressives sought to "liberate agencies from judicial supervision so that technocracy guided loosely by politics could replace law" and had a "vision for administrative law [that] had the courts withdrawing almost completely from the supervision of administrative agencies").

279. John Dickinson, *Book Reviews*, 22 AM. POL. SCI. REV. 981, 985 (1928) (reviewing JOHN PRESTON COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES (1927); and ERNST FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY: A COMPARATIVE SURVEY (1928)); *see also* Daniel R. Ernst, *Ernst Freund, Felix Frankfurter, and the American Rechtsstaat: A Transatlantic Shipwreck, 1894-1932*, 23 STUD. AM. POL. DEV. 171, 184 (2009) (discussing other students of Frankfurter who criticized Freund's distaste of administrative discretion).

280. WALTER GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 42-43 (1941).

In this intellectual climate, whatever Dickinson's precise intent in describing "law" and "fact" as "not two mutually exclusive *kinds* of questions,"[281] many readers understood his point broadly. Drawing the line between "facts" and "law" for purposes of judicial review, on this view, was not a matter of mere formal categorization, but rather a policy call dependent on the generality of the legal principle that the court or agency was articulating. That meant certain questions traditionally deemed "legal" could be re-conceptualized as "factual" where the principle being articulated was of insufficient abstraction to justify the involvement of generalist courts in the functioning of expert agencies.

In the Storrs Lecture delivered in 1938 at Yale Law School and published as *The Administrative Process*, James Landis set forth the standard account of New Deal progressives on the topic of judicial review of administrative action.[282] "[T]he administrative process," he claimed, "springs from the inadequacy of a simple tripartite form of government to deal with modern problems," with the changes wrought by the modern administrative state being "conducive to flexibility—a prime quality of good administration."[283] The quality of "expertness" that administrative agencies possessed, Landis argued, could arise "only from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem."[284]

Landis accepted that, under the prevailing interpretive approach, "[t]he scope of judicial review" over questions of fact and questions of law "is wholly different."[285] In this regard, he noted that he "use[d] the[] terms 'fact' and 'law' knowing how tenuous the distinction between them is" and described Dickinson as an authority who "reject[ed] the distinction completely."[286] With respect to questions of "fact," the issue was relatively straightforward: review was minimal under the precedents, and should be minimal because "the ex-

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281. DICKINSON, *supra* note 26, at 55.

282. LANDIS, *supra* note 261, at 136-40. Landis, then the Dean of Harvard Law School, had just returned from service as Chairman of the Securities and Exchange Commission, *see* Tushnet, *supra* note 13, at 1612, where he may well have played a role in the SEC's defense of its expansive early reading of its organic statute, *see In re* Application of Int'l Paper & Power Co., Exchange Act Release No. 292, 1937 WL 32739 (May 5, 1937), powers under our fundamental Act with undue strictness at this stage in our growth would be to sacrifice upon the altar of a by-gone legal formalism our ability to perform adequately our allotted task. It would, indeed, be for us to make the mistake which Chief Justice Marshall happily avoided in his exposition of a great organic act in *McCulloch v. Maryland*, 4 Wheat. 316.").

283. LANDIS, *supra* note 261, at 1, 69.

284. *Id.* at 23.

285. *Id.* at 145.

286. *Id.*

pertness of the administrative, if guarded by adequate procedures, can be trusted to determine these issues as capably as judges."[287]

But as to questions of law, Landis seemed to part ways with the prevailing approach. In a revealing statement, Landis observed that "[t]he interesting problem *as to the future of judicial review* over administrative action is the extent to which judges *will* withdraw, not from reviewing findings of fact, but conclusions upon law . . . due to the belief that" legal issues (like factual ones) "are best handled by experts."[288] Landis contended that "the same considerations of expertness" that prompted deference on factual issues "have validity in the field of law."[289] Indeed, the commonplace "desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions."[290] Questions of law, however, should be "decided by those best equipped for the task" due to their expertise, which would in certain specialized circumstances be administrative agencies rather than courts.[291] The message from *The Administrative Process* was clear: judicial deference to executive interpretation was not the law, circa 1938, but some form of the doctrine should be in the future.

B. The Death (and Temporary Revival) of the Traditional Canons from 1940 to the Administrative Procedure Act

Following the appointment of a set of new Justices, the Supreme Court in the early 1940s steadily expanded the zone of interpretive discretion given to administrative agencies, effectively abandoning the traditional interpretive

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287. *Id.* at 142; *see also* Robert M. Cooper, *Administrative Justice and the Role of Discretion*, 47 YALE L.J. 577, 595 (1938) (criticizing those who supported "the doctrine of judicial infallibility" and who were "presumably of the opinion that an independent tribunal endowed with the antiquated or cumbersome methods of legal procedure, steeped in the traditions of the common law and completely isolated from the previous steps in the administrative process, is the most suitable agency to determine finally the existence of certain basic facts pertaining to an administrative controversy").

288. LANDIS, *supra* note 261, at 144 (emphasis added).

289. *Id.* at 145.

290. *Id.* at 152 (emphasis omitted).

291. *Id.* at 153. In contrast to Landis's approach, Erwin Griswold's (later Landis' successor as Dean of Harvard Law School) 1941 article summarized the *existing* case law as hinging on two factors that "can be compressed into two long words: contemporaneousness, and long-continuedness." Erwin N. Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398, 404 (1941). Dean Griswold did not address the intellectual antecedents for these two factors, nor the development of the mandamus standard or law-fact distinction, but his analysis was, in the main, consistent with that of this Article.

methodology.[292] In charting this new course, the Court borrowed much from Dickinson's (and Thayer's) legal realist approach to the law-fact distinction. As Jaffe later explained, "[t]he device of characterizing a question as one of fact or as 'mixed' permit[ted] a court to pretend that it *must* affirm the administrative action if it is 'supported by evidence' or is 'reasonable.'"[293] But then, in the wake of a backlash against the New Deal and the perception of excesses by administrative agencies, Congress enacted the Administrative Procedure Act in 1946. Read against the history of the APA's adoption, section 706 is best interpreted as an attempt to revive the traditional methodology and to instruct courts to review legal questions using independent judgment and the canons of construction.

1. The New Jurisprudence

The opinion in *Gray v. Powell* heralded a new era and set forth an approach to judicial review that illustrated the proclivities of the new members of the Court. In *Gray*, the Court held that it would not question the Department of Interior's construction of the word "producer" under the Bituminous Coal Act

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292. *See* STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 22 (3d ed. 1992) ("In a relatively short time, the Supreme Court (and with it, much of the lower federal judiciary) swung from almost undisguised hostility toward the new programs of the administration to conspicuous deference. The availability of judicial review of administrative action was curtailed, and particular agency decisions were frequently sustained with judicial obeisance to the mysteries of administrative expertise. The defenders of the administrative process appeared to have substantially succeeded in insulating agency decisions from judicial check."); WALTER GELLHORN ET AL., ADMINISTRATIVE LAW, CASES AND COMMENTS 379-80 (8th ed. 1987) (stating that, during this period, the "historical building blocks" for deferential judicial review of agency legal interpretation were put in place); *cf.* Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 284, 300 (2013) (noting a rise in the number of citations of legislative history from about the year 1940, attributing that rise "in part [to] a rapid turnover in the personnel and therefore the ideology of the Court" with "the appointment of new progressive-minded Justices by President Roosevelt," and contending that the use of such history was "at least in its origin, a statist tool of interpretation"). Among the newly appointed members was Felix Frankfurter—one of two people (the other, Roscoe Pound) to whom Dickinson had dedicated *Administrative Justice and the Supremacy of Law*. The other new Justices were Hugo Black, Stanley Reed, William Douglas, Frank Murphy, James Byrnes (briefly), Robert Jackson, Wiley Rutledge, and Harold Burton. They replaced Willis Van Devanter, George Sutherland, Benjamin Cardozo, Louis Brandeis, Pierce Butler, James McReynolds, Harlan Stone, Charles Evans Hughes, and Owen Roberts.

