

---



---

## ARTICLE

---



---



---



---

### THE SPECIFICATION POWER

---



---

ILAN WURMAN<sup>†</sup>

*When agencies implement their statutes, administrative law doctrine describes what they do as interpretation. This raises the question of how much deference courts ought to give to such agency interpretations of law. This Article claims, however, that something else is usually going on when agencies implement statutory schemes. Although agencies interpret law, as they must, as an incident to enforce the law, agencies also exercise another power altogether: an interstitial lawmaking, gap-filling, policymaking power, a power that I shall call the “specification power.” This Article aims to advance existing accounts of agency activity and judicial deference by demonstrating that agencies exercise distinct powers of law-interpretation and law-specification when implementing a statutory scheme. Most significantly, it provides a constitutional account for why agencies may exercise this specification power as a formalist matter, even if they cannot have final say over the interpretation of law. If this account is correct, then calls to overturn modern judicial deference may be overblown if agencies are usually exercising their powers not of interpretation, but of specification.*

INTRODUCTION .....	690
I. THE STANDARD DEBATE .....	696
A. <i>Chevron and Its Rationales</i> .....	697
B. <i>The Case Against Deference: Article III</i> .....	698

---

<sup>†</sup> Visiting Assistant Professor, Sandra Day O'Connor College of Law, Arizona State University. Thanks to Nicholas Bednar, Rob Bernstein, Samuel Bray, Tara Grove, Kristin Hickman, Robert Leider, Ron Levin, Jennifer Mascott, Michael McConnell, Aaron Nielson, Bijal Shah, Larry Solum, and Adam White; to Richard Murphy, Peter Strauss, and the 2019 AALS New Voices in Administrative Law Program; to John Harrison, John McGinnis, and the participants of the Annapolis Junior Scholars Forum; to the participants of the 2019 National Conference of Constitutional Law Scholars in Tucson, Arizona; and to the participants in faculty colloquia at Arizona State, George Mason, Illinois, Louisiana State, Missouri, Northwestern, and Washington University in St. Louis. I also thank Jessica Kemper for tremendous research assistance.

C. <i>The Case for Deference: Interstitial Lawmaking</i> .....	700
D. <i>Policymaking and the Interpretation-Construction Distinction</i> .....	703
II. INTERPRETATION AND SPECIFICATION .....	706
A. <i>The Executive's Incidental Interpretation Power</i> .....	706
B. <i>The Executive's Specification Power</i> .....	709
1. Early Examples .....	710
2. <i>Youngstown</i> .....	712
3. An Analogy .....	714
III. THE CONSTITUTIONAL BASIS .....	714
A. <i>Nonexclusive Legislative Power</i> .....	715
B. <i>The Prerogative Specification Power</i> .....	718
IV. IMPLICATIONS .....	722
A. <i>Judging in a World Without Chevron</i> .....	723
1. Advancing the Debates .....	723
2. Revisiting <i>Chevron</i> and Its Predecessors.....	725
3. Objections, and a Note on Judicial Power .....	727
B. <i>Enforcing Nondelegation (As-Applied)</i> .....	729
C. <i>Interpretative Rules and Hard-Look Review</i> .....	730
V. CONCLUSION .....	732

## INTRODUCTION

The executive power to interpret law is at the center of modern debates over administrative law and the separation of powers. The doctrine announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* holds that courts must defer to an agency's reasonable interpretation of an ambiguous statute that it administers.<sup>1</sup> The doctrine is justified on at least two grounds: when Congress enacts statutes with ambiguities, Congress is presumed to delegate implicitly to the agencies the authority to resolve those ambiguities;<sup>2</sup> and agencies are more politically accountable, technically expert, and institutionally competent than courts to do so.<sup>3</sup>

<sup>1</sup> 467 U.S. 837, 842-43 (1984).

<sup>2</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (stating that *Chevron* deference is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps"); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); see also *City of Arlington v. FCC*, 569 U.S. 290, 319 (2013) (Roberts, C.J., dissenting) (quoting *Barrett*, 494 U.S. at 649).

<sup>3</sup> *Chevron*, 467 U.S. at 843 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.") (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)); see also, e.g., *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990)

*Chevron*'s "canonical"<sup>4</sup> status in administrative law, however, may be fraying. Critics have noted the apparent inconsistency between *Chevron* deference and the Administrative Procedure Act ("APA"), which provides in § 706 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."<sup>5</sup> Deference to executive interpretations also appears inconsistent with the structural separation of powers: Article III assigns the judicial power to "say what the law is"<sup>6</sup> to judges with life tenure and salary protections so they may exercise their legal judgment while insulated from the political accountability that seems to justify *Chevron* deference.<sup>7</sup> Finally, recent scholarship has suggested that historically courts may have respected only those executive interpretations that were contemporaneous with the enactment of the law or were longstanding, and were thus good evidence of what the law actually was.<sup>8</sup> For these reasons, even former Justice Kennedy has joined calls from his more formalist colleagues to reconsider "the premises that underlie *Chevron*."<sup>9</sup>

Many scholars, however, maintain that deference is inevitable. Nicholas Bednar and Kristin Hickman recently argued, for example, that *Chevron* deference, or something much like it, "is a necessary consequence of and corollary to Congress's longstanding habit of relying on agencies to exercise substantial policymaking discretion to resolve statutory details."<sup>10</sup> Unless Congress assumes "substantially more responsibility for making policy choices itself" or the courts "reinvigorate the nondelegation doctrine," they write,

---

("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."); *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986) (noting that the deference in *Chevron* was "predicated on expertise"); Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2597-98 (2006) ("[T]he general argument for judicial deference to executive interpretations rests on the undeniable claims that specialized competence is often highly relevant and that political accountability plays a legitimate role in the choice of one or another approach.").

<sup>4</sup> *City of Arlington*, 569 U.S. at 296 (describing *Chevron* as "now-canonical"); see also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006) (noting *Chevron*'s "foundational" and even "quasi-constitutional" status).

<sup>5</sup> 5 U.S.C. § 706 (2018); see also, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 871 (2001) (noting *Chevron*'s "conflict with the APA" and suggesting a way to resolve it).

<sup>6</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

<sup>7</sup> See THE FEDERALIST NO. 78, at 465-66, 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (setting forth the institutional and structural protections given to the judiciary).

<sup>8</sup> Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 916-19 (2017) ("Under the traditional interpretive approach, American courts 'respected' longstanding and contemporaneous executive interpretations of law . . .").

<sup>9</sup> *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring).

<sup>10</sup> Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1398 (2017).

“some variant of *Chevron* deference will be essential to guide and assist courts from intruding too deeply into a policy sphere for which they are ill-suited.”<sup>11</sup> A veritable legion of scholars has argued that deference is inevitable because the interpretation of broad statutory standards requires policymaking discretion, or the resolving of statutory “ambiguities” is for policymakers.<sup>12</sup> And legal realists maintain that *all* interpretation inherently entails policymaking.<sup>13</sup>

In short, when agencies implement statutory schemes, the doctrine treats their actions as “interpretations.”<sup>14</sup> This then raises the question of how much courts ought to defer to such interpretations of law, a question that remains unresolved by courts and scholars. The claim here is that this debate has stalled

---

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611, 611, 617 (2009) (suggesting that ambiguity should simply be treated as calling for an exercise of policymaking); 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, 846, 848 (2010) (distinguishing between situations “in which there is statutory language against which to judge the agency’s action and one in which there is not,” but noting that the latter includes “the possibility that an agency might, in the future, adopt a different interpretation”); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 464 (1989) (“When Congress has failed to speak clearly or comprehensively, who gets to decide what the law is? . . . When a *regulatory* statute is ambiguous . . . the agency stands as a potential alternative recipient of the power inevitably created by the legislature’s finite capacity for prescience and precision in expression.” (first emphasis added)); Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive’s Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141, 188 (2012) (“[T]he Court has begun to reclaim the interpretive power it ceded and the lawmaking power it shifted with the rise and fall of *Chevron*.” (emphasis added)); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 6 (1983) (“A statement that judicial deference is mandated to an administrative ‘interpretation’ of a statute is more appropriately understood as a judicial conclusion that some substantive law-making authority has been conferred upon the agency.”); *id.* at 7 (“[O]nce the delegation of law-making competence to administrative agencies is recognized as permissible, judicial deference to agency *interpretation* of law is simply one way of recognizing such a delegation.” (emphases added)); *id.* at 28 (“Indeed, it would be violating legislative supremacy by failing to defer to the *interpretation* of an agency to the extent that the agency had been *delegated law-making authority*.” (emphases added)); Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 963 (2018) (“A court that holds that an ambiguous statute constitutes a delegation of power to the agency is interpreting the statute . . . .”); Peter L. Strauss, “*Deference*” is Too Confusing—Let’s Call Them “*Chevron Space*” and “*Skidmore Weight*,” 112 COLUM. L. REV. 1143, 1144-45, 1159-60 (2012) (arguing that agencies have policymaking discretion in “*Chevron spaces*,” which are “created by statutory imprecision” and when “statutory meaning is uncertain”). The Supreme Court has also been unable to disentangle these notions since it decided *Chevron*. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (“Yet it can still be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law . . . .” (emphasis added)).

<sup>13</sup> See Sunstein, *supra* note 3, at 2587, 2591-93 (noting the close relationship between interpretation and policymaking).

<sup>14</sup> As the Court has said, “the agency remains the authoritative *interpreter* (within the limits of reason) of such statutes.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (emphasis added).

because, although the doctrine treats agency implementations of statutes as interpretation, something else is in fact usually going on. Agencies do interpret law as an incident to enforcing the law, but they also do something else: they exercise a kind of interstitial lawmaking, gap-filling, policymaking power where the statute is clear but does not specify a course of action, a power that I shall call the “specification power.”

Although many deference proponents have intuited that agencies are doing something along these lines, they have been unable to escape the doctrinal vocabulary of interpretation and therefore have failed to provide an accurate descriptive or constitutional account of this power.<sup>15</sup> A few scholars have recognized that the doctrine seems to conflate two different powers or activities,<sup>16</sup> but none provides a complete constitutional account of why agencies may exercise this policymaking power, nor provides a satisfactory account of what distinguishes the “interpretation” that agencies do from their “policymaking.”<sup>17</sup> This Article supplements the work of these scholars, illustrating the distinction between interpretation and “specification” and providing arguments from the Constitution’s text, structure, and history for why agencies may exercise this specification power.

American legal history is replete with examples of the exercise of both kinds of power. In the 1840 case of *Decatur v. Paulding*, the Court was confronted with two statutes, one which granted a pension to all widows of naval service members, and another which granted a pension specifically to the widow of Commodore Stephen Decatur.<sup>18</sup> Mrs. Decatur sought to collect both pensions.<sup>19</sup> The Court recognized that the interpretation of this law could leave room for discretion and even disagreement, and thus the Court would not compel the executive to adopt one interpretation over another

---

<sup>15</sup> See, e.g., Bednar & Hickman, *supra* note 10, at 1446-53 (referring to agency interpretation of statutes as both “interpretation” and “gap”-filling); Sunstein, *supra* note 3, at 2591-93 (explaining the legal realist insight that the exercise of “interpretation” inherently involves policymaking decisions); see also generally *supra* note 12.

<sup>16</sup> See Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 691 (2007) (“The Court’s labeling of administrative work as statutory construction has obscured the distinct carrying-out role of public bureaucracies.”); Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1891 (2015) (noting that “two meanings” of *Chevron* are “often confounded”); Lawrence B. Solum & Cass R. Sunstein, *Chevron as Construction* 3 (Dec. 13, 2018) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3300626](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300626) [<https://perma.cc/TZX7-U7TE>] (asking whether “there are actually two quite distinct *Chevron* doctrines?”); see also *infra* Part I.D.

<sup>17</sup> See *infra* Part I.D.

<sup>18</sup> 39 U.S. (14 Pet.) 497, 498 (1840).

<sup>19</sup> *Id.*

through a writ of mandamus.<sup>20</sup> But the Court also noted that had a nonmandamus action been brought, then “the Court certainly would not be bound to adopt the construction given by the head of a department” because in such cases it is the Court’s “duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them.”<sup>21</sup>

On the other hand, one of the earliest federal statutes provided that the military pensions that had been granted and paid by the states pursuant to the acts of the Confederation Congress to the wounded and disabled veterans of the Revolutionary War “shall be continued and paid by the United States, from the fourth day of March last, for the space of one year, under such regulations as the President of the United States may direct.”<sup>22</sup> President Washington’s regulations stated that the sums owed were to be paid in “two equal payments,” the first on March 5, 1790, and the second on June 5, 1790, and that each application for payment was to be accompanied by certain vouchers as evidence that the invalid served in a particular regiment or vessel at the time he was disabled.<sup>23</sup>

This is a particularly clear example of an executive officer exercising a power not of interpretation, but of what we might call specification. The regulation concerning two equal payments to be made three months apart was certainly a reasonable *interpretation* of the statute, which required the payments to be made within one year. Yet the executive could have chosen any number of other options: daily installments for the entire year, three installments at varying intervals to be completed within the year, and so on. Each of these options, in and of itself, would have been a reasonable interpretation of the statute because the statute only required such payments to be made within a year.

The act of choosing among these various possible interpretations, however, was not an act of interpretation. Nothing in the statute demanded one regulation over another; all would have been reasonable interpretations because all would have been permitted by the statute. The choice among these options, then, was not an act of interpretation, and that choice requires a different vocabulary. I

---

<sup>20</sup> *Id.* at 515 (“The head of an executive department of the government, in the administration of the various and important concerns of his office, . . . must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act.”).

