

The Specification Power

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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 scholarly 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.

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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 v. Natural Resources Defense Council* holds that courts must defer to an agency’s reasonable interpretation of an ambiguous statute that it administers.¹ The doctrine is justified on at least two grounds: that when Congress enacts statutes with ambiguities, Congress is presumed to delegate

¹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

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implicitly to the agencies the authority to resolve those ambiguities;² and that agencies are more politically accountable, technically expert, and institutionally competent than courts to do so.³

Chevron's "canonical"⁴ status in administrative law, however, has been fraying. Critics have long noted the apparent inconsistency between *Chevron* deference and the Administrative Procedure Act ("APA"), which provides in section 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."⁵ More fundamentally, deference to executive interpretations appears inconsistent with the structural separation of powers. Article III assigns the judicial power "say what the law is"⁶ 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.⁷ Finally, recent scholarship has shown that historically courts 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.⁸ For these reasons, even

² *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 159 (2000) (*Chevron* deference "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*, 133 S. Ct. 1863, 1881 (2013) (Roberts, C.J., dissenting) (quoting *Barrett*).

³ *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 Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 651–652 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference"); *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 n.30 (1986) (noting that the deference *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.").

⁴ *City of Arlington*, 133 S.Ct. at 1868; Sunstein, *Chevron Step Zero*, 92 *VA. L. REV.* 187, 188 (2006).

⁵ 5 U.S.C. § 706; 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).

⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); 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.").

⁷ THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁸ Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretations*, 126 *YALE L.J.* 908, 916–19 (2017).

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former Justice Kennedy has joined calls from his more formalist colleagues to reconsider “the premises that underlie *Chevron*.”⁹

On the other hand, many scholars maintain that deference is inevitable. Nicholas Bednar and Kristin Hickman recently argued that opponents of *Chevron* “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.”¹⁰ Indeed, “unless Congress chooses to assume substantially more responsibility for making policy choices itself or the courts decide to seriously reinvigorate the nondelegation doctrine”—neither of which “seems remotely likely”—“at least 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.”¹¹ A veritable legion of scholars has argued that deference is inevitable because the interpretation of broad statutory standards requires policymaking discretion, or resolving “ambiguities” is for policymakers.¹² And legal realists maintain that *all* interpretation inherently entails policymaking.¹³

⁹ *Pereira v. Sessions*, slip op. at 3 (Kennedy, J., concurring).

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

¹¹ *Id.*

¹² Peter Strauss has argued that deference should be reframed as “*Chevron* space,” a space within which an agency has policymaking discretion. Peter L. Strauss, “*Deference*” Is Too Confusing—Let’s Call Them “*Chevron* Space” and “*Skidmore* Weight,” 112 COLUM. L. REV. 1143, 1144-45 (2012). He seems to suggest that this space is created by interpretive ambiguity. See, e.g., *id.* at 1159-60 (noting that such “spaces” are “created by statutory imprecision” and when “statutory meaning is uncertain”). Thus his “*Chevron* space” 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. *Id.* at 1164. Although perhaps clearer, Strauss’s reformulation seems identical in substance to *Chevron* deference as currently formulated. Indeed, Strauss and Kenneth Bamberger in another essay suggest that ambiguity should simply be treated as calling for an exercise of policymaking. Kenneth A. Bamberger & Peter L. Strauss, *Chevron’s Two Steps*, 95 VA. L. REV. 611, 611, 617 (2009).

Jack Beerman has also intuited a distinction between the situation “in which there is statutory language against which to judge the agency’s action and on in which there is not.” 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 (2010). But he also refers to either situation as a question of statutory “interpretation.” See, e.g., *id.* (arguing that an agency interpretation of an ambiguous statute should still be reviewed for “reasonableness,” though arguing the courts should give teeth to their own review); *id.* at 848 (explaining that the courts could find an agency interpretation to be “reasonable” and leave open “the possibility that an agency might, in the future, adopt a different interpretation”).