293. JAFFE, *supra* note 64, at 547; *see also* DAVIS, *supra* note 79, § 250, at 902-05 (expressly connecting Thayer and Dickinson's perspective on the law-fact distinction and the Court's deference jurisprudence during the 1940s).

of 1937.[294] The Court reasoned that Congress had "delegate[d] th[e] function" of interpreting the statutory term "to those whose experience in a particular field gave promise of a better informed, more equitable" judgment, and that "this delegation will be respected and the administrative conclusion left untouched."[295] The Court brushed aside the fact that there was "no dispute as to the evidentiary facts" because "[i]t is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact finding bodies deprived of the advantages of prompt and definite action."[296] "To determine upon which side of the median line the particular instance falls," the Court reasoned, "calls for the expert, experienced judgment of those familiar with the industry."[297] In a dissenting opinion, Justice Roberts argued that in the absence of a "single disputed fact," the agency's "error was a misconstruction of the Act . . . and that error, under all relevant authorities, is subject to court review."[298] He accused the majority of "obviously fail[ing] in performing its duty," of "abdicat[ing] its function as a court of review," and of "complete[ly] revers[ing] . . . the normal and usual method of construing a statute."[299]

A few years later, in 1944, the Court elaborated on this mixed-question-of-law-and-fact approach. In *NLRB v. Hearst Publications, Inc.*, the Court concluded that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must de-

294. 314 U.S. 402, 411-12 (1941).

295. *Id.* at 412 & n.7 (citing, among other cases, *Bates*).

296. *Id.* at 412.

297. *Id.* at 413 (reasoning that, unless the agency's action could be characterized as not "a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed"). Although *Gray* does not expressly speak of "mixed questions" of law and fact, Justice Reed's draft opinions for the Court—which I have recently uncovered—make abundantly clear the connection between the preexisting debate and the *Gray* Court's reasoning and ultimate holding. *See* Justice Stanley Reed, Draft Opinion in *Gray v. Powell* (on file with author) (reasoning that, in "dealing with" questions about the standard of review, "courts have sought to subsume inferences from evidentiary facts under the categories of fact or law in an effort by that classification to determine their power of judicial review" and that, "[e]ven though th[e] Act [at issue in the case] forbids plenary review of facts and allows it for legal issues, the need for accurate separation of the two is not often essential"); *see also* Aditya Bamzai, The Law-Fact Distinction and *Gray v. Powell* (unpublished manuscript) (on file with author).

298. 314 U.S. at 418 (Roberts, J., dissenting); *see also id.* at 420 (arguing that, if an agency fails to "observe . . . guides in applying the statute . . . , it is the obligation of the courts to observe them in performing their statutory duty to review [its] determination").

299. *Id.* at 420-21.

termine it initially, the reviewing court's function is limited."[300] The Court rejected the argument that it could "import wholesale the traditional common-law conceptions" of the statutory term, lest the statute become "encumbered by the same sort of technical legal refinement as has characterized" the judicial definition.[301] Instead, the Court held that the agency's "[e]veryday experience in the administration of the statute gives it familiarity" with how best to define the statutory term and meant that the agency construction "is to be accepted if it has 'warrant in the record' and a reasonable basis in law."[302]

A third case, also from 1944, seemed to articulate a slightly different, more forthrightly multifactor and contextual approach to judicial deference. In *Skidmore v. Swift & Co.*, Justice Jackson authored a unanimous opinion for the Court asserting that a particular agency's legal interpretations, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[303] The "weight" given the agency's legal interpretation, on Justice Jackson's reasoning, "depend[ed] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[304] While Justice Jackson's reasoning paralleled the methodology of the interpretive canons to the extent that it instructed courts to look at agency "consistency," *Skidmore* did not provide a theoretical basis for its multifactor approach or an explanation for why the approach was appropriate. Nor did it explain how other factors with the "power to persuade" were related to the statute's contemporaneous understanding and the agency's customary practice.

Almost immediately, the Court inconsistently applied the new principles that it had articulated in *Gray*, *Hearst*, and *Skidmore*. The mixed-question analysis was embraced, in some cases, by the dissenting Justices in *Gray*,[305] and re-

300. 322 U.S. 111, 131 (1944); *see id.* at 135-36 (Roberts, J., dissenting) (reasoning that "Congress did not delegate" the interpretive task to the agency and that such a task "is a question of the meaning of the Act and, therefore, is a judicial and not an administrative question").

301. *Id.* at 125 (majority opinion).

302. *Id.* at 130-31.

303. 323 U.S. 134, 140 (1944).

304. *Id.*

305. *See* Barrett Line v. United States, 326 U.S. 179, 201-02 (1945) (Stone, C.J., and Roberts, Frankfurter, and Jackson, JJ., dissenting) (reasoning that "it is our business to deal with the case now here and not to be concerned with apparent inconsistences in administrative determinations" and that "the construction of this provision involves considerations so bound up with the technical subject matter that, even though the neutral language of the statute

jected, in others, by Justices in the *Gray* majority.[306] The analysis was embraced in some cases,[307] and rejected in others on grounds that were hard to decipher.[308] Still other cases made it hard to determine whether the Court was truly following a "mixed question" approach, as opposed to the broader principle that agencies receive deference for all legal interpretations, which was later adopted in *Chevron*.[309]

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permits, as a matter of English, the construction which the Court now makes, the experience of the Commission should prevail"); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 681 n.1 (1944) (Stone, C.J.) (arguing that "[i]t has now long been settled that" on questions of law "the experienced judgment of the Board is entitled to great weight").

306. *See* Switchmen's Union of N. Am. v. Nat'l Mediation Bd., 320 U.S. 297, 321 (1943) (Reed, J., dissenting) (reasoning that the agency "may be conceded discretion to make a reasonable determination of the meaning" of a statute, but criticizing the Court for allowing the agency "to determine not only questions judicially found to be committed to its discretion, as in *Gray v. Powell*, . . . but the statutory limits of its own powers as well").

307. *See* Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 478 (1947) (holding that, for application "of a broad statutory term or phrase to a specific set of facts" that may "be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that" the agency's "choice has substantial roots in the evidence and is not forbidden by the law"); Unemployment Comp. Comm'n of Alaska v. Aragon, 329 U.S. 143, 153-54 (1946) ("All that is needed to support the Commission's interpretation is that it has 'warrant in the record' and a 'reasonable basis in law.'"); Billings v. Truesdell, 321 U.S. 542, 552-53 (1944) (citing *Gray* for the proposition that "the interpretations of an Act of Congress by those charged with its administration are entitled to persuasive weight"); Dobson v. Comm'r, 320 U.S. 489, 502 (1943) (reasoning that "when the Court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand" and that "[i]n 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").

308. *See* Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 290-91 (1946) (relying on *Skidmore* and rejecting agency interpretation); Soc. Sec. Bd. v. Nierotko, 327 U.S. 358, 369-70 (1946) (observing that "[a]dministrative determinations must have a basis in law and must be within the granted authority" because agencies "act as a delegate to the legislative power," reasoning that it "is a judicial function" to "decide the limits of [agency] statutory power," and holding that agency holding was "beyond the permissible limits of administrative interpretation"); Mabee v. White Plains Pub. Co., 327 U.S. 178, 181-82 (1946) (relying on *Skidmore*); Estep v. United States, 327 U.S. 114, 142-43 (1946) (Frankfurter, J., concurring) (citing *Gray* for the proposition that Congress may "lodge[]" matters "in the exclusive discretion" of an agency); Interstate Commerce Comm'n v. Parker, 326 U.S. 60, 65 (1945) (citing *Gray* and reasoning that statutory language "gives administrative discretion" to the agency "to draw its conclusion from the infinite variety of circumstances which may occur in specific instances").

309. *See, e.g.*, Fed. Sec. Adm'r v. Quaker Oats Co., 318 U.S. 218, 227-28 (1943) (Stone, C.J.) (citing *Gray* for the proposition that the Court had "repeatedly emphasized the scope that must be allowed to the discretion and informed judgment of an expert administrative body," and claiming that "[t]hese considerations are especially appropriate where the review is of regu-

Leaving to one side the confusion in the case law in the year 1946, the Court's cases, when set against the backdrop of the historical narrative, clarify a point of wider jurisprudential significance. In the post-*Chevron* era, it has become *de rigueur* to compare the bright-line approach seemingly articulated in *Chevron* (and its predecessors, such as *Hearst*) with the multifactor and contextual approach articulated by Justice Jackson in *Skidmore*. But it is possible that a third explanation captures the jurisprudential phenomenon of the 1940s era: both the *Hearst* and *Skidmore* standards were alternative twentieth-century attempts by a Court struggling to define the bounds of judicial review of expert decisions by generalist courts—and *both* are departures from the traditional interpretive methodology and intellectual framework that privileged contemporary and customary interpretations.