<sup>21</sup> *Id.* This element of the case is discussed in Bamzai, *supra* note 8, at 951-52. As explained, although the courts did defer to executive interpretations of law, they did so only according to two canons of statutory construction that afforded weight to such interpretations if they were contemporaneous with the enactment of the law itself, or were longstanding, in which case they would be good evidence of what the law actually was. *Id.* at 916-18, 933, 937.

<sup>22</sup> Act of Sept. 29, 1789, ch. 24, 1 Stat. 95, 95.

<sup>23</sup> These regulations are preserved in the Library of Congress, and can be viewed at An Act Providing for the Payment of the Invalid Pensioners of the United States (Oct. 13, 1789), reprinted in LIBRARY OF CONGRESS, <https://www.loc.gov/resource/rbpe.21201200/?sp=1> [https://perma.cc/R29C-C9SU].

suggest the term “specification”: the executive officers specified this detail of implementation—this course of action—within the bounds of what the statute permitted but without more specific direction from the statute itself. Nothing in the statute bore on their choice, so long as it was within the range of options created by the best interpretation of the statute’s limits.

Now consider another case: A statute provides that a “stationary source” is defined as “any building, structure, facility, or installation” which emits air pollution. The statute does not say, however, what to do when more than one of these definitions applies, for example when there is a facility that includes multiple structures and installations. A judge might do all the “interpretation” there is to do—ascertaining the meaning of all the relevant terms as well as the legal effect of those terms against the structure and backdrop of the entire statute and preexisting law more broadly—and the statute might simply not answer the question. The statute is not ambiguous, nor is it vague. It has simply left a “gap” or a “silence,” a space within which the executive might specify the course of action in order to implement the statutory scheme. Here, again, the *result* of the executive’s choice would, of course, be a reasonable interpretation of the statute; but the act of *choosing among* the multiple permissible options would not be an act of interpretation. These were the facts of *Chevron* itself,<sup>24</sup> facts that call for an exercise of the specification power. This is the power to fill in the details where the statute is clear but does not specify the course of action.

Although agencies may not have final say over the interpretation of law, their exercise of the specification power is rooted in the text, structure, and history of both the “legislative power” and the “executive power.” Chief Justice John Marshall recognized long ago that there was a category of power partly but not wholly legislative in its nature—we shall call it here “nonexclusive” legislative power—that Congress may exercise itself or delegate to the other branches.<sup>25</sup> He described this power as the power to “fill up the details” of a general statutory provision.<sup>26</sup> The specification power may also be deduced from the vesting of “the executive power” in the chief executive, whether one adopts the prevailing formalist account that the vesting clause is a residual grant of power or the view that it merely grants a power of law-execution.<sup>27</sup>

---

<sup>24</sup> *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840, 859-62 (1984).

<sup>25</sup> The term “nonexclusive legislative power” is the author’s. It is inspired by Chief Justice Marshall in *Wayman v. Southard*, in which he distinguished between “exclusively legislative” power that Congress cannot delegate—that is, a power that in its nature was strictly and solely legislative, and which therefore had to be exercised by Congress—and power that “Congress may certainly delegate to others,” but which it also “may rightfully exercise itself.” *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825).

<sup>26</sup> *Id.* at 43.

<sup>27</sup> See *infra* Section III.B. At this juncture, it is worth distinguishing the account put forward here from three other accounts. First, Jack Goldsmith and John Manning have argued that the

This Article proceeds as follows. Part I briefly canvasses the literature on judicial deference to show that the doctrine and the literature describe agency action in this sphere as “interpretation.” It then shows that the debate over whether to defer to such interpretations has stalled because the principal antagonists in the debate seem to presume the agency power at issue is different, although they all refer to it using the same vocabulary of interpretation. Part II seeks to demonstrate that agencies have historically exercised not only a power of law-interpretation, but also a power of law-specification, when implementing a statutory scheme. Part III provides a constitutional account for why agencies may exercise this specification power, even if they cannot have final say over the interpretation of law. Part IV teases out the implications, revisiting the *Chevron* decision and making a formalist case for a kind of deference, at least to an agency’s specification power. This Part also demonstrates how this distinction may clarify other administrative law puzzles, such as the distinction between interpretative and legislative rules for purposes of the APA’s notice-and-comment procedures.

## I. THE STANDARD DEBATE

The *Chevron* decision is one of the most cited in all administrative law.<sup>28</sup> The brief sections that follow seek only to elucidate the nature of the existing debate, and how it has stalled.

---

President has a power to “complete” laws. Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280 (2006). They do not recognize this power, however, as distinct from the power of law-interpretation. *Id.* at 2290 (arguing that the completion power includes “authority to resolve statutory ambiguities or fill up statutory interstices”). The term “completion” power is also not the best term because the executive never quite *completes* a statutory scheme, but rather specifies particular details when necessary for implementation.

Second, Peter Strauss has described a “*Chevron* space,” a space of policymaking discretion that exists in between the spaces where statutory meaning is clear and compels a particular action on the one hand, and is clear and prohibits an action on the other. Strauss, *supra* note 12, at 1145. That approach is similar to the one presented here, but there is an important difference: under a specification power analysis even where the statute is not “clear” (i.e., it neither clearly requires, nor clearly prohibits the action), it is still up to the courts to decide whether the best interpretation of the statute permits the particular option.

Finally, another way to think about the specification power is that it is exercised in those classes of cases to which Justice Kavanaugh would simply apply arbitrary and capricious review after a court has done all the interpretation there is to do at “Step One” of *Chevron*. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2153-54 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (explaining that in cases where statutes use “broad and open-ended terms,” courts should defer to agency interpretation in the same way they do when conducting an arbitrary and capricious review). Although Kavanaugh’s account works within the existing doctrinal vocabulary, its central idea is consistent with the argument presented here.

<sup>28</sup> See, e.g., Herz, *supra* note 16, at 1870 n.19 (“It seems an obligation of the form to point out that *Chevron* is the most cited decision in administrative law.”); Peter M. Shane & Christopher J. Walker, *Foreword*, *Chevron at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475



### A. Chevron and Its Rationales

*Chevron* announced the rule that, when reviewing an agency's implementing regulations, a court must first ask "whether Congress has directly spoken to the precise question at issue."<sup>29</sup> If the statute clearly answers the question, "that is the end of the matter"; but "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."<sup>30</sup> That means the court must defer to the agency's interpretation of the statute even if it is not the "best" reading—that is, the reading at which the court itself would have arrived if it were asked to interpret the statute in the first instance.<sup>31</sup>

The Court and literature have suggested several rationales for the rule. Early on, the cases and literature theorized that statutory ambiguities are implicit delegations of authority from Congress to the agencies to resolve those ambiguities.<sup>32</sup> The Court in *Chevron* also relied upon agency accountability and expertise, and later commentators have emphasized these rationales.<sup>33</sup> The Court relied on precedent, stating that it has "long

---

& n.2, 495 (2014) (concluding that "*Chevron* is the most cited administrative law decision of all time" with, as of that time, over 68,000 citations across judicial decisions, court filings, and law review articles while *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), another competitor for most cited case, had only 48,608 total citations).

<sup>29</sup> *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

<sup>30</sup> *Id.* at 842-43.

<sup>31</sup> *Id.* at 843 n.11; see also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) ("Chevron teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative . . . Instead, the agency may . . . choose a different construction, since the agency remains the authoritative interpreter . . . of such statutes.").

<sup>32</sup> See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (describing deference as "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps"); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); see also *City of Arlington v. FCC*, 569 U.S. 290, 319 (2013) (Roberts, C.J., dissenting) (quoting the same); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989) (arguing that *Chevron* announced "an across-the-board presumption that, in the case of ambiguity, agency discretion is meant"). But see Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 195-96 (1992) (arguing that the political and constitutional "rivalry" between the legislative and executive branches undercuts the theory that "Congress actually wants to hand over power to the agencies" and arguing that statutory ambiguities are mainly the result of legislative constraints, not a "conscious desire of Congress to leave policy-making to the agency").

<sup>33</sup> See *Chevron*, 467 U.S. at 865 ("Judges are not experts in the field, and are not part of either political branch of the Government."); see also *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron*

recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."<sup>34</sup> In a subsequent case, Justice Scalia sought to root the doctrine in the history of mandamus review.<sup>35</sup> As the next two subsections show, the two principal sides to the debate can never come to a fundamental agreement about these rationales because both work within the same doctrinal vocabulary of "interpretation," but each in fact maintains a very different understanding of the agency power at issue.

### B. *The Case Against Deference: Article III*

Ever since *Chevron* was decided, there have been scholars who have argued that deference to agency statutory interpretation violates Article III, which vests the judicial power "to say what the law is"<sup>36</sup> in life-tenured, salary-protected judges.<sup>37</sup> The most systematic critic has been Philip Hamburger, who challenges deference in a long book on administrative law<sup>38</sup> and in a more recent article.<sup>39</sup> In the latter, Hamburger argues that "judges under Article III have the constitutional office or duty to exercise their own independent judgment about what the law is for their purposes,"<sup>40</sup> a duty which justifies not only the power of judges to decide cases but also "their security in their tenure and salaries."<sup>41</sup>

Indeed, one of the core rationales for *Chevron* deference has been the relative political accountability of administrative agencies.<sup>42</sup> Yet judges were accorded life tenure and salary protections to avoid this kind of political accountability when making legal judgments. In *The Federalist*, Hamilton argued that if courts were to be "bulwarks of a limited Constitution," there

---

deference."); *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986) (noting that the deference accorded in *Chevron* was "predicated on expertise"); Sunstein, *supra* note 4, at 2597-98 ("[T]he general argument for judicial deference to executive interpretations rests on the undeniable claims that specialized competence is often highly relevant and that political accountability plays a legitimate role in the choice of one or another approach.").

<sup>34</sup> *Chevron*, 467 U.S. at 844 & n.14 (citing cases supporting this view).

<sup>35</sup> See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 241-42 (2001) (Scalia, J., dissenting).

<sup>36</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

<sup>37</sup> U.S. CONST. art. III, § 1 (vesting the judicial power in courts whose judges "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."). For some early literature on the apparent inconsistency of *Chevron* and Article III, see, for example, Farina, *supra* note 12, at 467, 528.

<sup>38</sup> PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 309-21 (2014) (describing and criticizing various forms of judicial deference).

<sup>39</sup> Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

<sup>40</sup> *Id.* at 1195.

<sup>41</sup> *Id.* at 1209.

<sup>42</sup> See Sunstein, *supra* note 3.

ought to be “permanent tenure of judicial offices,” which would contribute to an “independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.”<sup>43</sup>

These concerns have been echoed by a number of Justices of the Supreme Court, particularly Justice Antonin Scalia, who perhaps more than any other judge is responsible for the prominence of modern-day deference.<sup>44</sup> Notwithstanding his support for deference, Scalia noted the apparent inconsistency between deference to agency legal interpretations and the requirements of Article III.<sup>45</sup>

Most recently, Justice Thomas wrote in *Michigan v. EPA* that “[t]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws,” and that “[i]nterpreting federal statutes—including ambiguous ones administered by an agency—calls for that exercise of independent judgment.”<sup>46</sup> Thomas argues that transferring interpretive authority to agencies “is in tension with Article III’s Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies.”<sup>47</sup> And if what’s going on is not interpretation but rather a kind of legislative power (as I shall argue below), Justice Thomas has said that giving this legislative power to agencies would also violate the Constitution, which requires Congress to exercise such power with limited historical exceptions for courts.<sup>48</sup> Justice Thomas has been recently joined on the Court by Justice Gorsuch, who shares his views on deference.<sup>49</sup>

---

43 THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

44 For Justice Scalia’s influence, see Scalia, *supra* note 32, at 512 (arguing the deference should be accorded even to a “pure question of statutory construction”); *id.* at 514 (explaining that the cases justify deference to administrative legal interpretations on the basis of the “‘expertise’ of the agencies in question,” their “intense familiarity with the history and purposes of the legislation at issue,” and “their practical knowledge of what will best effectuate those purposes”); *id.* at 516 (rooting *Chevron*’s theoretical justification in a theory of congressional intent to delegate to agencies interpretive authority to resolve ambiguities).

45 *Id.* at 513 (“Indeed, on its face the suggestion [to defer to an executive agency on a question of law] seems quite incompatible with Marshall’s aphorism that ‘[i]t is emphatically the province and duty of the judicial department to say what the law is.’” (second alteration in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

46 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (quoting *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1217, 1219 (2015) (Thomas, J., concurring in the judgment)).

47 *Id.* (citing U.S. CONST. art. III, § 1).

48 *Id.* at 2713.

49 See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (“*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty.”). Justice Kavanaugh may also share these views. He would cabin deference to cases of “broad and open-ended terms like ‘reasonable,’ ‘appropriate,’ ‘feasible,’ or ‘practicable.’” Kavanaugh, *supra* note 29, at 2153; see also *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448-49 (2019) (Kavanaugh, J., concurring in the judgment) (“[S]ome cases involve regulations that employ broad and open-ended terms like ‘reasonable,’ ‘appropriate,’ ‘feasible,’ or ‘practicable.’ Those kinds of terms afford agencies broad policy discretion,

What, then, explained the Court's departure from these constitutional requirements in *Chevron*? The Court, as explained, appears to have relied on precedents dating back to the early Republic in which courts deferred to executive interpretations of law. According to recent scholarship, however, this reliance was likely misplaced. The federal courts appear not to have deferred to executive interpretations as such; rather, they seem to have deferred to them in accordance with two canons of statutory construction that treated contemporaneous executive interpretations and longstanding executive interpretations as good evidence of what the law actually is.<sup>50</sup> In other words, if agencies are interpreting law, then the constitutional case for deference is relatively weak.

### C. *The Case for Deference: Interstitial Lawmaking*

The defenses of deference to agency interpretations of law, for the most part, are not rooted in constitutional arguments, but rather in a "realistic" view of law itself. According to this view, neither administrators nor judges really "interpret" law, but rather "make" law. Many scholars have argued that "interpreting" broad statutory provisions entails significant policymaking discretion, and policymaking is for the political branches.

In 1991, Ann Woolhandler suggested that "the most coherent justification for judicial deference to agency lawmaking (sometimes called 'policymaking' or the 'exercise of discretion') is that agencies exercise delegated legislative power."<sup>51</sup> If this justification were unlawful because of the principle that Congress cannot delegate its legislative power, then that raises the question "how it was that the courts themselves" had historically exercised similar policymaking functions.<sup>52</sup> Woolhandler explains that "[s]ome lawmaking functions must inevitably flow to the branches that apply legislation to particular facts, that is, the executive or the judiciary."<sup>53</sup> Although "such executive action is verbalized as law-execution or administration, and such judicial action is verbalized as law-judging, interpretation, or discovering, they all nevertheless involve lawmaking functions."<sup>54</sup> Once it is recognized that both "administration" of the law and the judicial "interpretation" of the

---

and courts allow an agency to reasonably exercise its discretion to choose among the options allowed by the text of the rule.").

<sup>50</sup> Bamzai, *supra* note 8, at 930-47 (showing that these early cases relied on the *contemporanea expositio* and *interpres consuetudo* canons of constructions, and did not defer to executive interpretations of law qua executive interpretations of law).

<sup>51</sup> Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 213 (1991).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 205.

<sup>54</sup> *Id.*

law involve the same kind of function, and that this function is one of lawmaking or policymaking that the courts are not uniquely qualified to discharge, the case for deference is stronger than if one adopts a rigidly formalist account of the separation of powers.<sup>55</sup>

Fifteen years later, Cass Sunstein argued that the Court's rationales in *Chevron* amounted to "a candid recognition that assessments of policy are sometimes indispensable to statutory interpretation."<sup>56</sup> Sunstein sees deference as an outgrowth of "the legal realist attack on the autonomy of legal reasoning" and the shift from common-law regulation to administrative regulation.<sup>57</sup> Sunstein cites to the legal realists Max Radin and Ernst Freund, who argued that "the inevitable ambiguities of language" make the interpretation of law "a controlling factor in the effect of legislative instruments," and thus make courts a "rival organ with the legislature in the development of the written law."<sup>58</sup> Supposing that the legal realists "were broadly right" to suggest that policymaking inheres in interpreting statutory ambiguity, "then there seems to be little reason to think that courts, rather than the executive, should be making the key judgments."<sup>59</sup> In sum, the recognition of executive "law-interpreting power can be understood as a natural outgrowth of the twentieth-century shift from judicial to executive branch lawmaking."<sup>60</sup>

In light of the growing calls to cabin *Chevron*, Nicholas Bednar and Kristin Hickman recently invoked similar arguments. Because "statutory ambiguity is unavoidable," or put differently, because "statutory questions simply do not have answers that can be derived through traditional common law reasoning,"

---

<sup>55</sup> Woolhandler was not the first to make arguments along these lines. See also, e.g., Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 307 (1988) (arguing that "through the process of statutory interpretation" in many cases, "courts are resolving a policy issue that Congress raised but declined to resolve" and thus a judge's "personal political philosophy influences greatly his resolution of the policy issue" (footnote omitted)); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 507-08 (1985) ("Comparative institutional analysis demonstrates that, when Congress enacts a statute that raises but does not resolve an important policy issue, the executive branch is the preferred institution to resolve that issue.").

Henry P. Monaghan made similar arguments in his famous article on judicial deference, published one year before *Chevron*. See Monaghan, *supra* note 12. He explained that "once the delegation of law-making competence to administrative agencies is recognized as permissible, judicial deference to agency interpretation of law is simply one way of recognizing such a delegation." *Id.* at 7. Monaghan explained that "[t]he current fashion is to decry the sweeping delegations of law-making authority conferred upon administrative agencies," but "[o]nce the propriety of agency law making is recognized, the analytic problem is considerably simplified. Judicial deference to agency 'interpretation' of law is simply one way of recognizing a delegation of law-making authority to an agency." *Id.* at 25-26.

<sup>56</sup> Sunstein, *supra* note 3, at 2587.

<sup>57</sup> *Id.* at 2591.

<sup>58</sup> *Id.* (quoting Ernst Freund, *Interpretation of Statutes*, 65 U. PA. L. REV. 207, 208 (1917)).

<sup>59</sup> *Id.* at 2592.

<sup>60</sup> *Id.* at 2595.

resolution of these questions depends on policy considerations.<sup>61</sup> For example, Bednar and Hickman argue that the Communications Act of 1934 gave the Federal Communications Commission “specific authority to establish uniform standards of accounting for utilities,” but nothing in the statute “offered more detailed guidance regarding the content” of those standards.<sup>62</sup> What was the Court to do, other than defer and review for a minimum quantum of rationality?<sup>63</sup> “[P]articularly given the complexity of modern statutes,” Congress often intends “that agencies have discretion in filling the gap.”<sup>64</sup> Further, eliminating *Chevron* “will not magically resolve the problem of statutory ambiguity,” over which judges themselves will disagree; this disagreement again prompts the question whether judges or administrators should resolve these ambiguities.<sup>65</sup> Several other scholars have similarly argued that interpretive ambiguity often calls for policymaking discretion.<sup>66</sup>

Formalists tend to reject this line of argument. Cynthia Farina has observed, for example, that “this nonchalant classification of law interpretation as simply a species of lawmaking is troubling,” and that “[i]ts logical implication—that what courts, the archetypal interpreters, do when they construe a law is really no different than what legislatures, the archetypal lawmakers, do when they create a law—looks wondrous strange against the backdrop of our 200-year legal tradition.”<sup>67</sup> To be sure, at least one formalist, Philip Hamburger, has recognized that judges do in fact engage in a kind of lawmaking when exercising the judicial power. “It is widely recognized that judges often use their interpretation as a mode of lawmaking,” but it would be a “gross overstatement . . . to conclude” that this interpretation “is merely lawmaking.”<sup>68</sup> In the end, Hamburger argues, it “also is interpretation,”<sup>69</sup>—that is, the judicial power simultaneously partakes of interpretive and lawmaking qualities. Thus, judges should exercise independent judgment regardless.<sup>70</sup> Sunstein shares a similar position, but reaches a different conclusion. Adopting the view of the legal realists that lawmaking inheres in all acts of interpretation, Sunstein would have judges share this interpretive power with agencies.<sup>71</sup>

---

<sup>61</sup> Bednar & Hickman, *supra* note 10, at 1446-47.

<sup>62</sup> *Id.* at 1447-48.

<sup>63</sup> *Id.* at 1448.

<sup>64</sup> *Id.* at 1449; *see also id.* at 1458 (“[M]any statutes contemplate that agencies will exercise discretion to fill statutory gaps . . .”).

<sup>65</sup> *Id.* at 1453.

<sup>66</sup> *See supra* note 12.

<sup>67</sup> Farina, *supra* note 12, at 477.

<sup>68</sup> Hamburger, *supra* note 39, at 1223.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *See* Sunstein, *supra* note 3, at 2582-84.

#### D. Policymaking and the Interpretation-Construction Distinction

Some scholars have recognized that there are, in fact, two distinct powers at play that the Court's deference framework seems to conflate. Elizabeth Foote has argued that *Chevron's* "paradigm" that "mainstream public administration is the same activity as statutory construction"<sup>72</sup> is incorrect as a matter of administrative theory, which posits that agencies are doing much more than merely interpreting law when "carrying out" administrative statutes. She argues that the "administrative function is an operational, policy-implementing role" that is "quite foreign to the work product of a court."<sup>73</sup> "[A]gencies implement their enabling acts with a combination of expertise, practicality, interest-group input, and political will," and not the "judicial-style methodology that would be principally attentive to the text and structure" of statutes.<sup>74</sup> The inputs that go into agency decisions go beyond statutory interpretation and include technical assessments, expert predictions, policy views, public input, political influence, and practical needs.<sup>75</sup> This distinction between statutory interpretation or construction on the one hand and the administrative "carrying out" of statutes on the other, Foote argues, was the conception shared by the Congress that enacted the APA.<sup>76</sup>

Foote sees, correctly, that there are really two distinct powers at issue, but does not clearly explain the distinction. It is not entirely clear in her account what divides statutory construction from "public administration"; Foote argues that a court should ask "whether the question on review is necessarily a legal question," or whether it "requires flexibility in application, political responsiveness, public participation, factual development, expertise, and practical considerations of enforcement and management."<sup>77</sup> Thus she suggests *Zuni Public School District No. 89 v. Department of Education*,<sup>78</sup> a case that has all the hallmarks of being genuinely about statutory interpretation,<sup>79</sup> should nevertheless be considered as dealing with "public administration" because it involves a "highly technical, specialized interstitial matter."<sup>80</sup> Foote

---

<sup>72</sup> Foote, *supra* note 16, at 675.

<sup>73</sup> *Id.* at 678, 680.

<sup>74</sup> *Id.* at 691.

<sup>75</sup> *Id.* at 681.

<sup>76</sup> *Id.* at 682-83, 711.

<sup>77</sup> *Id.* at 711.

<sup>78</sup> 550 U.S. 81 (2007).

<sup>79</sup> The issue was whether the statutory requirement that school funding be calculated by excluding the "per-pupil expenditures. . . above the 95th percentile or below the 5th percentile of such expenditures" allowed the agency to exclude from the calculations schools above and below these percentiles in terms of *total student population*. *Id.* at 84-86 (emphasis omitted) (quoting 20 U.S.C. § 7709(b)(2)(B)(i) (2006)).

<sup>80</sup> Foote, *supra* note 16, at 717-18 (quoting *Zuni*, 550 U.S. at 90).

also does not provide a constitutional account of why agencies may exercise this policymaking power at all.

Some scholars have given an account of *Chevron* deference using the framework of the interpretation-construction distinction. The first to do so was Michael Herz.<sup>81</sup> More recently, Larry Solum and Cass Sunstein have sought to explain *Chevron* based on this distinction.<sup>82</sup> Their work provides the clearest and most convincing descriptive and legal accounts of modern deference. The specification power has the potential to further refine this work.

Michael Herz argues that agencies “construct” statutes after courts are finished interpreting or “construing” them, and “interpretation has failed to produce an answer.”<sup>83</sup> Herz explains that *Chevron* “insists on respect for the delegation of policymaking authority to administrative agencies, but it preserves interpretive authority for courts.”<sup>84</sup> The “court and the agency are making different sorts of decisions. The agency is making a policy decision. By definition, within its *Chevron* space, the agency is unconstrained by the statute, which has given out.”<sup>85</sup>

Herz follows the nineteenth century scholar Francis Lieber in suggesting that interpretation is nothing more than discerning the *meaning* of words used in a statute: “Interpretation [is] the narrower task, consisting of ‘the discovery and representation of the true meaning of any signs used to convey ideas.’”<sup>86</sup> Construction, on the other hand, is the “drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text.”<sup>87</sup> Herz argues that Lieber’s distinction “maps tidily onto *Chevron*, particularly if step one is not especially capacious.”<sup>88</sup> In other words, once a court finishes understanding Congress’s meaning, it is finished with interpretation and can move on to step two, which is construction.

Solum and Sunstein similarly argue that “there are actually two quite distinct *Chevron* doctrines.”<sup>89</sup> They write that interpretation is “about the linguistic meaning of [a] term,” whereas construction deals with “the legal effect” of that meaning “through implementation rules, specification, and other devices.”<sup>90</sup> What they call “*Chevron* as Construction” involves no “deference to an agency’s

---

<sup>81</sup> Herz, *supra* note 16.

<sup>82</sup> Solum & Sunstein, *supra* note 16.

<sup>83</sup> Herz, *supra* note 16, at 1883, 1891.

<sup>84</sup> *Id.* at 1871.

<sup>85</sup> *Id.* at 1881.

<sup>86</sup> *Id.* at 1894 (quoting FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 5 (William G. Hammond ed., 3d ed. 1880)).

<sup>87</sup> *Id.* (quoting LIEBER, *supra* note 87, at 44).

<sup>88</sup> *Id.* at 1895.

<sup>89</sup> Solum & Sunstein, *supra* note 16, at 3.

<sup>90</sup> *Id.* at 3-4.



view of the linguistic meaning of the statute,” but “insists on judicial deference to agency action” only in the “construction zone.”<sup>91</sup>

The interpretation-construction distinction is useful, but it requires a refinement. In the first place, it is not at all clear that the Founding generation ever understood there to be a distinction between interpretation and construction.<sup>92</sup> Even if the distinction is real, both interpretation and construction still appear to have been (and to remain) tasks for judges. The judicial duty appears to have always entailed determining what legal effect the meanings of statutes have once placed within the context of the existing corpus juris.<sup>93</sup> For example, a statute that declares killing unlawful, but says nothing about attempts, conspiracies, or self-defense, has no “meaning” with respect to those other concepts. But judges would nevertheless give legal effect to those other concepts (assuming of course that they derive from some source of law in the legal system) as part of applying the unlawful killing statute.<sup>94</sup> In other words, much of what qualifies as “construction” may actually historically be part of the judicial power.