2. *The Road to the Administrative Procedure Act*

In his 1944 opinion in *Skidmore*, Justice Jackson remarked that there was "no statutory provision as to what, if any, deference courts should pay to" agency interpretations of statutes.[310] Within two years, that would change as a result of developments within the political branches that were occurring in parallel with this new jurisprudence. In 1939, Representative Francis Walter and Senator Mills Logan introduced legislation to govern administrative procedure and judicial review in the House and Senate.[311] The debate over the bill attracted intense national attention, with one congressman remarking that "[p]ractically every leading newspaper in the country has commented editorially on the contents of this bill. It has been spectacularized in the news columns

lations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged").

310. Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944).

311. H.R. 6324, 76th Cong. (1939); S. 915, 76th Cong. (1939). The bill was modeled on a proposal by Roscoe Pound, the Chairman of the ABA's Special Committee on Administrative Law, submitted to Congress in 1938. *Report of the Special Committee on Administrative Law*, 65 ANN. REP. ABA 215 (1940); *Report of the Special Committee on Administrative Law*, 64 ANN. REP. ABA 281 (1939); *Report of the Special Committee on Administrative Law*, *supra* note 277; *see also* James M. Landis, *Crucial Issues in Administrative Law*, 53 HARV. L. REV. 1077, 1083 nn.11-12 (1940) (observing that House Resolution 6324 renumbered the sections of Pound's bill, added definitions, and made minor substantive changes); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996) (relating the history of attempts to enact a statute addressing administrative procedure and judicial review before the Walter-Logan bill).

and on the radio."[312] The bill passed the House and Senate, but President Roosevelt—on Attorney General Jackson's recommendation—vetoed it on December 18, 1940.[313] In doing so, he characterized the bill as "one of the repeated efforts by a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulations."[314] Roosevelt sought to deflect criticism of his veto, at least temporarily, by asking Congress to wait for the recommendations of a Committee on Administrative Procedure that he had asked Attorney General Jackson to establish following the introduction of the Walter-Logan bill in Congress.[315]

Roosevelt's veto message prompted a heated reaction from Roscoe Pound, who excoriated it in a 1941 speech before the New York State Bar Association that was reprinted in the *Journal of the American Bar Association*.[316] Pound dramatically claimed that the message was "much in the spirit of the absolute ideas which have been making headway all over the world in the past two dec-

312. 86 CONG. REC. 13,814 (1940) (statement of Rep. Michener). From the vantage point of the post-*Chevron* era, the bill gave scant attention to the standard of judicial review for questions of law, requiring simply that a reviewing court would set aside a decision that "infringes . . . the statutes of the United States" or that "is otherwise contrary to law." That provision contrasted with the far more fulsome provisions on judicial review of factual issues, on which the debate centered. 84 CONG. REC. 7075 (1939) (statement of Rep. Logan) (arguing that the bill would eliminate the "scintilla" rule, under which a reviewing court would affirm an agency decision supported by a "scintilla" of evidence, and replace it with the "substantial evidence" rule, under which an agency decision would be affirmed only if it rested on substantial evidence). Whether the bill would actually change then-existing law was disputed; other senators pointed out that courts had already embraced the substantial evidence rule. *See id.*; *see also, e.g.*, Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938) (applying the substantial evidence rule); NLRB v. Montgomery Ward & Co., 133 F.2d 676, 685 (9th Cir. 1943) (same); Appalachian Power Co. v. NLRB, 93 F.2d 985, 989 (4th Cir. 1938) (same).

313. 86 CONG. REC. 13,942-43, 13,945.

314. *Id.* at 13,943.

315. *See* FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, app. A, at 251-52 (1941). Of the twelve members of the final committee, eight could be considered supporters of the New Deal, while four may have been opponents. *See* Sunstein, *supra* note 3, at 2081 n.46 (noting that the Committee majority was composed of "New Deal enthusiasts skeptical about judicial checks on administration" and that it recommended no new legislation defining the scope of judicial review). The minority was composed of Carl McFarland, E. Blythe Stason, Arthur T. Vanderbilt, and one "conservative" member, Lawrence Groner, who was later described as "off by himself, way off at the right end, nobody joining him." Kenneth C. Davis & Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 513 (1986). The committee's staff included two young law professors, Kenneth Davis and Walter Gellhorn, who would go on to become two of the leading academic experts on administrative law in the second half of the twentieth century. *See* Shepherd, *supra* note 311, at 1595.

316. Roscoe Pound, *The Place of the Judiciary in a Democratic Polity*, 27 ABA J. 133 (1941).

ades."[317] In doing so, he specifically criticized the "recent[]" trend of "giving the interpretation of [statutes] to the executive, or to administrative officials."[318] He equated "tak[ing] away interpretation by the courts" and "leav[ing] interpretation of the provisions and directions of the law to the executive" with "enter[ing] upon the path leading to a *lex regia*" and "moving a long way from . . . the genius of our institutions [which] was opposed to the deposit of unlimited power anywhere."[319]

On January 22, 1941, a month after the House failed to override Roosevelt's veto of the Walter-Logan bill, the Attorney General's Committee on Administrative Procedure submitted its report, accompanied by two draft bills from the "majority" (more favorable to administrative discretion and flexibility) members of the Committee and the "minority" (more favorable to codifying procedural requirements) members. The majority reasoned that agencies were too diverse to be governed by a single set of procedures and, hence, proposed continuous study and reporting of administrative procedures,[320] along with a draft bill that did not codify a standard for the scope of review of agency decisions.[321] The minority bill, by contrast, proposed a unified and comprehensive code of administrative procedure, including provisions setting forth standards for judicial review of administrative action for all relevant questions of (1) constitutional right, power, privilege or immunity; (2) the statutory authority or jurisdiction of the agency; (3) the lawfulness and adequacy of procedure; (4) findings, inferences or conclusions of fact unsupported, upon the whole record, by substantial evidence; and (5) administrative action otherwise arbitrary or capricious.[322] The minority draft also included a judicial-review proviso stating that "upon such review due weight shall be accorded the expe-

317. *Id.* at 133.

318. *Id.* at 136.

319. *Id.* at 137.

320. Dean Acheson, *Summary of Attorney General's Committee Report*, *reprinted in* 27 ABA J. 143, 145 (1941) ("The Committee believes that the judicial review which now exists is wise and should be maintained . . . . [T]he Committee believes that [changes] may not wisely be effected by general legislation.").

321. *See* H.R. 4782, 77th Cong. (1941); S. 675, 77th Cong. (1941); FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 191-202 (1941).

322. H.R. 4782; S. 675; S. DOC. NO. 77-8, at 203, 217-47; *see also Additional Views and Recommendations of Messrs. McFarland, Stason and Vanderbilt*, *reprinted in* 27 ABA J. 146, 146-47 (1941) (outlining the minority's proposal for a comprehensive code of administrative procedure).

rience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it."[323]

With respect to questions of law, the majority of the Attorney General's Committee reasoned that:

> Even on questions of law [independent] judgment [by the court] seems not to be compelled. The question of statutory interpretation might be approached by the court de novo and given the answer which the court thinks to be the "right interpretation." Or the court might approach it, somewhat as a question of fact, to ascertain, not the "right interpretation," but only whether the administrative interpretation has substantial support. Certain standards of interpretation guide in that direction. Thus, where the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body. Again, the administrative interpretation is to be given weight—not merely as the opinion of some men or even of a lower tribunal, 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. This may be particularly significant when the legislation deals with complex matters calling for expert knowledge and judgment.[324]

Two aspects of this passage stand out. First, the report's suggestion that "questions of law" might be approached as "a question of fact, to ascertain . . . only whether the administrative interpretation has substantial support" mirrors Dickinson's argument on the law-fact distinction—a debt that the report acknowledged by quoting Dickinson's analysis.[325] Second, the majority asserted its recommendation tentatively, thereby indicating that the authors of the report did not believe that their position fully reflected the state of the case law, but rather proposed a new and idealized rule of interpretation. Buttressing that point, the report cited a single case to support the deferential standard of review that it (tentatively) proposed—Judge Augustus Hand's Second Circuit opinion in *SEC v. Associated Gas & Electric Co.*[326] Simply put, when the report was issued in January of 1941—before the Court issued *Gray* and *Hearst*—the

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323. S. DOC. NO. 77-8, at 246-47.

324. *Id.* at 90-91 (footnote omitted).

325. *Id.* at 88 n.37 (citing DICKINSON, *supra* note 26).