---

<sup>91</sup> *Id.* at 4-5.

<sup>92</sup> Herz recognizes that historically, and still to this day, courts and commentators often use the terms interchangeably, as if there is no distinction. Herz, *supra* note 16, at 1891-92. For an originalist argument that the Framers did not distinguish between the two concepts, see John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 773 (2009).

<sup>93</sup> As Will Baude and Stephen Sachs have explained, “Legislatures don’t change the law in a vacuum. Like contracting parties, they act in a world already stuffed full of legal rules . . . . In our system, at least, new enactments are designed to take their place in an existing corpus juris, as new threads in a seamless web.” William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1098 (2017). Thus, even once the “meaning” of a statute is clear, the question of legal effect is still one for judges: “How does [the legal enactment] fit into the rest of the corpus juris? What do ‘the legal sources and authorities, taken all together, establish’? Questions like these presuppose some particular system of law, and their answers depend on the other legal rules in place.” *Id.* at 1083 (cleaned up) (quoting 4 JOHN FINNIS, *Introduction to PHILOSOPHY OF LAW: COLLECTED ESSAYS* 1, 18 (2011)).

<sup>94</sup> *Id.* at 1099-1100 (using another criminal statutory example). Baude and Sachs also describe “the famous case of the two ships *Peerless*,” in which the two parties to a contract “agreed to send cotton on the *Peerless*, unaware that there were two such ships sailing months apart (and that each party had a different ship in mind).” *Id.* at 1083. The court knows everything there is to know about “meaning”—each party to the contract simply had in mind a different ship. “Yet we still have to decide the case,” and resolution will depend on those “other legal rules in place.” *Id.* At a minimum, the very fact that Baude and Sachs titled their article “The Law of Interpretation,” whereas everything they described Solum would, per a conversation I have recently had with him, label as the “law of construction,” suggests that the interpretation-construction distinction is problematic.

Elsewhere Herz describes the distinction as follows: “In general, interpretation is the process for resolving ambiguity; construction is the process for resolving vagueness.” Herz, *supra* note 16, at 1898. It is not clear to me that this distinction is correct, either, though it might be partly correct. Insofar as “vagueness” involves the scope and reach of legal provisions, rather than their meaning, that does appear to point more toward the specification power, although courts may also have a role in resolving vagueness using their traditional tools of construction. Insofar as vagueness points toward the specification power, it is at most a subset. The specification power entails far more than

The specification power is a useful concept whatever one's position on the interpretation-construction distinction. Specification is a *subset* of construction that could be described as a legislative or policymaking power. It is the power over this subset of "construction" that the constitutional sources permit the executive branch to exercise. Thus, one can believe that it is for the courts to exercise power in most of the "construction zone," while accepting that one piece of that zone may nevertheless be equally suitable for the executive branch.<sup>95</sup>

## II. INTERPRETATION AND SPECIFICATION

Executive officers routinely interpret law. They must determine for their own purposes what the law means to implement and enforce it. This requires that they be the first interpreters of the laws. But judges have their own constitutional duty to decide what the law is when adjudicating actual cases and controversies, and their judgment has historically been final and binding in those cases.

Yet there comes a point when the law runs out. The law may have nothing more to say.<sup>96</sup> A judge can conclude to the best of her own judgment that the law simply does not require one alternative or another—that it leaves a gap within which it is for an agency to specify the details. It turns out that such a "specification power" was often exercised in the early Republic. That is to be expected: no law can ever specify every particular detail of implementation.

### A. *The Executive's Incidental Interpretation Power*

It has long been observed that administrative agencies and executive departments must interpret law as an incident to enforce the law, and did so

---

resolving vagueness—it involves filling in statutory details when there is simply silence or a grant of discretion, either of which may or may not involve vagueness.

<sup>95</sup> Before *Chevron* became a landmark case, Ronald Levin provided a descriptive account of judicial review of agency action very similar to the scheme I propose here. Levin argued that courts should always exercise independent judgment over "questions of law," but sometimes the best legal interpretation of Congress's enactments is that they delegate discretion to the agency. Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 21-22 (1985). The court's role is always at a minimum to determine the scope of this delegation. *Id.* at 21 ("Delegations are never unbounded. Identifying the restrictions that Congress imposed on its delegate is a form of statutory interpretation and hence poses a 'question of law.'" (footnote omitted)). Within the discretionary space, "the agency is not *interpreting* the legislative will but, instead, responding to a legislative invitation to *make* law." *Id.* at 22. This account is consistent with the account presented here, although the *Chevron* Court ultimately took deference in another direction. In addition to reviving Levin's pre-*Chevron* theoretical model and refining it with a new vocabulary, my aim in the next Parts is to support that model with historical antecedents and formalist constitutional theory.

<sup>96</sup> As Justice Kagan recently said in the context of judicial deference to an agency's interpretation of its own regulation, a court must first "exhaust all the 'traditional tools' of construction," but "the core theory" of judicial deference "is that sometimes the law runs out, and policy-laden choice is what is left over." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019) (citations omitted). That is exactly right. I would just add: if the law has run out, then what is there to interpret?

since the early years of the Republic. Early on Congress instructed heads of departments “to superintend” the business of the various departments.<sup>97</sup> When confronted with claims by individual customs collectors that the requirement of their oath of office to execute their offices “according to law” required each collector to follow the law as each collector understood it, Alexander Hamilton, as Treasury Secretary, instructed his collectors:

The power of *superintending* the collection of the revenue, as incident to the duty of doing it, comprises, in my opinion, among a variety of particulars not necessary to be specified, the right of *settling*, for the government of the officers employed in the collection of the several branches of the revenue, the *construction* of the laws relating to the revenue, in all cases of doubt.<sup>98</sup>

This power of construction was necessary lest “the most incongruous practices upon the same laws might obtain in different districts of the United States,” and was “essential to uniformity and system in the execution of the laws.”<sup>99</sup> Thus, over time, Hamilton instructed his collectors on several points of law, including, for example, whether a vessel had to pay tonnage at each entry and whether exports returned for lack of a foreign market was liable to pay duties.<sup>100</sup>

Although the executive departments had to interpret law as an incident to enforcement, they did not have the power of final judgments. That is, the executive could interpret the law for its purposes, but if a court confronted that law through a case or controversy, the court would have final say (at least in that particular case) over what the law required. As Leonard White has written, “[e]xcept for the withholding or revocation of a privilege,” no sanction was “at the disposal of administrative officials,” not even the heads of departments.<sup>101</sup> “[P]enalties and forfeitures were imposed by [a] judge,” which “gave the court opportunity to decide upon the legality and correctness

---

<sup>97</sup> LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 204 (1948) (first citing Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 65-66, then citing Act of Feb. 20, 1792, ch. 7, § 3, 1 Stat. 232, 234). Congress settled on the standard phrase, “subject to the superintendence, control and direction of the department of the treasury, according to the authorities and duties of the respective officers thereof.” *Id.* (quoting Act of June 5, 1794, ch. 47, § 4, 1 Stat. 376, 378).

<sup>98</sup> *Id.* at 204-05 (quoting Revenue Circular from Alexander Hamilton to the Treasury Department (July 20, 1792), in 3 *THE WORKS OF ALEXANDER HAMILTON* 557-59 (John C. Hamilton ed., 1850) [hereinafter Revenue Circular]).

<sup>99</sup> *Id.* at 205 (quoting Revenue Circular, *supra* note 98, at 557-59), see also HAMBURGER, *supra* note 38, at 89-90 (discussing the same letter).

<sup>100</sup> WHITE, *supra* note 97, at 207. Whether any of these are more properly understood as exercises of the specification power will depend on a careful analysis of the statutes Hamilton was implementing. This question is not necessary to resolve at this juncture.

<sup>101</sup> *Id.* at 446.

of official action.”<sup>102</sup> Even in Hamilton’s circular to his collectors in which he explained the necessity of a centralized executive exposition of the laws, he recognized that “a remedy, in a large proportion of the cases, might be obtained from the courts of justice.”<sup>103</sup> Or, as he wrote in *The Federalist* No. 78, “The interpretation of the laws is the proper and peculiar province of the courts. . . . It therefore belongs to them to ascertain [the] meaning [of the Constitution], as well as the meaning of any particular act proceeding from the legislative body.”<sup>104</sup>

The Supreme Court confirmed early on that courts had final interpretive authority over statutes, even though the interpretation of law requires discretion on the part of the executive as well. In the 1840 case of *Decatur v. Paulding*,<sup>105</sup> the Court recognized that law-interpretation often left much room for discretion and thus the Court would not *compel* the executive to adopt one interpretation over another through a writ of mandamus.<sup>106</sup> “[I]n the administration of the various and important concerns of his office,” Chief Justice Taney wrote, the head of a department “must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act.”<sup>107</sup> The Court also noted, however, that should a case come before the Court in a more traditional mode, it would be up to the Court to decide the law for itself.<sup>108</sup> In a traditional non-mandamus case “which involved the construction of any of these laws,” Chief Justice Taney wrote, “the Court certainly would not be bound to adopt the construction given by the head of a department” because in such cases it is the judges’ “duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them.”<sup>109</sup>

---

<sup>102</sup> *Id.* Jerry Mashaw confirms this early history, and that finality of judgment was reserved for courts in other administrative statutes as well. JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 105 (2012) (noting that no penalties would be imposed upon a shipowner “unless the U.S. Attorney for the district brought an action against the vessel or the owner and prevailed on the merits.”); *id.* at 130 (“The statutes providing for land commission adjudication of private claims made commission determinations final against the United States, but not against third party claimants. These latter claims would have to be fought out in the courts.”).

<sup>103</sup> WHITE, *supra* note 97, at 205 (quoting Revenue Circular, *supra* note 99, at 557-59).

<sup>104</sup> THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>105</sup> 39 U.S. (14 Pet.) 497 (1840).

<sup>106</sup> *Id.* at 515.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* This element of the case is discussed in Bamzai, *supra* note 8, at 952. As explained, although the courts did defer to executive interpretations of law, they did so only according to two canons of statutory construction that afforded weight to such interpretations if they were contemporaneous with the enactment of the law itself, or were longstanding, in which case they would be good evidence of what the law actually was. *Id.* at 916-17.

Similarly, in *United States v. Dickson*, the Court pronounced that, notwithstanding “the uniform construction” given to an act by the treasury department for two decades:

[I]t is not to be forgotten, that ours is a government of laws, and not of men; and that the Judicial Department has imposed upon it, by the Constitution, the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it.<sup>110</sup>

In short, executive officers have, and always have had, an incidental power, indeed a duty, to interpret the law in order to execute it. But this interpretation power was only incidental, and it was not final. The courts had final judgment over the interpretation of statutes at least in those cases and controversies that came properly before them.<sup>111</sup>

#### B. *The Executive’s Specification Power*

Since the beginning of the Republic, the executive department has exercised another power, one distinct in kind from the incidental executive power of interpretation. This power has been referred to with different terminology. Jack Goldsmith and John Manning have recently suggested the existence of a power similar to what is contemplated here, and referred to it as the President’s “completion power.”<sup>112</sup> It is a power that the early administrative theorists described as the power to “express the will of the state as to details where it is inconvenient for the legislature to act.”<sup>113</sup> This is the power that administrators exercise when the statutory requirements are clear, but simply do not specify a course of action.<sup>114</sup>

---

<sup>110</sup> 40 U.S. (15 Pet.) 141, 162 (1841).

<sup>111</sup> The separation of powers scholar M.J.C. Vile elegantly explains the difference between the executive’s incidental power of interpretation, and the supreme interpretation power of the courts in cases amenable to judicial review, as follows:

The difference between these [executive] interpretations and those of the judge, however, is the authoritative quality of the judicial interpretation, whereas those of other officials, although usually accepted as valid, are in principle subject to review. The importance of this distinction cannot be lost sight of in the constitutional system of government . . . .

M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 360-61 (2d ed. 1998).

<sup>112</sup> Goldsmith & Manning, *supra* note 27, at 2282.

<sup>113</sup> FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION* 17 (1900).

<sup>114</sup> The choice of the term “specification” over “completion” might now be clearer. When the executive exercises this power (whatever it is), it is not really “completing” the law, which most assuredly remains incomplete. It has merely filled in a particular detail in a particular context where the statute happened not to specify a particular course of action. When the executive acts to fill this

## 1. Early Examples

The instances of this power's exercise in the early years of the Republic are legion, and few raised any controversy. The first collection act of 1789 directed only that shipowners keep manifests of their goods.<sup>115</sup> This provision of law was not *ambiguous*; it simply did not specify the course of action in many details. It was left to Hamilton to create the forms and procedures to be used at the Treasury, which included the precise form to be used for the manifest of imported goods and merchandise by shipowners,<sup>116</sup> the precise form of the certification of the manifests to be made by customs officials,<sup>117</sup> the form to be used to report on spirits brought by the vessel,<sup>118</sup> and many other details of administration. Congress subsequently adopted these procedures in the Collection Act of 1799.<sup>119</sup>

In 1798, Congress enacted legislation "to provide for the valuation of Lands and Dwelling-Houses, and the enumeration of Slaves within the United States."<sup>120</sup> This statute granted significant discretion to the executive branch to fill in statutory details. The statute assigned existing counties to various divisions for purposes of the act, and provided that if any new county is formed out of two existing counties belonging to two different divisions, "then the commissioners to be appointed in pursuance of this act, shall determine to which of such divisions it shall belong."<sup>121</sup> It also provided that the first meeting of the commissioners shall be "at such time and place as shall be appointed and directed by the commissioner for each state, first named and qualified, according to this act."<sup>122</sup> The commissioners were empowered "to divide their respective states into a suitable and convenient number of assessment districts," as well as to appoint a principal assessor and "such number of respectable freeholders to be assistant assessors, as they shall judge necessary for carrying this act into effect," provided that the Secretary of Treasury had power to alter the number of districts and assessors.<sup>123</sup> More substantively, the commissioners were required "to establish all such regulations" necessary to effectuate the assessments, "[p]ursuant to which regulations and instructions" the commissioners shall cause the assessors to

---

gap, it is specifying a particular course of action in a particular case; it cannot really be said to be completing the statute, which might never cease requiring new specifications.