326. 99 F.2d 795 (2d Cir. 1938). Judge Hand's opinion in the case could be understood as an application of the traditional canons. *See id.* at 798 (noting "uniform[] treat[ment]" and "long settled practice," as well as the "benefit of [the agency's] special knowledge acquired through continuous experience in a difficult and complicated field").

majority could find no better case to support a deferential standard of review on questions of law.

3. Section 706 of the Administrative Procedure Act

For several years, issues of administrative reform were relegated to the backburner as Congress focused on the nation's war effort.[327] But when Congress finally enacted the APA to govern internal agency procedure and judicial review in 1946,[328] one might have predicted that the Court's incipient deviation from the traditional interpretive method would be swept away. After all, section 706 of the APA provided that a "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."[329] On its face, section 706's instruction that a court "decide all relevant questions of law" appeared to contemplate some form of de novo review of agency legal interpretation. Section 706, moreover, prescribed the same standard of review for statutory provisions as for constitutional provisions by requiring that courts "interpret constitutional and statutory provisions" alike. Since at least *Marbury*, constitutional provisions had been subject to de novo review.[330] And section 706 required, without suggesting that a deferential standard be applied, that courts overturn agency actions "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[331] Finally, section 706 established deferential standards of review for issues other than "relevant questions of law,"[332] thereby indicating that Congress knew how to write a deferential standard into statute when it wanted to do so.

No less importantly, had the enactors of the APA wanted to require courts to give additional weight to agency expertise—and thereby, to codify or to leave

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327. *See* Shepherd, *supra* note 311, at 1641 (noting that during several of the war years "Congress ignored administrative reform").

328. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); *see also* S. REP. NO. 79-752, at 5-7 (1945) (explaining how the APA would meet the goal of a bill that is "complete enough to cover the whole field").

329. 5 U.S.C. § 706 (2012); *see also id.* § 706(2)(A), (C) (authorizing courts to "set aside agency action, findings, and conclusions found to be . . . not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

330. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 922-23 (1995).

331. 5 U.S.C. § 706(2)(C).

332. *See id.* § 706(2)(A) (providing that agency actions, findings, and conclusions may be overturned "if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

in place the Supreme Court's post-1940s jurisprudence on the question of deference—they had before them a template for doing so. Like the APA generally, secttion 706 was modeled on the proposed bill of the minority of the Attorney General's Committee on Administrative Procedure.[333] But there was a single, glaring difference: the minority proposal had included a proviso requiring that a reviewing court give "due weight" to agency "technical competence" and "specialized knowledge."[334] Section 706 omitted that language.[335]

Scholars have long debated what section 706's instruction means. On the one hand, as Duffy explains, "commentators in administrative law have 'generally acknowledged' that section 706 seems to require de novo review on questions of law."[336] Similarly, Merrill observes that section 706 "suggests that Congress contemplated courts would always apply independent judgment on questions of law"[337] and notes the "puzzling" fact that there has been no judicial "'rediscovery' of the language of the APA."[338] And Jerry Mashaw states that section 706 "seems to allocate firmly [questions of statutory interpretation] to de novo judicial determination."[339]

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333. *See* Nathaniel L. Nathanson, *Some Comments on the Administrative Procedure Act*, 41 ILL. L. REV. 368, 414 (1946) ("In general Section 10 of the Act adopts the proposal of the minority of the Attorney General's Committee."); Shepherd, *supra* note 311, at 1649-50 (observing that bills introduced in 1943 "mirrored the Attorney General's Committee's minority bill" and became the APA after "two years of negotiations and softening amendments"). Contrary to Shepherd's characterization, however, not all of the "amendments" that the APA made to the minority bill should be characterized as "softening." *See infra* text accompanying notes 334-335.

334. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 246-47 (1941).

335. *See* Dickinson, *supra* note 261, at 517 n.40 (noting that, although the APA "adopts most of the judicial review provisions of the minority bill," the proviso "seems never to have been seriously considered by Congress or its committees").

336. Duffy, *supra* note 196, at 194-95. Duffy argues that "the tension between *Chevron* and Section 706" cannot "be solved by considering *Chevron* to be a traditional canon of statutory construction that formed part of the background understanding when Section 706 was enacted." *Id.* at 195. He ultimately concludes that a canon such as the one announced in *Chevron* would have been "unknown in 1946." *Id.* at 197.

337. Merrill, *supra* note 18, at 995.

338. Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1086 (1997). Merrill also reflects on the "embarrassing" point that the "APA appears to compel th[e] conclusion" that "courts should decide all questions of law de novo." *Id.* at 1085.

339. Mashaw, *supra* note 27, at 2243; *see also* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 473 n.85 (1989) ("That section 706 *appears* to contemplate de novo judicial determination of questions of statutory meaning is generally acknowledged. This reading is supported by the section's failure to distinguish in any way between the interpretation of constitutional and statutory provisions,

On the other hand, Adrian Vermeule observes that "on reflection" the APA "is generally indeterminate on the crucial question" of deference, because "*Chevron* might be one of the legal rules courts are to apply."[340] That is because, under a "plausible reading" of the APA, where "agencies are exercising delegated authority, perhaps the meaning of the relevant law just is what agencies say that it is."[341] In a similar vein, John Manning suggests that "the framers of the APA meant its judicial review provisions to be a restatement of pre-APA standards."[342] It may even be the case that, to use Justice Scalia's words, Congress enacted section 706 under "the quite mistaken assumption that questions of law would always be decided de novo by the courts."[343]

Against the backdrop of the historical development of the law of judicial deference, however, the meaning of section 706 is easier to discern. The most natural reading of section 706—one that has, to my knowledge, heretofore escaped scholarly or judicial attention—is that the APA's judicial review provision adopted the traditional interpretive methodology that had prevailed from the beginning of the Republic until the 1940s and, thereby, incorporated the customary-and-contemporary canons of construction. In other words, when Congress enacted the APA, it *did* in fact incorporate traditional background rules of statutory construction. It did *not*, however, incorporate the rule that came to be known as *Chevron* deference, because that was not (at the time) the traditional background rule of statutory construction. Under the traditional approach, a court would "respect"—or, to use modern parlance, "defer to"—an agency's interpretation of a statute if and only if that interpretation reflected a customary or contemporaneous practice under the statute.

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the former of which has always been subject to independent judgment." (citations omitted)); Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2640 (2003) ("Arguably, Section 706 of the Administrative Procedure Act is a broad statement delegating [interpretive] authority to courts, contrary to the rule adopted in *Chevron*." (footnotes omitted)).

340. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 207-08 (2006).

341. *Id.* at 208. To be clear, Vermeule's account does not purport to be authoritative. In his view, this interpretation of the APA is "[p]lausible, but not necessary; candid observers, on all sides, acknowledge that Congress has not authoritatively required or forbidden the *Chevron* principle." *Id.*

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

343. Scalia, *supra* note 22, at 514; *see also* BREYER & STEWART, *supra* note 292, at 280 ("Despite the language of the Administrative Procedure Act instructing *courts* to decide 'all relevant' questions of law, the courts have consistently said that *some* questions of law are for the agency to decide.").

To put the point slightly differently, the *contemporanea expositio* and *interpres consuetudo* canons were considered part and parcel of de novo review. Courts routinely applied (and continue to apply) the two canons in construing constitutional provisions. By extension, in requiring courts to "interpret constitutional and statutory provisions" equivalently, Congress would have expected courts to apply de novo review *and* to apply those canons of construction to construe statutory provisions.

To the extent that it is relevant,[344] the legislative history of the APA tends to confirm this interpretation of section 706. The APA arose out of a "fierce political battle over administrative reform" fought between proponents and opponents of the New Deal over what both factions believed to be "the life of the New Deal" itself.[345] Proponents of the law repeatedly claimed that courts would be authorized to review questions of law. Representative Walter, the author of the House Report on the APA and the chairman of the House Subcommittee on Administrative Law, explained before the passage of the Act that section 706 "requires courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions."[346] The House and Senate reports echoed this point, providing that "questions of law are for courts rather than agencies to decide in the last analysis."[347] The House report also included a "diagram synopsis" of the Act, which indicated

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344. *But see supra* notes 106-111 and accompanying text. The legislative history of the APA, moreover, may be particularly unreliable because each side of a partisan debate may have "tried to lay a foundation in the legislative history for interpretations favorable to its view." Kenneth Culp Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411, 431 (1954); *see also* Shepherd, *supra* note 311, at 1662-63 (reasoning that "each party to the negotiations over the bill attempted to create legislative history—to create a record that would cause future reviewing courts to interpret the new statute in a manner that would favor the party").

345. Shepherd, *supra* note 311, at 1680. In light of that backdrop, commentators have observed that "[t]he APA—the basic charter governing judicial review and *Chevron* itself—was born in a period of considerable distrust of agency activity." Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 468 (1987); *see also* United States v. Morton Salt Co., 338 U.S. 632, 644 (1950) ("The [APA] was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices."). While it may well be that some parts of the APA were an effort to entrench New Deal programs against future opposition, *see* McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999), the distrust of agency activity appears to have influenced the framing of the standard-of-review provision that is the subject of this Article.

346. 92 CONG. REC. 5654 (1946) (statement of Rep. Walter).

347. H.R. REP. NO. 79-1980, at 44 (1946); S. REP. NO. 79-752, at 28 (1945); *see also* Duffy, *supra* note 196, at 193-94 & n.406 (suggesting that, contra *Chevron*, Congress clearly indicated its expectation that the APA authorized de novo review of legal questions).

that "reviewing courts . . . are to determine all questions of law . . . and hold unlawful action found . . . in violation of any statute."[348] At the same time, there was some evidence (from a June 1945 Senate committee print prepared by congressional staff) that an earlier version of § 706 was intended as a "restatement of the scope of review . . . necessary lest the proposed statute be taken as limiting or unduly expanding judicial review."[349] That "restatement" characterization made sense if Congress believed that the approach to statutory interpretation it was "restating" approximated de novo review.

The hearings that led to the APA's passage also suggested that Congress was aware of the confusion created by the Supreme Court's then-somewhat-recent forays into giving agency legal interpretation deferential review. In one of those hearings, Carl McFarland of the American Bar Association testified that he did "not believe the principle of review or the extent of review can or should be greatly altered"; that the "basic exception of administrative discretion should be preserved"; and that "the scope of review should be as it now is."[350] Representative Walter responded: "You say 'as it now is.' Frankly, I do not know what it now is . . . . [T]he Supreme Court apparently changes its mind daily."[351] The Walters-McFarland exchange suggests that Congress was

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348. H.R. REP. NO. 79-1980, at 29. Critics of the law, by contrast, expressed concern about the scope of judicial review. Edwin Johnson, a Democratic Senator from Colorado who was known as an intraparty critic of the New Deal, *see* DAVID M. JORDAN, FDR, DEWEY, AND THE ELECTION OF 1944, at 276 (2011), quoted an article arguing that the APA's judicial review provision "goes entirely too far[,] is dangerous, and would result in an impossible substitution of the judicial for the administrative process and thus deprive our jurisprudence of that process or else delay its proper and normal development," *see* 92 CONG. REC. 2163 (quoting Allen Moore, *The Proposed Administrative Procedure Act*, 22 DICTA 1, 14-15 (1945)), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 335 (2d Sess. 1946). *See also* Shepherd, *supra* note 311, at 1668-69 (arguing that Johnson's insertion of Moore's statement into the Congressional Record reveals "an undercurrent of discontent" among certain New Deal supporters).

349. STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., REP. ON THE ADMIN. PROCEDURE ACT (Comm. Print 1945), *reprinted in* S. DOC. NO. 79-248, at 39. Duffy suggests that this early print should be discounted because the congressional staff who prepared this print "may have been influenced by representatives of the Attorney General, who were working with the staff in the spring of 1945." Duffy, *supra* note 196, at 132 n.95. Perhaps so—and perhaps that is reason to ignore the legislative history altogether, resting instead on the APA's text and structure. But it is worth noting that the "restatement" characterization might have seemed apt to a congressional staffer writing in 1945 because much of the case law prior to the 1940s was consistent with the APA's statutory text.

350. *Federal Administrative Procedure: Hearings 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. 38 (1945) [hereinafter *Admin. Procedure Hearings*], *reprinted in* S. DOC. NO. 79-248, at 84.

351. *Id.* (statement of Rep. Walter).

aware of the shifting jurisprudence on the Court, and sought to reject one strand of it in codifying a standard in section 706.

To be sure, it is important to acknowledge the lack of clarity in these portions of legislative history. The only case that any of the participants cited was *Consolidated Edison Co. v. NLRB*, to which Representative Walter referred and which involved the "substantial evidence" standard for review of factual findings.[352] At worst, however, the legislative history brings us back, full circle, to the APA's text and the historical background against which it was adopted. In light of the jurisprudential developments preceding the APA's adoption, the simplest explanation for section 706's text and structure is that Congress intended to direct courts to apply the standard of review that had prevailed—almost uniformly—for nearly a century and a half prior to the codification of section 706. The prevailing standard of review was the independent-judgment rule, tempered by application of the traditional canons of construction, such as *contemporanea expositio* and *interpres consuetudo*.

4. The APA's Aftermath

In the immediate aftermath of its passage, critical attention to the import and meaning of the APA was widespread. The highest profile, and ultimately most influential,[353] of the contemporaneous commentaries was the *Attorney General's Manual on the Administrative Procedure Act*, published a year after the APA's enactment by Attorney General Tom Clark—who, shortly thereafter, was

352. 305 U.S. 197, 229 (1938). The remainder of the exchange appeared to focus on judicial review of agency fact finding. *See Admin. Procedure Hearings*, *supra* note 350, at 38 (statement of Rep. Sumners). Indeed, much of the debate surrounding the APA appeared to focus on judicial review of agency fact finding. *See* Dickinson, *supra* note 261, at 434-37, 513-15 (reviewing recommendations by the American Bar Association, the Attorney General, and others related to judicial review of agency fact finding).

353. *See* Steadman v. SEC, 450 U.S. 91, 103 n.22 (1981) (stating that the manual "has been 'given some deference by this Court because of the role played by the Department of Justice in drafting the legislation'") (quoting Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, Inc., 435 U.S. 519, 546 (1978)); *see also* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (describing the manual as "the Government's own most authoritative interpretation of the APA, . . . which we have repeatedly given great weight"). As Shepherd explains, however, this "deference is suspect," because "[n]o reason exists to give more weight to the *Attorney General's Manual* than to conservatives' contrasting interpretations." Shepherd, *supra* note 311, at 1683; *see also* Scalia, *supra* note 159, at 917 n.228 (noting that the Attorney General "has never been particularly addicted to a broad interpretation of the APA").

appointed to the Supreme Court.[354] The manual characterized section 706 as "restat[ing] the present law as to the scope of judicial review" and as a "general restatement of the principles of judicial review embodied in many statutes and judicial decisions."[355] That characterization, whatever its merits, was inherently question begging when it came to section 706's command on "questions of law": What exactly was section 706 "restating," the traditional independent-judgment rule or the Court's then-recent forays into categorizing what appeared to be legal questions as factual questions? The manual offered no analysis — none at all — on that critical question.[356]

Many contemporaneous academic commentators sympathetic to the New Deal were similarly vague about the meaning of the "decide all relevant questions of law" language contained in section 706. Some said nothing at all about the phrase, suggesting (if anything) that they understood the rule, both before and after the enactment of the APA, to be that a reviewing court was to use independent judgment in interpreting legal text.[357] Others observed that the Act

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354. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947); *see also* S. REP. NO. 79-752, app. B, at 37-45 (1945) (reprinting a letter from Attorney General Tom C. Clark to Senator Pat McCarran containing comments on the proposed APA).

355. U.S. DEP'T OF JUSTICE, *supra* note 354, at 93, 108; *see also* Duffy, *supra* note 196, at 131 & n.86 (observing that the manual repeatedly described the APA as intended to restate the existing law). At least one commentator has criticized the manual as "damage control" in a "highly political document designed to minimize the impact of the new statute on executive agencies." *Id.* at 119, 133; *see also* Shepherd, *supra* note 311, at 1682 (arguing that the manual sought "to create a record" that would influence future reviewing courts). Be that as it may, the salient point is that, on the critical question of judicial deference to agency interpretation of law, the manual said nothing to flesh out the principles that it believed the APA had "restated."