<sup>115</sup> WHITE, *supra* note 97, at 206 (explaining that Hamilton first devised these procedures); *see also* Act of July 31, 1789, ch. 5, §§ 4, 10, 1 Stat. 29, 36, 38.

<sup>116</sup> Act of Mar. 2, 1799, ch. 22, § 23, 1 Stat. 627, 644-45.

<sup>117</sup> *Id.* § 25, 1 Stat. at 646-47.

<sup>118</sup> *Id.* § 30, 1 Stat. at 649-51.

<sup>119</sup> WHITE, *supra* note 97, at 206 & n.17 (citing Act of Mar. 2, 1799, ch. 22, 1 Stat. 627).

<sup>120</sup> Act of July 9, 1798, ch. 70, 1 Stat. 580.

<sup>121</sup> *Id.* § 1, 1 Stat. at 580-83.

<sup>122</sup> *Id.* § 4, 1 Stat. at 584.

<sup>123</sup> *Id.* § 7, 1 Stat. at 584-85.

value and enumerate houses, lands, and slaves, according to the principles established by Congress.<sup>124</sup>

Even where a statute was entirely silent, the executive sometimes filled in details out of necessity. For example, the Treasury and other departments created an entire class of disbursement personnel not specifically authorized by law, but which these departments found necessary to ensure the proper appropriation of funds for various activities.<sup>125</sup> In another entertaining example, Congress directed that surveyors mark the corners of townships with trees; but “[n]ature was not so kind,” and subsequent regulations permitted the use of stones.<sup>126</sup>

Jerry Mashaw has detailed numerous statutes, some only a single line long, granting tremendous discretion to administrative agencies to fill in statutory details.<sup>127</sup> One statute of particular interest provided that the military pensions which had been granted and paid by the states pursuant to the acts of the Confederation Congress to the wounded and disabled veterans of the Revolutionary War “shall be continued and paid by the United States, from the fourth day of March last, for the space of one year, under such regulations as the President of the United States may direct.”<sup>128</sup> President Washington’s regulations stated that the sums owed were to be paid in “two equal payments,” the first on March 5, 1790, and the second on June 5, 1790; and that each application for payment was to be accompanied by vouchers and affidavits affirming that the invalid served in a particular regiment or vessel at the time he was disabled.<sup>129</sup>

This is a particularly clear example of an executive officer exercising a power not of interpretation, but of specification. The regulation that the payments were to be made in two equal payments three months apart was, to

---

<sup>124</sup> *Id.* § 8, 1 Stat. at 585.

<sup>125</sup> WHITE, *supra* note 97, at 340-41.

<sup>126</sup> MASHAW, *supra* note 102, at 126.

<sup>127</sup> In an early statute establishing post roads, Congress granted the Postmaster General “the authority to provide for additional post roads and to decide where to set up post offices,” and “full authority to contract for the carriage of mail by whatever devices he thought ‘most expedient’ and to prescribe regulations for his subordinates as he found necessary.” *Id.* at 46. Mashaw discusses several other examples. *Id.* at 47 (noting that in the statute authorizing the Bank of the United States, “all of the Bank’s operating policies—including when and where to establish branches—were left to the regulations to be adopted by the Bank’s directors . . . .”); *id.* at 135 (explaining that Congress gave authority to registers and receivers of land offices to make corrections so long as buyers provided “testimony satisfactory to the register and receiver of public moneys” (quoting Act of Mar. 3, 1819, ch. 98, 3 Stat. 526)); *id.* at 192 (describing how steamboat inspectors were “authorized to adopt any means they thought necessary to test the sufficiency of a steamboat or its equipment”).

<sup>128</sup> Act of Sept. 29, 1789, ch. 24, 1 Stat. 95.

<sup>129</sup> These regulations are preserved in the Library of Congress, and can be viewed at An Act Providing for the Payment of the Invalid Pensioners of the United States, (Oct. 13, 1789), *reprinted in* LIBRARY OF CONGRESS, <https://www.loc.gov/resource/rbpe.21201200/?st=text> [<https://perma.cc/R29C-C9SU>].

be sure, a reasonable interpretation of the statute, which required the payments to be made within one year. Yet many other options were available: daily installments for the entire year, or perhaps three installments at varying intervals over the course of a year. Each of these options, in and of itself, would have been a reasonable interpretation of the statute. In other words, the *result* of the executive's choice would have been a reasonable interpretation of the statute, but the act of choosing among these various possible interpretations was itself not an interpretive act. Nothing in the statute bore on which regulation to choose. All of the options would have been reasonable because all fell within the boundaries of the statute. Choosing among these options was a pure matter of policy—an act of specification.

## 2. *Youngstown*

Goldsmith and Manning argue that the President's action in the *Youngstown* steel seizure case may be best understood as an exercise of the specification (what they call completion) power.<sup>130</sup> At the height of the Korean War, President Truman issued an executive order directing the Secretary of Commerce to seize and operate steel mills subject to ongoing labor disputes and nationwide strikes.<sup>131</sup> The case assessing the validity of the President's action is often celebrated for Justice Jackson's concurring opinion, in which he offered a three-part framework for assessing the lawfulness of an exercise of executive power depending on whether Congress has authorized that exercise of power, was silent with respect to it, or prohibited it.<sup>132</sup>

Goldsmith and Manning argue that Chief Justice Vinson's dissent may have had the better framework.<sup>133</sup> In that dissent, Vinson noted that “[t]he absence of a specific statute authorizing seizure of the steel mills as a mode of executing the laws—both the military procurement program and the anti-inflation program—has not until today been thought to prevent the President

---

<sup>130</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); Goldsmith & Manning, *supra* note 28, at 2282-87.

<sup>131</sup> *Youngstown*, 343 U.S. at 583; Goldsmith & Manning, *supra* note 28, at 2283.

<sup>132</sup> The three-part framework was stated as follows: (1) “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate”; (2) “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain,” and thus “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law”; and (3) “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring).

<sup>133</sup> See Goldsmith & Manning, *supra* note 27, at 2282.



from executing the laws.”<sup>134</sup> Numerous precedents “amply demonstrate[d] that Presidents have taken prompt action to enforce the laws and protect the country whether or not Congress happened to provide in advance for the particular method of execution.”<sup>135</sup> These precedents, according to Goldsmith and Manning, are examples of “a completion power” that “enables the President to go beyond (but not against) the implemental prescriptions of particular statutes, when necessary to effectuate the legislative program.”<sup>136</sup>

Goldsmith and Manning argue that the only limit on the President’s power was the point at which “the executive’s actions implementing a statute cross a line from something that is reasonably incidental to a statutory command into something that looks more like new lawmaking.”<sup>137</sup> This analysis requires a modification. An exercise of the specification power may not cross the line into “new lawmaking,” and yet it may still be unlawful precisely because it goes beyond the statute. The range of options that may be specified is still limited by the interpretation power. For this reason, my sense is that President Truman’s action was still unlawful: no statute really came close to giving him the power to seize the mills, and there was no real “gap” to fill at all. There was simply no law.<sup>138</sup>

Regardless of how *Youngstown* would come out under an analysis of the specification power, the upshot is simply that sometimes there is no more interpretation to do, yet the statute still leaves “gaps” to fill. Either through an explicit grant of discretion or statutory silence, the executive has a power to fill in the details of the statutory scheme where the legislature could not conveniently act or foresee all eventualities. The limit on the specification power is not the reasonableness of the agency’s exercise of interpretive power, but rather the scope and breadth of the gap left by the statute as determined by the interpretation power. The only other limits on the specification power are the nondelegation doctrine—the point at which the gap the executive is seeking to fill is simply too big—and the reasonableness requirements of the Administrative Procedure Act.<sup>139</sup>

---

<sup>134</sup> *Youngstown*, 343 U.S. at 701-02 (Vinson, C.J., dissenting).

<sup>135</sup> *Id.* at 700.

<sup>136</sup> Goldsmith & Manning, *supra* note 27, at 2285.

<sup>137</sup> *Id.* at 2308.

<sup>138</sup> See *Youngstown*, 343 U.S. at 585-86 (“There are two statutes which do authorize the President to take both personal and real property under certain conditions. However, the Government admits that these conditions were not met and that the President’s order was not rooted in either of the statutes.” (footnote omitted)).

<sup>139</sup> 5 U.S.C. § 706(2)(a) (2018) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

### 3. An Analogy

At this point, the reader may not be convinced that the powers of interpretation and specification are really distinct. It may therefore be helpful to draw an analogy that demonstrates that the distinction between interpretation and specification is common in ordinary human interactions. Consider the following example. Suppose that two parents tell their children, “Go make breakfast.” If the children serve up a plate of stones and leaves, they have *misinterpreted* the instruction. Suppose now that they bring pizza for breakfast instead. This may create a difficult question, but it is an *interpretive* question: is pizza the kind of thing we ordinarily consider to be included in “breakfast”? Reasonable judges might disagree, but the question is nevertheless an interpretive one—that is, whether pizza even falls within the scope of the permissible options.<sup>140</sup>

Suppose the children are instead confronting the choice whether to make eggs and bacon, waffles, or bagels. That choice involves no interpretation whatsoever. Each of these options would fall within the meaning of breakfast, and therefore fall within the scope of the permissible options. If pizza were interpreted to be included within the meaning of breakfast, then the children could add pizza for consideration, too—at least after a determination that it falls within the meaning of breakfast. However, the choice among these options, each of which would be a reasonable interpretation of the instruction, is itself not an interpretive choice. It is a pure policymaking choice. The children would be exercising discretion to “specify” the course of action within the bounds of the parents’ instruction.

Although it is not always easy to see in complicated statutes, this distinction between interpretation and specification always exists, even if judges do not always agree, as a matter of interpretation, whether an option falls within the bounds of the permissible and is thus amenable to the specification power.

### III. THE CONSTITUTIONAL BASIS

As explained above, no previous work has provided a formalist account of this specification power. Goldsmith and Manning come closest to providing such an account in their “completion power” article, but their account requires

---

<sup>140</sup> This suggests my disagreement with Peter Strauss. Whereas Strauss’s “*Chevron* space” exists between the zone where the statute clearly permits an action and the zone where it clearly prohibits an action, *see* Strauss, *supra* note 12, at 1161-65, the space between these zones of clarity may still call for interpretation. *See also, e.g.*, John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 845 (2016) (arguing that in matters of constitutional interpretation judges have the duty to “use the ample methods of clarification available to clarify the precise meaning of the Constitution”).

further refinement. First, like the rest of the literature, they treat “interpretation” and “completion” as the same, and therefore are unable to resolve the Article III problem.<sup>141</sup> Second, their argument in favor of the completion power rests largely on Chief Justice Vinson’s dissent in *Youngstown*; they give only cursory analysis to the Constitution’s text and structure.<sup>142</sup> This Part supplies the constitutional argument from the text and structure of both the legislative-power and executive-power provisions of the Constitution, thereby supporting a formalist or originalist case for deference of a certain sort. This approach should also appeal to the adherents of other contemporary methods of constitutional interpretation that also value textual and historical arguments.<sup>143</sup>

#### A. *Nonexclusive Legislative Power*

*Wayman v. Southard*,<sup>144</sup> the Court’s first major nondelegation case,<sup>145</sup> is the first source of constitutional support for the specification power. In that case, Chief Justice John Marshall elaborated upon the meaning of the grant of “legislative power” to Congress in the Constitution. The 1792 Process Act at issue in *Wayman* established that the practices prevailing in each respective state supreme court as of 1789, respecting “the forms of writs and executions” and the “modes of process . . . in suits at common law,” would govern in

---

<sup>141</sup> The authors argue that

[t]he *Chevron* doctrine appears to reflect the idea that while Congress can legitimately give either courts or agencies ultimate authority to resolve statutory ambiguities or fill up statutory interstices, it is more consistent with the background premises of our constitutional democracy to embrace a default rule that Congress prefers to leave such completion power in the hands of the more accountable executive.

Goldsmith & Manning, *supra* note 27, at 2299 (emphasis added) (footnote omitted).

<sup>142</sup> They briefly argue that this completion power may inhere in either the Vesting Clause or the Take Care Clause, but ultimately rely on an analogy to the Necessary and Proper Clause. *Id.* at 2303-06. They note that there are reasons why such a clause might have been included in Article I, without the negative implication that therefore there is no similar *implied* power in Article II (or Article III). *Id.* at 2306.

<sup>143</sup> See, e.g., Jamal Greene, *A Nonoriginalism for Originalists*, 96 B.U. L. REV. 1443, 1445-46 (2016) (noting that under a “pluralistic or eclectic approach to constitutional interpretation,” interpreters “use multiple modes of inquiry, including those based on constitutional text, history, and structure, on legal and political precedent, or on practical consequences, without necessarily privileging any one in particular”).

<sup>144</sup> 23 U.S. (10 Wheat.) 1 (1825).

<sup>145</sup> An earlier case, *Cargo of the Brig Aurora v. United States*, in which the Court upheld Congress’s conditioning of the existence of an embargo on a presidential finding of non-neutrality among foreign states, is also taken as a nondelegation case. 11 U.S. (7 Cranch) 382, 383, 388 (1813). It is not particularly controversial, however, and the Court did not give any sustained treatment to a nondelegation principle.

federal court proceedings in those states.<sup>146</sup> The statute included a proviso: subject to the rules and regulations prescribed by the federal courts.<sup>147</sup> The nondelegation question in *Wayman* (which the Court did not even have to decide<sup>148</sup>) was whether this proviso was an unconstitutional delegation of legislative power to the courts.

The plaintiff in *Wayman* had sought an execution of judgment against the defendant in hard currency.<sup>149</sup> The defendant sought the application of a 1792 Kentucky law providing that a plaintiff must accept state paper currency in satisfaction of a judgment.<sup>150</sup> The Court agreed with the plaintiff that the 1792 Kentucky law did not govern in a federal court suit at common law because the federal acts provided that only those state practices established as of 1789 applied.<sup>151</sup> The defendant then pressed a nondelegation argument: the 1792 Process Act for the governing of process and suits at common law would be an unconstitutional delegation of legislative power in light of its proviso, if that proviso were interpreted to extend to matters outside of courtroom proceedings and to the manner of executions. Thus, Congress could not have

---

<sup>146</sup> *Wayman*, 23 U.S. (10 Wheat.) at 27. The statute enacted the following:

That the forms of writs, executions, and other process, except their style and the forms and modes of proceeding in suits in those of common law, shall be the same as are now used in the said Courts respectively, in pursuance of the act entitled, 'An act to regulate processes in the courts of the United States,' . . . except so far as may have been provided for by the act to establish the judicial courts of the United States; subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same.

Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (repealed 1872); *Wayman*, 23 U.S. (10 Wheat.) at 31. The "act" referred to in the quoted statute above was the 1789 Act providing that "the forms of writs and executions, except their style, and modes of process . . . , in the circuit and district courts, in suits at common law, shall be the same in each state respectively, as are now used or allowed in the supreme courts of the same." Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93 (repealed 1872); *Wayman*, 23 U.S. (10 Wheat.) at 26-27.

<sup>147</sup> The process prescribed was subject to "such alterations and additions as the said Courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any Circuit or District Court concerning the same." *Wayman*, 23 U.S. (10 Wheat.) at 31.

<sup>148</sup> The Court noted,

But the question respecting the right of the Courts to alter the modes of proceeding in suits at common law, established in the Process Act, does not arise in this case. That is not the point on which the Judges at the circuit were divided, and which they have adjourned to this Court. The question really adjourned is, whether the laws of Kentucky respecting executions, passed subsequent to the Process Act, are applicable to executions which issue on judgments rendered by the Federal Courts?

*Id.* at 48-49.

<sup>149</sup> *Id.* at 2.

<sup>150</sup> *Id.* at 2-3.

<sup>151</sup> *Id.* at 32, 41.

intended for it to reach outside the courtroom to the manner in which a judgment was executed.<sup>152</sup> Indeed, a regulation requiring the acceptance of state bank notes affected not only how one would be divested of property, but also of how much property.<sup>153</sup>

The Court, however, rejected this argument, holding that the law did in fact reach to matters outside of courtroom procedures to all “proceedings in suits’ at common law,” including execution of judgments.<sup>154</sup> Chief Justice Marshall proceeded to address the nondelegation argument. He wrote: “It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”<sup>155</sup> The Judiciary Act and the Process Act “empower the Courts respectively to regulate their practice,” and “[i]t certainly will not be contended, that this might not be done by Congress.”<sup>156</sup> Yet it also “will not be contended” that “mak[ing] rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description . . . may not be conferred on the judicial department.”<sup>157</sup>

“The line has not been exactly drawn,” Chief Justice Marshall continued, “which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions *to fill up the details*.”<sup>158</sup> In other words, the power to make rules “fill[ing] up the details” of a general legislative provision is a kind of *nonexclusive* legislative power, a power partly but not wholly legislative in character and which Congress can exercise itself but which it can also confer on one of the other departments.

---

<sup>152</sup> *Id.* at 13-17, 42.

<sup>153</sup> *See id.* at 32, 42. According to the reporter, defendant’s counsel had argued:

All the legislative power is vested exclusively in Congress. Supposing Congress to have power, under the clause, for making all laws necessary and proper, &c. to make laws for executing the judicial power of the Union, it cannot delegate such power to the judiciary. The rules by which the citizen shall be deprived of his liberty or property, to enforce a judicial sentence, ought to be prescribed and known; and the power to prescribe such rules belongs exclusively to the legislative department.

*Id.* at 13-14.

Indeed, some scholars have argued that, because this rule would have deprived an individual of private property, it ought to be considered exclusively legislative and nondelegable, contrary to Marshall’s dictum that we shall soon encounter. *See, e.g.,* HAMBURGER, *supra* note 38, at 393. That may be correct, and for present purposes it does not matter whether Marshall’s dictum in this respect is correct.

<sup>154</sup> *Wayman*, 23 U.S. (10 Wheat.) at 36.

<sup>155</sup> *Id.* at 42-43.

<sup>156</sup> *Id.* at 43.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* (emphasis added).

Chief Justice Marshall then assessed whether the power delegated by the proviso was an impermissible delegation—that is, whether it fell within the class of powers that was “exclusively legislative.” He observed that the Act permitted the courts to specify where the executive officer might keep the goods of the debtor until the day of sale; to specify how notice is to be given before the execution of a judgment; and to specify whether the sale can be made on credit.<sup>159</sup> Chief Justice Marshall thus recognized that a broad statutory provision might call for an exercise of what we have called the “specification” power to fill in interstitial *legislative* details, where there was no more interpretation to be done. Because it is quite impossible for Congress to anticipate every detail of implementation, there must exist this class of nonexclusive legislative power “to fill up the details” of a statutory scheme.<sup>160</sup>

### B. *The Prerogative Specification Power*

Although the Process Act of 1792 explicitly delegated the power to the courts to “specify” particular details of that law, there may be other sources of constitutional power for the executive to specify at least certain kinds of details even in the absence of an explicit delegation to make regulations. The first possible source is the Take Care Clause; the second, more likely source is the Vesting Clause.

A specification power could inhere in the President’s duty to take care that the laws be faithfully executed, assuming this textual provision is also a grant of power. If Congress left a detail to be specified, even if it did so unknowingly and even if it did not explicitly grant the executive the power to make regulations, how are executive officers to execute the laws faithfully without providing for that detail of implementation? This is what we ordinarily mean when we say a statute has a “gap.” In *Chevron* itself, the agency was required to regulate “stationary sources.”<sup>161</sup> To execute this

---

<sup>159</sup> *Id.* at 44-46.

<sup>160</sup> This view is also consistent with Chief Justice Marshall’s analysis in *Marbury*, where he argued that where a statute (or the Constitution) gave the President discretion to act, such discretion was generally not examinable by a court; only where a statute gave more specific instructions were the President’s actions pursuant to such statute examinable by the courts. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803). Chief Justice Marshall, writing for the Court, said:

The conclusion from this reasoning is, that where the heads of departments . . . merely . . . act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

*Id.*

<sup>161</sup> *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 859-62 (1984).

instruction, the agency had to decide what to consider as a stationary source when more than one of the statutory definitions applied.<sup>162</sup> This gap *had* to be filled, in other words, for the law to be faithfully executed.

John Marshall, this time as a member of the U.S. House of Representatives in 1800, hinted that such a specification power belonged to the executive even absent an explicit delegation from Congress. Commenting on the enforcement of a treaty and the President's duty "to take care that the laws be faithfully executed," Marshall wrote that Congress may unquestionably "prescribe the mode" by which the President is to execute the treaty, but, he added, "till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses."<sup>163</sup>

Chief Justice Vinson, for his part, surveyed the historical sources in his *Youngstown* dissent and concluded that such precedents "amply demonstrate[] that Presidents have taken prompt action to enforce the laws and protect the country whether or not Congress happened to provide in advance for the particular method of execution."<sup>164</sup>

Because the Take Care Clause may not even be a grant of power, the Vesting Clause is the more likely source of the specification power.<sup>165</sup> There is a debate in the executive power literature over the precise meaning of "the executive power" vested in the President, and the structure of Article II more broadly. Michael McConnell reflects and refines the prevailing formalist account in a recent study and argues that all historically executive powers are vested in the executive department, subject to express limitations elsewhere in the text.<sup>166</sup> The Vesting Clause vests the President with all the executive powers,<sup>167</sup> but the various executive-prerogative powers listed in Blackstone were then distributed across the national government.<sup>168</sup> For example, the Constitution grants

<sup>162</sup> *Id.*

<sup>163</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 684 (Vinson, C.J., dissenting) (quoting 10 ANNALS OF CONG. 596, 614 (1800)).

<sup>164</sup> *Youngstown*, 343 U.S. at 700 (Vinson, C.J., dissenting).

<sup>165</sup> The Take Care Clause is written as a duty—a limitation on *how* the law is to be executed—and therefore seems not to be a grant of power.

<sup>166</sup> Michael McConnell, *The President Who Would Not Be King* (unpublished manuscript) (on file with author).

<sup>167</sup> Compare U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."), with *id.* art. II, § 1 ("The executive Power shall be vested in a President of the United States . . .").

<sup>168</sup> See, e.g., McConnell, *supra* note 166, at 55-56. McConnell writes that William Crosskey "was the first to note that the enumeration of powers by the Committee of Detail was as much about legislative-executive separation of powers as it was about federalism." *Id.* at 46; see also 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 466 (1953), describing Congress's

making a threefold division of power within the new national government, and . . . vest[ing] in Congress many . . . 'executive' powers . . . [which] were much more

Congress the historically prerogative powers over war and peace, letters of marque and reprisal, and coining money (among other such powers);<sup>169</sup> it grants the Senate a say in the appointment and treaty powers;<sup>170</sup> and it grants courts equity jurisdiction.<sup>171</sup> If the specification power is a prerogative power not limited elsewhere in the text, then it is vested in the executive.<sup>172</sup>

The executive in Britain was historically understood to have a kind of specification power. Both John Locke and William Blackstone describe a prerogative power to fill in legislative details as an incident to enforcement even in the absence of explicit legislative direction. Locke wrote that because legislators are not “able to foresee, and provide, by Laws, for all, that may be useful to the Community,” the executive has a power to exercise a legislative power “in many Cases, where the municipal Law has given no direction, till the Legislative can conveniently be Assembled to provide for it.”<sup>173</sup> Locke goes on to say that because the lawmaking body is too numerous and slow and not always in being, “and because also it is impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the publick,” there is therefore “a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe.”<sup>174</sup> The prerogative power, in other words, “can be nothing, but the Peoples permitting their Rulers, to do several things of their own free choice, where the Law was silent . . . .”<sup>175</sup>

---

important determinants of the particular enumeration of Congressional powers . . . than was the desire of making clear the powers which Congress was to have, and the powers which it was *not* to have, as against the states.

*See also generally id.* at 415-28, 429-32, 454, 464-66 (discussing the English executive-prerogative powers and the division of the powers across the three federal branches in the United States Constitution).

<sup>169</sup> U.S. CONST. art. I, § 8.

<sup>170</sup> *Id.* art. II, § 2.

<sup>171</sup> *Id.* art. III, § 2.

<sup>172</sup> In the “Decision of 1789,” Congress seems to have adopted this view of Article II. James Madison argued that

[t]he constitution affirms, that the executive power shall be vested in the President. Are there exceptions to this proposition? Yes, there are. The constitution says, that in appointing to office, the Senate shall be associated with the President, unless in the case of inferior officers . . . . Have we a right to extend this exception? I believe not.

<sup>1</sup> ANNALS OF CONG. 481 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison). *See also id.* at 516 (statement of Rep. Madison) (“[T]he executive power shall be vested in a President of the United States. The association of the Senate with the President in exercising that particular function, is an exception to this general rule; and exceptions to general rules, I conceive, are ever to be taken strictly.”).

<sup>173</sup> JOHN LOCKE, *The Second Treatise of Government* § 159, in TWO TREATISES OF GOVERNMENT 392 (Peter Laslett ed., 1960) (1690).

<sup>174</sup> *Id.* § 160 at 393.

<sup>175</sup> *Id.* § 164 at 395.



Locke then adds, contrary to Blackstone (see below), that sometimes this power can go against “the direct Letter of the Law, for the publick good.”<sup>176</sup>

Blackstone, whose work heavily influenced the Founders,<sup>177</sup> described a prerogative power more along the lines presented here. “For, though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power,” wrote Blackstone, “yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate.”<sup>178</sup> Therefore, the executive’s edicts or proclamations on these points (its executive orders and regulations) “are binding upon the subject, where they do not either contradict the old laws, or tend to establish new ones; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary.”<sup>179</sup> If this power to specify the details necessary to enforce a law is a prerogative power, as Blackstone seems to describe, then it is vested in the executive department because such a power is not otherwise limited by the constitutional text.