356. An interesting piece of contemporaneous anecdotal evidence that tends to belie the "restatement" characterization is the following report from an article by two scholars from the Brookings Institution: "The writers have discussed the [APA] with many persons who hold responsible positions in a variety of government agencies, and have not found a single instance of approval. On the contrary, there is practically universal opinion that the bill, if actually enforced, will wreck federal administration." Frederick F. Blachly & Miriam E. Oatman, *Sabotage of the Administrative Process*, 6 PUB. ADMIN. REV. 213, 227 n.1 (1946). It is not clear, however, whether this anecdotal evidence accurately captures the reaction of federal officials at the time of the APA's passage, or even whether the suggested alarm was because of the APA's judicial review provisions. Other commentators sympathetic to the New Deal took a more sanguine view of the Act. *See, e.g.*, Nathanson, *supra* note 333, at 420 ("The Act's greatest contribution is more likely to be, to borrow a phrase from the Attorney General, in codifying the best existing law and practice.").

357. *See* Nathanson, *supra* note 333, at 413-18 (analyzing the Act's judicial review provisions without addressing review of questions of law); S. Walter Shine, *Administrative Procedure Act: Judicial Review "Hotchpot"?*, 36 GEO. L.J. 16, 30-31 (1947). Silence on the scope of judicial re-

"preserve[d] the customary dichotomy of law and fact, in spite of argument by distinguished commentators that these categories cannot in application be distinguished, and in spite of recent Supreme Court decisions giving support to such argument"[358]—thereby more strongly indicating that legal questions would be subject to a court's independent judgment. Still others appeared to start from the premise that review of legal questions was generally de novo,[359] but that section 706 incorporated the then-recent jurisprudence establishing a deferential carve out for "mixed questions of law and fact."[360] Notably, some commentators believed that section 706's language would expand the scope of judicial review of questions of law, though in some unspecified way.[361]

On the other side of the ledger, critics of the Court's recent case law had a different take on section 706. Senator Pat McCarran of Nevada, the chairman

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view of questions of law reflected the view, held by many, that the dispute over the application of the "substantial evidence" test was "[t]he most important, and perhaps the widest disagreement" about section 706. Alfred Long Scanlan, *Judicial Review Under the Administrative Procedure Act—In Which Judicial Offspring Receive a Congressional Confirmation*, 23 NOTRE DAME LAW. 501, 536 (1948). Some commentators had interpreted then-recent Supreme Court decisions as blessing administrative determinations supported by a "scintilla" of evidence, and believed that section 706 reversed those precedents. Dickinson, *supra* note 261, at 515-18; *see, e.g.*, NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318, 343 (1940) (noting that courts should be "mindful of the separate responsibilities Congress has imposed upon the Board and the courts"); NLRB v. Waterman Steamship Corp., 309 U.S. 206, 208 (1940) (declaring that "courts [may] not encroach upon this exclusive power of the Board" to find facts). Others believed that those particular precedents did not embrace the "scintilla" standard, but that Congress intended to "exhort[]" those courts that had "fallen into the vice of relaxing" the substantial evidence rule. Scanlan, *supra*, at 539.

358. Ray A. Brown, *The Federal "Administrative Procedure Act,"* 1947 WIS. L. REV. 66, 86.

359. Scanlan, *supra* note 357, at 528-29 (reasoning that section 706's directive to "decide all relevant questions of law" was "simply a restatement of the present powers which reviewing courts possess, and frequently exercise, of reviewing relevant questions of constitutional and statutory law").

360. *Id.* at 531 (reasoning that "mixed" questions are "merely another ramification of the substantial evidence rule").

361. *See* Frederick F. Blachly & Miriam E. Oatman, *The Federal Administrative Procedure Act*, 34 GEO. L.J. 407, 427-30 (1946) (arguing that the Act "greatly widens the scope of judicial review," while seeming to assume that both before and after the Act, courts were to use independent judgment to review questions of law); Julius Cohen, *Legislative Injustice and the Supremacy "of Law,"* 26 NEB. L. REV. 323, 339 (1947) (claiming, albeit without expressly considering judicial review of legal questions, that, notwithstanding the Attorney General's "assurance" that section 706 merely restated preexisting standards of judicial review, "the language of the section leaves no doubt that it was the major purpose of the drafters to tighten substantially the judicial grip on administrative action."). The title of Cohen's article is a self-conscious reference to Dickinson's manuscript *Administrative Justice and the Supremacy of Law*. *See* Cohen, *supra*, at 323 n.* (reflecting the influence that the book played two decades after its 1927 publication).

of the Senate Committee on the Judiciary at the time of the APA's enactment, wrote an article in the *American Bar Association Journal* stating that the APA "simply and expressly provides that Courts 'shall decide all relevant questions of law'"—with discretion committed "by law" to an agency only if "intentionally given to the agency by the Congress, rather than assumed by it in the absence of express statement of law to the contrary."[362] This provision, in McCarran's view, "cut down the 'cult of discretion'" that had "gained considerable currency in the last decade or so."[363]

A notable contribution to the debate came from John Dickinson—the same John Dickinson who, drawing on the scholarship of James Bradley Thayer, had in important respects originated the notion that agencies should receive deference when applying law to facts.[364] Surveying the APA's review provisions, Dickinson said, effectively, that the Act had repudiated the legal realist's perspective on the law-fact distinction.[365] He made three important points. First, he observed that the APA "stands at the end of a long history which illumines every part of it; and aside from that history, no provisions of the Act, least of all those having to do with judicial review, can be adequately construed."[366] The terms of art that the statute used, on this sensible view, had to be understood against the history of those terms' use in the preexisting jurisprudence.

Second, Dickinson noted that then-recent Supreme Court decisions had *departed* from the longstanding tradition of applying independent judgment to

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362. Pat McCarran, *Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review*, 32 ABA J. 827, 831 (1946).

363. *Id.* at 828, 893.

364. *See supra* notes 267-274 and accompanying text.

365. Dickinson, *supra* note 261. I do not know whether Dickinson's perspective on issues of deference had undergone an evolution in the two decades between his 1927 publication of *Administrative Justice and the Supremacy of Law in the United States* and his 1947 article. In the interim, Dickinson had played a role in the Roosevelt Administration as Assistant Secretary of Commerce and Assistant Attorney General for the Antitrust Division, before returning to Pennsylvania Law School as a professor and also joining the Pennsylvania Railroad as general counsel. *See* Haskins, *supra* note 275, at 9-13; *see also* Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 417 (1990) (detailing Dickinson's role in establishing a committee to study stock exchange legislation while at the Department of Commerce, and characterizing Dickinson as "markedly more sympathetic to business interests than were most of the others involved in formulating federal stock exchange policy"); *id.* at 453 (noting that Dickinson was likely responsible for inclusion of the word "deceptive" in section 10(b) of the Securities Exchange Act of 1934).

366. Dickinson, *supra* note 261, at 434.

review statutory questions.[367] It had "previously been understood that in a review proceeding questions of law are for the determination of the reviewing Court," Dickinson observed, but "[i]ncreasingly, in recent years the Supreme Court has tended to treat many issues, which, when subjected to adequate analysis, would be seen to be issues of law, as lying within the discretion of an administrative agency, and, therefore, non-reviewable."[368] The notion that courts possess the "discretion to decide between doubtful rules of law has gradually permeated," such that courts "have begun" to distinguish "between two kinds of questions of law: Those which involve what are sometimes spoken of as general law or legal principles, and others which involve the construction of technical terms and the application of knowledge thought to be expert and specialized."[369] Dickinson noted that, far from being a sign of judicial quiescence, the Court's ability to redraw the line between questions of law and fact—and, hence, to "draw the line between what is 'general' and what is 'technical'"—necessarily lodged great power in the Justices by "leaving to the Court's discretion the determination of whether it would or would not review a legal question."[370]

Third, Dickinson interpreted section 706 as a "clear mandate" repudiating this tendency. Section 706 required a reviewing court to decide questions of law "for itself, and in the exercise of its own independent judgment."[371] In Dickinson's view, "[m]ore explicit words to impose this mandate could hardly be found than those . . . employed" in section 706.[372]

Leaving to one side its merits, the terms of the debate in the immediate aftermath of the APA's passage tell us much about how a neutral observer would have understood the plain text of section 706. Both sides of the debate appeared to understand that the background presumption for interpretation of legal questions was de novo review. The debate occurred on the margins: did

367. *See id.* (remarking that Dickinson found "no room for doubt that Congress intended to broaden judicial review as it had *lately* been limited by the Supreme Court" (emphasis added)).

368. *Id.* at 516 (citing, as support for the traditional independent-judgment rule, Justice Brandeis's concurring opinion in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73-92 (1936)).

369. *Id.* at 516-17.