For what it is worth, I am not convinced that the standard formalist account is correct. As Julian Mortenson has written in two recent and important papers, one forthcoming in the pages of this law review, historically “the executive power” was likely understood to refer only to law-execution and not to all of the King’s prerogative powers.<sup>180</sup> I think Mortenson is probably right. But, as I am developing in another work, even on the law execution account of the Vesting Clause there may be a “thick” version of “the executive power” that plausibly includes the powers to appoint, control, and remove executive officers and, perhaps, Blackstone’s proclamation power.<sup>181</sup> Blackstone describes this power under the same heading under which he discusses “the executive power of the laws,” and states that this proclamation

---

<sup>176</sup> *Id.*

<sup>177</sup> See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 593-94 (2008) (noting that Blackstone’s works “constituted the preeminent authority on English law for the founding generation” (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999))); CROSSKEY, *supra* note 168, at 416 (describing the Constitution’s distribution of prerogative powers listed in Blackstone); Gary L. McDowell, “*High Crimes and Misdemeanors*”: *Recovering the Intentions of the Founders*, 67 GEO. WASH. L. REV. 626, 640 (1999) (calling Blackstone the “most dominant source of authority on the common law for those who wrote and ratified the Constitution”). *But see generally* Martin Jordan Minot, Note, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the Commentaries*, 104 VA. L. REV. 1359 (2018) (arguing that Blackstone was far less influential on the Founders than is commonly believed).

<sup>178</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*261.

<sup>179</sup> *Id.*

<sup>180</sup> Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1169-70 (2019); Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. (forthcoming Apr. 2020).

<sup>181</sup> See Ilan Wurman, In Search of Prerogative (Oct. 28, 2019) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3472108](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3472108) [<https://perma.cc/YW56-BKDB>].

power extends simply to the “manner, time, and circumstances of putting those laws in execution”<sup>182</sup> and to “enforce the execution of such laws as are already in being.”<sup>183</sup> Thus, even if “the executive power” refers only to the power to carry into execution preexisting laws, that power very well may include this proclamation power.

One final observation may be useful. The precise scope of the specification power may vary depending on its source. The scope of the executive’s inherent specification power may not be commensurate with the scope of the specification power expressly delegated by Congress. There may be details of implementation that are impermissible for the executive to enact in the absence of such a delegation. Blackstone’s description of a power to implement the “manner, time, and circumstances” of enforcement may not entail, for example, the power to create interstitial rules that affect the legal rights of individuals. It may, on the other hand, be permissible for Congress to delegate the power to the executive to specify such details, depending on one’s theory of delegation. To be sure, if it is impermissible altogether for Congress to make such a delegation—if the making of any rule, no matter how minor or interstitial, that affects private rights or conduct is an exercise of “exclusively” legislative power—then there may be no variance between the scope of the specification power rooted in the executive power clause and the scope of the specification power rooted in legislative delegation. For our purposes, the important point is that whatever the precise scope and limits of the specification power when rooted in these different constitutional sources, such a power exists.

#### IV. IMPLICATIONS

This Part revisits the debates with which this Article began, and shows how they can be advanced or at least clarified. It shows how several of the Court’s rationales in *Chevron* are unsupportable, but some are valid as to the specification power. Finally, it discusses the limitations of the present argument, and ends with a footnote on the nondelegation doctrine. All told, properly distinguishing between executive interpretation and specification allows us to understand how judges would operate in a world without *Chevron* deference. They would resolve for themselves all matters of interpretation, including ambiguities; but where the statute, on its best reading, leaves a gap to be filled, the judges would permit the executive to specify the details within the limits of such gaps.

---

<sup>182</sup> BLACKSTONE, *supra* note 178, at \*261.

<sup>183</sup> *Id.*

### A. *Judging in a World Without Chevron*

#### 1. Advancing the Debates

In their article on the completion power, Goldsmith and Manning write that the completion power may justify *Chevron* deference notwithstanding the apparent violation of Article III and the APA. In light of such hurdles, it “remains necessary to identify a legal justification” for why “Congress would prefer agencies rather than courts to have binding authority to resolve residual ambiguities.”<sup>184</sup> According to them, the best explanation for *Chevron* “is that executive branch officials are endowed with presumptive constitutional authority, grounded in Article II, to complete an ambiguous statutory scheme unless Congress specifies otherwise.”<sup>185</sup> Yet, if the powers of interpretation and completion (or specification) are in fact distinct, as argued here, no legal justification is necessary. The courts need not, and cannot consistently with Article III, defer to an agency’s exercise of the interpretation power. But the courts certainly can defer to the executive’s constitutionally rooted specification or interstitial lawmaking power. It would not even be appropriate to call it “deference,” because judges would simply have no authority in this domain except to ensure that the agency stays within the limits of the gap created by the statute and does not act arbitrarily and capriciously.<sup>186</sup>

Moreover, Goldsmith and Manning treat “resolv[ing] residual ambiguities” as tantamount to the completion power, as they do elsewhere.<sup>187</sup> Others have similarly argued that resolving statutory ambiguities should be treated as an exercise of policymaking rather than interpretation.<sup>188</sup> But neither Goldsmith and Manning, nor these other scholars, defend this view; none provides an argument for why the resolution of ambiguities is in fact an exercise of policymaking discretion rather than interpretation. To be sure, they very well might be the same power if one adopts the legal realist view that all interpretive power inherently entails lawmaking.

---

<sup>184</sup> Goldsmith & Manning, *supra* note 27, at 2301 (footnote omitted).

<sup>185</sup> *Id.*

<sup>186</sup> 5 U.S.C. § 706(2)(a) (2018) (stating that reviewing courts are to “hold unlawful and set aside agency actions . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

<sup>187</sup> Goldsmith & Manning, *supra* note 27, at 2301. For example, they write:

The *Chevron* doctrine appears to reflect the idea that while Congress can legitimately give either courts or agencies ultimate authority to resolve statutory ambiguities or fill up statutory interstices, it is more consistent with the background premises of our constitutional democracy to embrace a default rule that Congress prefers to leave such completion power in the hands of the more accountable executive.

*Id.* at 2299 (emphasis added).

<sup>188</sup> See *supra* note 13 and accompanying text.

If one rejects that view, then resolving genuine “ambiguity,” as opposed to specifying the details within statutory gaps where the statute is otherwise clear, is most likely an exercise of the interpretation power. Determining the meaning, scope, and application of a statutory command is a quintessential interpretive task on the pre-realist understanding. Although there is some literature suggesting different possible meanings of “ambiguity”<sup>189</sup>—and, as explained here, ambiguity is often conflated with other concepts such as gaps or silences<sup>190</sup>—at a minimum ambiguity entails the proposition that a particular linguistic command is susceptible to more than one meaning in a particular context.<sup>191</sup> And ascertaining the legal effect of statutes in light of ambiguous meaning has always been understood to be a judicial task.<sup>192</sup> Resolving ambiguities, in other words, is up to the judge: she must decide whether “pizza” is included within “breakfast.” But once she decides that it is, the choice of whether to go with pizza or something else is a matter of specification.<sup>193</sup>

Bednar and Hickman’s claim that *Chevron* is “inevitable” can now also be clarified. When they write that calls for *Chevron*’s demise “fail to take into account that *Chevron* deference, or something much like it, is a necessary consequence of and corollary to Congress’s longstanding habit of relying on agencies to exercise substantial policymaking discretion to resolve statutory details,”<sup>194</sup> that proposition need no longer be objectionable to *Chevron*

<sup>189</sup> See, e.g., Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 799-802 (2010) (describing numerous academic approaches to defining “ambiguity”).

<sup>190</sup> For instance, Professor Siegel, in his recent defense of *Chevron*, stated that the power conferred by a statutory ambiguity “should not be regarded as interpretive power, but as the power to make a policy choice.” Siegel, *supra* note 12, at 965. Siegel does not defend this view, however, and as explained, it seems that it can only be sustained by the legal realist position that all acts of interpretation inherently entail lawmaking. See *supra* note 12. Moreover, if resolving ambiguities is not an interpretive task, then it is unclear what exactly is left for interpretation at all—other than enforcing the clear textual meaning of a statute in noncontroversial cases. Almost all statutes are ambiguous in some respects and interact with a dizzying array of other statutes within the legal system. If courts were simply left to police the outer boundaries of statutes where they are unquestionably clear, that would certainly seem to work a major transfer of power from the courts to agencies. And if some ambiguities are amenable to resolution by courts and others not, one needs an account of such a distinction. That is the account this Article seeks to provide—by distinguishing between genuine ambiguities on the one hand, and gaps or silences on the other hand that call for exercises of the specification rather than interpretation power.

<sup>191</sup> See, e.g., Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 67 (2011) (“*Ambiguity* refers to words that have more than one sense or meaning. *Vagueness* refers to the penumbra or borderline of a word’s meaning, where it may be unclear whether a certain object is included within it or not.”).

<sup>192</sup> See, e.g., BLACKSTONE, *supra* note 178, at \*60 (noting that as part of the interpretation of laws, judges first look to the usual signification of words, but if the “words happen to be still dubious, we may establish their meaning from the context,” and also from the “subject-matter” of the statute and the “effects and consequence” of the signification of the words).

<sup>193</sup> See *supra* subsection II.C.3.

<sup>194</sup> Bednar & Hickman, *supra* note 10, at 1398.

skeptics. The executive branch has long exercised discretion pursuant to its executive power to fill in statutory details where it was inconvenient for the legislative branch to act, either as an incident to enforcing the law or where Congress has explicitly delegated its nonexclusive legislative power to fill in such details. The skeptics can still call for an end to deference to executive interpretation, while recognizing that courts have a limited role in policing the outer boundaries of executive specification.<sup>195</sup>

To be sure, lower-order disagreements will exist over whether an agency action falls within the permissible bounds of the statute and is thus a proper exercise of specification, or whether it is a misinterpretation of the statute because it falls outside the permissible. Even if different judges might come to different conclusions, however, the issue is not whether interpretation is an error-free or disagreement-free exercise. The question is who has the power to decide, even in the face of possible errors and disagreements. Article III assigns this task to life-tenured and salary-protected judges so that they are insulated from the political accountability that might otherwise justify *Chevron* deference. Yet these judges might use all their reasoning and legal resources and conclude that the statute simply does not require one answer or another, and therefore it is left to the executive to specify the details with its Article II powers.

Put another way, in every case a judge should be able to distinguish between interpretation and specification. Judges may disagree, to be sure, on what falls within the range of the specification power in a given case because they might disagree on the best interpretation of the statute and thus disagree on the scope of the policymaking space left for the agency.

## 2. Revisiting *Chevron* and Its Predecessors

Rereading *Chevron* in light of the above analysis reveals that the Court in that seminal case also conflated interpretation and specification. *Chevron* involved the decision of the Environmental Protection Agency (EPA) under the Reagan Administration to interpret “stationary source” in the Clean Air Act to refer to an entire plant rather than to any individual emitting source within that plant (this was called the “bubble” policy).<sup>196</sup> The bubble policy permitted plants to fall below certain regulatory standards with respect to individual sources of emissions so long as there were offsetting reductions in emissions in other parts of the plant.<sup>197</sup> The Act’s statutory definition plausibly could refer either to any individual installation within a plant, or to

---

<sup>195</sup> They would still review executive specification to ensure the agency’s choices are not arbitrary and capricious. See 5 U.S.C. § 706(2)(a) (2018).

<sup>196</sup> *Chevron U.S.A., Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840, 859-62 (1984).

<sup>197</sup> *Id.* at 853-55.

the plant as a whole. The Act defined stationary source as “any building, structure, facility, or installation” which emits air pollution.<sup>198</sup>

The Court deferred to the agency’s choice and offered numerous rationales. On the one hand the Court suggested that “[w]e have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.”<sup>199</sup> The Court, in other words, assumed the agency’s exercise of power was one of law-interpretation. “In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>200</sup>

On the other hand, the Court also argued that “[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress,” and “[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”<sup>201</sup> Later on, the Court appears to conflate these ideas in the same sentence, noting for example that “[w]hen 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” because “[i]n such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”<sup>202</sup> Thus, the Court held that the EPA’s choice was “a permissible construction of the statute.”<sup>203</sup>

Properly understood, the Court in *Chevron* was not concerned with interpretation. The statute seemed to call rather for specification. A judge can stare at the statute all she wants, and it still defines a stationary source as “any building, structure, facility, or installation” which emits air pollution. What is a judge to do when there is a facility with multiple structures and installations—that is, when more than one of these definitions might apply? The statute is not ambiguous as to which is a stationary source; the Act says that they all can be so considered. The meaning of the statute, in other words, is clear. The statute simply does not answer which of these definitions to adopt when more than one applies. No matter how much one stares at this statute, even with its structure and

---

<sup>198</sup> *Id.* at 859 (quoting Clean Air Amendments of 1970, Pub. L. No. 91-604, §§ 4(a), 111(a)(3), 84 Stat. 1676, 1683 (codified at 42 U.S.C. § 7411(a)(3) (2018))).

<sup>199</sup> *Id.* at 844 (footnote omitted).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 843-44 (quoting *Morton v. Ruiz*, 415 U. S. 199, 231 (1974)).

<sup>202</sup> *Id.* at 866 (emphasis added).

<sup>203</sup> *Id.*

purposes in mind, it does not appear to answer the question; it is a gap in the statute within which it is left to the agency to specify the details.

Earlier deference cases similarly seem to have contemplated specification rather than interpretation. In *NLRB v. Hearst Publications, Inc.*,<sup>204</sup> for example, which is often considered to be a predecessor to *Chevron*,<sup>205</sup> the majority of the Court did not appear to defer to the executive's *interpretation* of the National Labor Relations Act. Hearst argued that "[b]ecause Congress did not explicitly define the term [employee], . . . its meaning must be determined by reference to common-law standards."<sup>206</sup> This was crucial: courts historically had not only an interpretation power, but a common-law lawmaking function akin to specification. It is *this* function that the Court appeared willing to give to the administrative agencies, not final authority over interpretation. Questions of statutory interpretation "are for the courts to resolve," the Court noted, "especially when arising in the first instance in judicial proceedings."<sup>207</sup> But the reviewing court's function is more "limited" where the question is instead "one of specific application of a *broad statutory term* in a proceeding in which the agency administering the statute must determine it initially."<sup>208</sup>

In other words, broad terms call not for interpretation, but rather the specification of details.<sup>209</sup> That is because broad statutory terms like "unreasonable" or "unfair" or "fair and equitable" obviously include a large number of possibilities. But in and of themselves, they rarely answer the question of which of the possibilities to choose.

### 3. Objections, and a Note on Judicial Power

Formalists might reject the present thesis on the ground that what it has described as specification was historically considered part of interpretation. Justice Thomas has argued that if deference is justified on the basis of legislative delegations from Congress, then that, too, violates the

---

<sup>204</sup> 322 U.S. 111 (1944).

<sup>205</sup> See, e.g., Bamzai, *supra* note 8, at 918 & n.27; Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 CARDOZO L. REV. 2241, 2243 (2011).

<sup>206</sup> *Hearst*, 322 U.S. at 120.

<sup>207</sup> *Id.* at 130-31.

<sup>208</sup> *Id.* at 131 (emphasis added).

<sup>209</sup> To be sure, it can still be disputed whether the statute actually had more to say on the meaning of the term "employee." Justice Roberts in a separate opinion argued that "[t]he question who is an employee, so as to make the statute applicable to him, is a question of the meaning of the Act and, therefore, is a judicial and not an administrative question." *Id.* at 136 (Roberts, J., concurring in the judgment). But this view seems to conflate the historical judicial powers of interpretation and common-law lawmaking, i.e. the judicial interpretation and specification powers, the latter of which is also appropriate for the executive branch.

Constitution for Article I reasons.<sup>210</sup> But there is no doubt that whether the courts' activities were called interpretation, this historical judicial power entailed significant power to fashion rules in the absence of law from Congress. That is, courts historically exercised an interstitial, common-law legislative power, which they still exercise to at least some degree to this day.<sup>211</sup> *That* much of the legal realist critique formalists really ought to accept.<sup>212</sup> And Congress can, of course, revise the federal common law by legislation, a power it does not have over judicial decisions.<sup>213</sup> If Congress could have obviated the need for this interstitial lawmaking power by legislating in more detail—and if, as this Article has aimed to show, the executive has always had a power to specify the details of a legislative program—then there is nothing about the modern transference of this specification power from courts to agencies that is inconsistent with the original constitutional design.

From the other side, the legal realists might still object that all acts of interpretation are really acts of policymaking. That view, however, is inconsistent with the Founders' design and their understanding of the separation of powers. "However difficult it may be to determine with precision the exact boundaries of the Legislative and Executive powers," James Madison once exhorted his colleagues in the House of Representatives,<sup>214</sup> there are still genuine lines dividing legislative, executive, and judicial powers. Our entire constitutional system depends on there being such boundaries.

---

<sup>210</sup> See *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) ("[I]f we give the 'force of law' to agency pronouncements on matters of private conduct as to which Congress did not actually have an intent, we permit a body other than Congress to perform a function that requires an exercise of the legislative power." (internal quotations and citations omitted)).

<sup>211</sup> See, e.g., *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 367 (1943) ("In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469-70 (1942) (Jackson, J., concurring) (observing that when federal courts decide questions that "cannot be answered from federal statutes alone," they may "resort to all of the source materials of the common law," which "follows from the recognized futility of attempting all-complete statutory codes"); *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842) (holding that the federal courts have the power, on "questions of a more general nature" such as "the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law," to ascertain "what is the just rule furnished by the principles of commercial law to govern the case").

<sup>212</sup> *But see generally* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (arguing that it is plausible to have a legal system in which judges find law).

<sup>213</sup> *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1871) (holding that Congress may not "prescribe rules of decision" to particular cases, but can amend legislation to create "new circumstances" which the court will then apply its "ordinary rules" to).

<sup>214</sup> 3 ANNALS OF CONG. 238 (1791) (Joseph Gales ed., 1834); see also *Klein*, 80 U.S. (13 Wall.) at 700 (1792) ("Mr. Madison saw some difficulty in drawing the exact line between subjects of legislative and ministerial deliberations, but still such a line most certainly existed.").



What this Article has proposed is that the Founders' view can be accepted without completely rejecting what the legal realists had to offer. They were right that historically judges exercised a kind of interstitial lawmaking power, and that often Congress explicitly leaves such power to the exercise of the executive branch. It does not follow, however, that all acts of interpretation are inherently lawmaking. The Founders may not have had the final word on the separation of powers, but that hardly means there are no limits demarcating the boundaries between the separate powers they identified.

Finally, as a historical matter, judges often looked to statutory purposes and policy considerations in arriving at their judgments of what a statute required.<sup>215</sup> The distinction between interpretation and specification does not necessarily require a judge to abandon purpose in arriving at what the judge believes to be the best reading of a statute. It does require, however, the recognition that matters of policy often call for specification by the agency. At least that much is justified by the modern shift from common-law to administrative regulation.<sup>216</sup>

#### B. Enforcing Nondelegation (*As-Applied*)

As explained, specification is bounded by interpretation: courts must determine as a matter of interpretation the scope of the permissible, which is then subject to the specification power. There may be another limit, however, on an agency's exercise of the specification power: the nondelegation doctrine. There may come a point at which the "specification" of a legislative detail transgresses the boundary between mere specification, which is a nonexclusive legislative power, and exclusively legislative power that Congress must exercise.

In an earlier Article, I argued that the courts could make the nondelegation doctrine workable by refashioning it to be a more modest, as-applied nondelegation doctrine.<sup>217</sup> The idea was to treat each statutory ambiguity the same way *Chevron* does, as an implicit delegation of power

---

<sup>215</sup> Justice Scalia noted this:

Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce "absurd" results, or results less compatible with the reason or purpose of the statute. This, it seems to me, unquestionably involves judicial consideration and evaluation of competing policies, and for precisely the same purpose for which (in the context we are discussing here) *agencies* consider and evaluate them—to determine which one will best effectuate the statutory purpose.

Scalia, *supra* note 33, at 515.

<sup>216</sup> Sunstein, *supra* note 3, at 2591.

<sup>217</sup> Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 977 (2018).

from Congress to the agency to resolve that ambiguity. The as-applied nondelegation doctrine would then assess each implicit delegation of authority for potential nondelegation violations.<sup>218</sup> Thus, the incoherence of the major questions cases would be resolved because the Court could honestly find ambiguity yet hold that the regulation, rather than the statute, violates the Constitution as an impermissible legislative act made pursuant to an impermissible implicit delegation of authority from Congress.<sup>219</sup>

The distinction between interpretation and specification clarifies this framework, which can replace the *Chevron* framework altogether. When judges confront an ambiguous statute, they must do all the interpretation they can to resolve what the statute, according to their own judgments, requires. But after exercising this judgment, the judges might conclude that the statute simply does not answer the question at hand—it leaves, either explicitly or implicitly, a gap for the agency to fill. The as-applied nondelegation doctrine then polices this specification power for impermissible delegations. The executive can specify the details within the discretion granted by a statute, but it cannot exercise “exclusively legislative” power. Sometimes the gaps will be too big for the agency to fill. That may have been the case in *Youngstown*. And if that’s the case, courts need not strike down the statutory provision which, after all, usually creates gaps of various sizes. The courts can instead strike down only those regulations or executive actions (like Truman’s) that are too big, or too important, or that otherwise meet the requirements (whatever they happen to be) for “exclusively legislative power.”

### C. Interpretative Rules and Hard-Look Review

Although a full exploration of the following implications must await another day, it is worth pointing out that two of administrative law’s most persistent puzzles may also be resolved by distinguishing specification and interpretation.

First, under the APA, interpretative rules do not have to go through notice-and-comment rulemaking, in contrast to “legislative” rules.<sup>220</sup> The test for distinguishing the two kinds of rules is that a rule is legislative if without that rule there would be an inadequate legislative basis for an enforcement action.<sup>221</sup> This creates a puzzle. Under the theory of *Chevron*, most legislative rules are themselves interpretations of statutes. Indeed, the *Mead* doctrine says that deference to agency interpretation is warranted precisely where the

---

<sup>218</sup> *Id.* at 977, 1006.

<sup>219</sup> *Id.* at 989-90.

<sup>220</sup> 5 U.S.C. § 553(b) (2018); *see also* *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111-12 (D.C. Cir. 1993).

<sup>221</sup> *Am. Mining Cong.*, 995 F.2d at 1112.

agency has promulgated a legislative rule.<sup>222</sup> More still, under the *Chenery II* doctrine, it is usually acceptable for an agency to proceed directly from a broad statutory standard to an adjudication instead of resorting to rulemaking<sup>223</sup>—suggesting that most of the time there is an adequate legislative basis to enforce broad statutory standards, and so most rulemakings are interpretative after all. In other words, under the current doctrine, it is impossible to tell the difference between interpretative rules and legislative rules because both are interpretations of some prior legal authority that already provides a sufficient basis for enforcement.

The distinction between interpretation and specification may help resolve this puzzle. Insofar as a rule or agency statement is in fact merely an interpretation of a statute, then it would not have to go through notice-and-comment rulemaking because it is an “interpretative” rule under the APA. But the lack of public participation in the process of arriving at that interpretation ought to be acceptable because the courts would review such interpretations de novo, without deference. But insofar as the rule is not merely an interpretation, but actually a specification—the making of policy in the interstices of the acknowledged bounds of the statute—public participation through the notice-and-comment process is and ought to be required by the APA. Courts do not have much of a say here, but at least the public does.

This relates to a second puzzle: what is the relationship between “hard look” or arbitrary-and-capricious review of agency policymaking and *Chevron*’s second step?<sup>224</sup> If regulations are all interpretations of statutes, then courts should defer to reasonable choices made by an agency. But if that’s the case, then there is no more room for hard-look review of the agency’s policy choices—which by assumption are actually just constructions of the statute. Put another way, if hard look review requires agencies to base their decisions “on a consideration of the relevant factors,”<sup>225</sup> and the relevant factors are found in the statute, then Step Two and hard-look are identical. Several

---

<sup>222</sup> United States v. Mead Corp., 533 U.S. 218, 229-31 (2001).

<sup>223</sup> SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 203 (1947).

<sup>224</sup> Hard-look review is sometimes also called *State Farm* review after *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), which is often taken as the origin of hard-look review. See Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, 70 ADMIN. L. REV. 361, 379 (2018) (referring to the Court’s approach in *State Farm* as “hard look review”); David Zaring, *Rule by Reasonableness*, 63 ADMIN. L. REV. 525, 530 (2011) (acknowledging that *State Farm* review is sometimes called hard-look review). But see Nat’l Lime Ass’n v. EPA, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980) (outlining the evolution of “hard look review”); Joshua McKarcher, *Restoring Reason: Reformulating the Swerve Doctrine of Motor Vehicle Manufacturers v. State Farm*, 76 GEO. WASH. L. REV. 1342, 1342, 1362-63 (2008) (noting that the *State Farm* opinion adopted D.C. Circuit Judge Leventhal’s “reasoned analysis” requirement for rescissions); Strauss, *supra* note 13, at 1149 n.23 (“Judge Leventhal is . . . the acknowledged progenitor of ‘hard look review.’”).

<sup>225</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

scholars and courts have therefore concluded that *Chevron's* second step is tantamount to hard-look review.<sup>226</sup>

The distinction between interpretation and specification may resolve this puzzle as well. Insofar as an agency's act is truly an interpretive one, there is no need for hard-look review because the courts in any event review such interpretations de novo, and the analysis never proceeds past what is currently called *Chevron* Step One. But if the agency action were one of several possible policy choices, each of which would have been permissible under the statute, then the courts still could police such acts of specification to ensure their reasonableness if that is what Congress intended courts to do by granting courts the power of arbitrary-and-capricious review.<sup>227</sup>

## V. CONCLUSION

When agencies implement statutes, modern doctrine describes their activity as interpretation, raising the question of how much deference courts ought to give such executive interpretations of law. Many scholars have advocated great deference on the ground that interpretation of broad statutory terms entails policymaking discretion, a claim that formalists typically reject as violative of Article III. This Article has aimed to show that when agencies implement a statutory scheme, they exercise both a power of law-interpretation and of law-specification. This Article has further aimed to show that it is perfectly constitutional as a formalist matter for agencies to exercise this specification power, even if they cannot have final say over the interpretation of law. This suggests that calls to overturn the modern deference regime may be correct, but likely overblown—at least if what agencies are usually doing is not interpretation, but specification.

---

<sup>226</sup> See, e.g., *Citizens Coal Council v. EPA*, 447 F.3d 879, 889 n.10 (6th Cir. 2006) (“We recognize that there is support for the proposition that in review of rulemaking the second step of *Chevron* indeed amounts to the same inquiry as arbitrary or capricious review under the APA.”); Bednar & Hickman, *supra* note 11, at 1433 (noting that “[n]umerous subsequent D.C. Circuit opinions equate *State Farm* and *Chevron* step two”); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1266-77 (1997) (arguing that the two inquiries overlap).

<sup>227</sup> See 5 U.S.C. § 706(2)(a) (2018) (describing arbitrary-and-capricious review).