370. *Id.* at 517. For a similar point made post-*Chevron*, see Duffy, *supra* note 196, at 192-93, which remarks on "*Chevron*'s capacity to aggrandize judicial power" and observes that "if the common-law premises underlying *Chevron* are accepted, the courts have authority . . . to allocate lawmaking authority."

371. Dickinson, *supra* note 261, at 516.

372. *Id.*

the independent-judgment rule govern "mixed questions of law and fact"? Dickinson, notwithstanding his earlier scholarship, argued that it did and that section 706 did not incorporate the Supreme Court's recent interpretive experimentation. Some New Deal supporters, by contrast, claimed that section 706 incorporated the recent cases. The critical debate in the immediate period following enactment of the APA occurred against this backdrop—and not over the generalized rule of deference later articulated in *Chevron*.

C. *The Irrelevancy of Text, the Forgetting of the Traditional Canons, and the Confusion Before 1984*

The revival of the independent-judgment rule that the APA appeared to augur did not occur. Over time, interpreters of the APA failed to distinguish between the background rules that Congress sought to incorporate in section 706, and those it sought to reject. And they failed to appreciate that implicit in the incorporated-rule theory was the notion that the Court could no longer innovate on the appropriate rules for judicial review, but rather would have to subordinate its preferences to the balance struck by the 1946 Congress. The end result of these failures was the widely shared perspective that the doctrine of *Gray v. Powell* and *NLRB v. Hearst Publications* not only remained good law, but could be elaborated upon by the Court. As that process of elaboration occurred, it exerted a gravitational pull on each of the various strands of preexisting deference case law—resulting in a mishmash jurisprudence incorporating cases applying the mandamus standard, the traditional canons, and the principles of the 1940s. And as this elaboration occurred, the distinction between the many cases setting forth a de novo standard of judicial review and the cases articulating a deferential standard began to grow starker and ever more irreconcilable.[373]

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373. For a recent summary of the immediate pre-*Chevron* period, see Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1 (2013). The authors note that, although "[t]here is considerable ambiguity about . . . the pre-*Chevron* baseline," the "key inquiry" in the immediate pre-*Chevron* period was "whether the legal question decided by the agency and under judicial review is a pure question of legal interpretation or a mixed question of law application to a particular set of facts." *Id.* at 6, 9 (emphasis omitted); *see* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 545-60 (7th ed. 2016); *see also* MANNING & STEPHENSON, *supra* note 36, at 747 ("For better or worse, the enactment of the APA did not seem to have any noticeable impact on how courts reviewed agency interpretations of statutes."); *id.* at 754 ("In the four decades following *Hearst* and *Skidmore*, the doctrine developed into a more standard-like multifactor approach, rather than a more rule-like categorical approach."); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("[C]ourts will defer more when the agency has special expertise that it can bring to bear on the legal question . . . . A court

Judge Friendly gave voice to these concerns when he observed that "there are two lines of Supreme Court decisions" on the subject of judicial deference "which are analytically in conflict."[374] Likewise, in a dissent from the Court's decision to reject an agency interpretation of a statute, Justice Thurgood Marshall contended that, by ignoring principles of judicial deference, the Court had opened itself to the "frequently voiced criticism" that deference was invoked "only when the Court finds itself in substantive agreement with the agency action at issue."[375]

The views of the two leading scholars of administrative law during this era, Davis and Jaffe, exemplify some of the problems with the various approaches. In his influential 1951 administrative law treatise, Davis categorically asserted

may also ask whether the legal question is an important one."). Others have noted that "the enactment of the APA did little to displace the domination of common law in the field. If anything, the growth of purely judge-made law accelerated." Duffy, *supra* note 196, at 115; *see also* 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 2:18, at 140 (2d ed. 1978) ("Perhaps about nine-tenths of American administrative law is judge-made law, and the other tenth is statutory . . . . Most of it is common law in every sense, that is, it is law made by judges in absence of [a] relevant constitutional or statutory provision . . . ."); JAFFE, *supra* note 64, at 337 ("In most cases the scope of review, whether statutory or common law, is very much the same."). Duffy attributes the comfort that courts and commentators displayed toward judge-made law in part to the fact that the decades following the APA's enactment were the era of the "New Federal Common Law." Duffy, *supra* note 196, at 136-37; *see also* Henry J. Friendly, *In Praise of* Erie—*and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408-10 (1964) (tracing the beginning of the "New Federal Common Law" era to *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943)). On the other hand, one of Judge Friendly's former clerks, Raymond Randolph (now a judge himself on the D.C. Circuit), finds it "doubtful" that Judge Friendly "influenced the Court's deference formula" and speculates that Judge Friendly "would have been somewhat critical" of *Chevron* because he "would have preferred not to dole out deference in such a large dose." A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. REV. 1, 15-16 (1999).

374. 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).

375. Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 712 (1980) (Marshall, J., dissenting); *see also* United States v. Swank, 451 U.S. 571, 595 (1981) (White, J., dissenting) (accusing Court's analysis of being "nothing more than a substitution of what it deems meet and proper for the wholly reasonable views of the [agency] as to the meaning of its own regulation and of the statutory provisions"); Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780-81 (1975) ("At best, concepts such as 'substantial evidence' tend to be little more than convenient labels attached to results reached without their aid. As evidence of their unimportance, judicial opinions commonly do not even articulate the standards of review employed, and when they do the articulation is seldom useful to understanding the result or predicting future results.").

that "the doctrine of *Gray v. Powell* has survived the APA."[376] At the same time, Davis observed that "sometimes the Supreme Court applies [the doctrine of *Gray*] and sometimes it does not," with the "criteria that guide the use or nonuse of the doctrine . . . exceedingly elusive" and "not necessarily all disclosed by judicial language."[377] The upshot appeared to be that *Gray* had emphatically survived the APA—but only to be acknowledged in some subset of the Court's cases. For his part, Jaffe acknowledged that *Gray* and *Hearst Publications* had "recognized perhaps more openly than had been customary in the recent past the law- or policy-making function of the agencies" and could be construed as "an abdication of the customary power and responsibility of the judiciary."[378] He nevertheless claimed that the doctrine was "as traditional as it is sound" because it echoed Justice Brown's reasoning in *Bates*.[379] While expressing a preference for a deferential standard of review, Jaffe observed that the "practice of the Supreme Court . . . show[ed] the Court sometimes asserting the correctness of the agency rule, at other times going no further than to hold the administrator can but is not required to adopt such a rule," with "this latter practice" having "given rise to profound difficulties of description and analysis, and to intense controversy."[380]

D. Chevron *Revisited: From Confusion to Clarity and the Repudiation of the Traditional Canons*

With this past as prologue, it is fruitful to revisit the Court's 1984 opinion in *Chevron*. The Court's opinion famously neglected to analyze the text of the APA in announcing its canonical two-part test.[381] Instead, the Court relied on

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376. DAVIS, *supra* note 79, § 246, at 885. For this proposition, Davis relied on the Court's opinion in *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), which in turn contained no reasoning on this issue.

377. DAVIS, *supra* note 79, § 248, at 893; *id.* § 251, at 905; *see also id.* § 247, at 887 (noting that the doctrine of *Gray v. Powell* is not consistently applied).

378. JAFFE, *supra* note 64, at 575.

379. *Id.*

380. *Id.* at 557–58 (footnotes omitted).

381. *See* United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) ("There is some question whether *Chevron* was faithful to the text of the [APA], which it did not even bother to cite."); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 2–3 (1996) (noting that in *Chevron*, "the Court entirely neglects to mention the APA, even where the statutory charter should be central to the Court's deliberations"); Duffy, *supra* note 196, at 189 (reasoning that *Chevron* "provides one of the best examples of a pure common-law method" because the Court "justified its ruling with case law and its own assessment of the policy reasons (agency expertise and democratic

two principal kinds of arguments: (a) an appeal to abstract political theory and (b) an appeal to the precedents of the Court. While a comprehensive evaluation of the first is outside the scope of this Article, the Court's reliance on the latter is cast in a new light when compared to the historical record.

Of the several dozen cases that the Court cited to support *Chevron*'s two-part test,[382] seven were decided before 1940. Each of those cases is consistent with the model of the traditional canons of statutory construction. Indeed, in one of them, Chief Justice Hughes rejected a party's invocation of the "familiar principle . . . that great weight is attached to the construction consistently given to a statute by the executive department charged with its administration" by noting the following "qualification of that principle [that was] as well established as the principle itself": "The Court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons."[383]

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accountability) for preferring agency interpretation over judicial interpretation"); *cf.* Darby v. Cisneros, 509 U.S. 137, 144-45 (1993) (holding that, to determine "[w]hether courts are free to impose an exhaustion requirement as a matter of judicial discretion," the starting point "is congressional intent" as expressed in the APA (quoting McCarthy v. Madigan, 503 U.S. 140, 144 (1992))).

382. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-44 & nn.9, 11-14 (1984); *id.* at 865-66 & nn.39-41.

383. Burnet v. Chi. Portrait Co., 285 U.S. 1, 16 (1932). The remaining cases cited in *Chevron* are to the same effect and applied the *contemporanea expositio* and *interpres consuetudo* canons in one fashion or another—save for one that addressed the arbitrary-and-capricious standard. *See* McLaren v. Fleischer, 256 U.S. 477, 481 (1921) (invoking 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"); Webster v. Luther, 163 U.S. 331, 342 (1896) ("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."); Brown v. United States, 113 U.S. 568, 571 (1885) ("This contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in a case of doubt ought to turn the scale."); United States v. Moore, 95 U.S. 760, 762-63 (1878) (noting a construction of a statute that had "always heretofore obtained in the Navy Department" was "entitled to the most respectful consideration, and ought not to be overruled without cogent reasons"); Edward's Lessee v. Darby, 25 U.S. (1 Wheat) 206, 210 (1827) ("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."); *see also* Am. Tel. & Tel. Co. v. United States, 299 U.S. 232, 235-36 (1936) (holding that, in the case where the order was "attacked as arbitrary," the 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" in construing a statute that allowed

Chevron cited Chief Justice Hughes's opinion, but failed to engage with his reasoning.

Justice Stevens punctuated this list of cases with a citation of Pound's *The Spirit of the Common Law*.[384] That was certainly ironic. During the debates that preceded the passage of the APA, while serving as chairman of the American Bar Association's Special Committee on Administrative Law, Pound had sharply criticized what he viewed as an emerging "administrative absolutism" posed by the modern administrative state,[385] and had equated "tak[ing] away interpretation by the courts" and "leav[ing] interpretation of the provisions and directions of the law to the executive" with "enter[ing] upon the path leading to a *lex regia*."[386] One wonders what Pound would have thought of being cited as the sole academic authority in favor of the presumption of delegation announced in *Chevron*.

But the supreme irony of *Chevron* is that, to support the interpretive theory that it adopted, the Court cited cases like *Edward's Lessee* that applied the contemporaneous-construction canon. Those cases had, consistent with Chief Justice Hughes' opinion in *Burnet*, long been understood to require a court to hold an agency to its longstanding and contemporaneously adopted position. The rule adopted in *Chevron* said the opposite.

Relying on the same nineteenth-century cases *Chevron* cited, Justice Harlan in his 1904 *Bates* dissent had rejected a newly stated position by the govern-

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the Commission "in its discretion, [to] prescribe the forms of any and all accounts, records, and memoranda").

384. *See Chevron*, 467 U.S. at 843 (citing ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 174-75 (1921)). Justice Stevens's citation of Pound can be seen as an excuse for the Court's failure to interpret section 706. In the cited pages of *The Spirit of the Common Law*, Pound argued that "even after the legislator has acted it is seldom if ever that his foresight extends to all the details of his problem or that he is able to do more than provide a broad if not crude outline." ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 174 (1921). Thus, according to Pound, "even in the field of the enacted law," the common law plays a "chief part," because the interpreter "must rely upon it to fill the gaps in legislation, to develop the principles introduced by legislation, and to interpret them." *Id.* The common law "is and must be used, even in an age of copious legislation, to supplement, round out and develop the enacted element; and in the end it usually swallows up the latter and incorporates the results in the body of tradition." *Id.* at 174-75. In the case of section 706, the citation of Pound was apropos, because the statute does incorporate a preexisting common-law approach to interpretation. But the Court misidentified the import and foundations of the common-law precedents that it cited. *See id.* at 175 (noting that jurisprudence "works with the materials" of the common law, "analyzes them and systematizes them, . . . traces their history, [and] seeks their philosophical foundations").

385. *Report of the Special Committee on Administrative Law*, *supra* note 277.

386. Pound, *supra* note 316, at 136-37.

ment because he "had supposed it to be firmly settled that the established practice of an Executive Department charged with the execution of a statute will be respected and followed."[387] According to Justice Harlan, the Court's decision not to "regard[]" the "practice of the Post Office Department, covering a period of sixteen years and more," had "overthrown" "[t]he rule of construction which [the Supreme Court] ha[d] recognized for more than three quarters of a century."[388] Nowhere in the *Bates* majority opinion did Justice Brown dispute that Justice Harlan had accurately captured the holdings of cases like *Edward's Lessee*.[389] It appeared to be shared ground among the Justices in *Bates* that the contemporary and customary canons of construction did not apply when the agency changed its legal position.

Within eight decades—between Justice Harlan's opinion in 1904 and the *Chevron* decision in 1984—the true meaning of the cases applying the *contemporanea expositio* and *interpres consuetudo* canons had been completely and entirely forgotten. The traditional rules of construction, to use Justice Harlan's words, had finally been "overthrown."

CONCLUSION

In this Article, I have traced the origins and development of the doctrine of judicial deference to executive interpretation. The fundamental payoff of the historical analysis has been the insight that judicial deference—as an interpretive theory practiced from the mid-twentieth century onwards and especially after the Court's opinion in *Chevron*—is an innovation. Although some forms of "respect" for executive constructions did exist in traditional interpretive methodology, the modern doctrine finds no true historical antecedent in the nineteenth century, neither in the cases applying the traditional canons of construction on which *Chevron* relied, nor in the cases applying the standard for obtaining a writ of mandamus. The doctrine, moreover, cannot be squared with the text of section 706 of the APA, which is best read as an attempt to codify the traditional approach to statutory interpretation in the wake of experimentation with that approach by the Supreme Court in the 1940s. The doctrinal flaw of *Chevron*, thus, is that the case failed to understand the rationale behind the precedents on which it relied, thereby severing the doctrine of judicial deference from both the text of the statute Congress enacted to govern ju-

387. Bates & Guild Co. v. Payne, 194 U.S. 106, 111 (1904) (Harlan, J., dissenting).

388. *Id.* at 111-12.

389. *See id.* at 109 (relying on mandamus cases and cases deferring to agency factual determinations to support its deferential stance toward the agency's then-current legal position).

dicial review of agency action and the interpretive framework that Congress incorporated.

Perhaps *Chevron* can be justified on some other ground. Perhaps, in the modern administrative state, the cost-benefit analysis of different interpretive methodologies weighs so heavily in favor of judicial deference that the twentieth-century abandonment of the traditional canons should be viewed as a net positive.[390] Perhaps, in light of the thirty-year run of the *Chevron* doctrine, Congress now actually intends to delegate lawmaking authority to agencies to fill gaps in statutes determined to be ambiguous.[391] Or perhaps, given *Chevron*'s thirty-year run, it is simply too late to upset the deference applecart and return to the views that prevailed before the mid-twentieth century.[392] But the proposition that *Chevron* has a basis in traditional interpretive methodology, the views of the Framers of the United States Constitution, or section 706 of the Administrative Procedure Act should be abandoned—*that* proposition is a fiction. To be sure, the canons of construction with which the Framers of the Constitution and the lawyers of the nineteenth century would have been familiar—those privileging customary and contemporary interpretations of legal texts—use terminology that bears a passing resemblance to the words now used to articulate the concept of *Chevron* deference. But those canons were far removed from *Chevron*, both in spirit and in application. The true story of the origins of judicial deference is that the current doctrine, as an interpretive theory, originated much later—during the twentieth century—out of a desire to abandon the formalism of the traditional framework.

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390. *Cf.* VERMEULE, *supra* note 340, at 207-29 (presenting justifications for *Chevron*).

391. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 925 & n.25, 995-1006 (2013).

392. *See, e.g.*, 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 for the Court."). *But see* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1214 n.1 (2015) (Thomas, J., concurring) ("Although the Court has appeared to treat our agency deference regimes as precedents entitled to *stare decisis* effect, some scholars have noted that they might instead be classified as interpretive tools . . . [which] might not be entitled to such effect."); Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 320 (2005) (Thomas, J., concurring) (expressing willingness, notwithstanding statutory stare decisis, to overrule precedents interpreting the federal-question statute, 28 U.S.C. § 1331, "[i]n an appropriate case, and perhaps with the benefit of better evidence as to the original meaning of [the statute's] text").