Henry Monaghan similarly could not escape blending these two powers together. He wrote that the court’s role is always textual *interpretation*, but that questions of deference are really questions about “the allocation of law-making competence.” Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 6 (1983). Thus, “[a] statement

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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.* This statement seems largely consistent with the conclusions of the present author. But Monaghan does not arrive at these conclusions. He concludes that the power at issue is all “interpretation”—or perhaps it is all law-making, or always both at the same time—and it is best “understood” as either interpretation or lawmaking depending on to which body Congress intended to allocate this authority. Thus he writes that “[w]here deference exists, the court must specify the boundaries of agency authority, within which the agency is authorized to fashion authoritatively part, often a large part, of the *meaning* of the statute,” but “to the extent that the court interprets the statute to direct it to supply *meaning*, it *interprets* the statute to exclude delegated administrative law-making power.” *Id.* (emphases added). Elsewhere he blends these concepts more specifically. *See, e.g., 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 26 (“*Judicial deference to agency ‘interpretation’ of law is simply one way of recognizing a delegation of law-making authority to an agency. . . .* There is, therefore, no constitutional significance to the asserted distinction between substantive and interpretive rule making.”) (emphasis in original); *id.* at 26-27 (“But unless one is prepared to rethink fundamentally the role of public administration in our constitutional order, article III, standing alone, is not violated by judicial deference to administration *construction* of law.”) (emphasis 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 Siegel is the most recent to make this kind of argument. Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937 (2018). Siegel’s “key insight is that even when a court interprets a legal directive de novo, the court may discover that the best construction of the directive is that it vests decisionmaking power in some other body.” *Id.* at 956. Siegel, however, suggests that *Chevron* is right on this ground because statutory ambiguities themselves should be treated like delegations of policymaking authority. *See, e.g., id.* at 963 (“A court that holds that an ambiguous statute constitutes a delegation of power to the agency is interpreting the statute[.]”); *id.* at 965 (“The power thus conferred should not be regarded as interpretive power, but as the power to make a policy choice.”). But neither Siegel nor any of these other scholars provides any theoretical grounding for *why* ambiguities should be treated as calling for policy choices rather than interpretive choices.

Many other scholars have claimed that resolving “ambiguities” is a matter for policymakers. *See, e.g.,* 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.”) (emphasis added); Linda 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). 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).

¹³ Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2587, 2591-93 (2006).

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In short, when agencies implement statutory schemes, the doctrine treats their actions as “interpretations.”¹⁴ 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 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.¹⁵ Two scholars who have recognized that the doctrine seems to conflate two different powers¹⁶ do not provide a constitutional account of why agencies may exercise this policymaking power, nor provide a satisfactory account of what distinguishes the “interpretation” that agencies do from their “policymaking.”¹⁷ This Article supplies both deficiencies, illustrating the distinction between interpretation and “specification” and providing arguments from the Constitution’s text, structure, and history for why agencies can 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*,¹⁸ 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.¹⁹ Mrs. Decatur sought to collect both pensions.²⁰ The Court recognized that the interpretation of this law could leave room for discretion and even disagreement, and thus the Court would not

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

¹⁵ See, e.g., Bednar & Hickman, *supra* note __, at 1446-53 (referring to agency interpretation of statutes as both “interpretation” and “gap”-filling); Sunstein, *supra* note __, at 2591-93 (explaining the legal realist insight the exercise of “interpretation” inherently involves policymaking decisions). See generally sources cited *supra* note __.

¹⁶ 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); Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1891 (2015); see *infra* Part I.D.

¹⁷ See *infra* Part I.D.

¹⁸ 39 U.S. (14 Pet.) 497 (1840).

¹⁹ *Id.* at 498.

²⁰ *Id.*

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compel the executive to adopt one interpretation over another through a writ of mandamus.²¹ But the Court also noted that had a non-mandamus 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 judges’ “duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them.”²²

On the other hand, one of the earliest statutes 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.”²³ President Washington’s regulations stated that the sums owed were to be paid in “two equal payments,” the first on March 5, 1789, and the second on June 5, 1789; 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.²⁴

This is a particularly clear example of the President exercising a power not of interpretation, but of specification. The regulation concerning two equal payments to be made one month apart was certainly a reasonable *interpretation* of the statute, which required the payments to be made within one year. Yet the President 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 required such payments to be made within a year. The result of the President’s choice, in other words, was a reasonable interpretation of the statute; but the act of choosing among these various possible interpretations 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

²¹ *Id.* at 515 (“The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act.”).

²² *Id.* This element of the case is discussed in Bamzai, *supra* note __, at 951. 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 __.

²³ Act of July 16, 1790, 1 Stat. 129.

²⁴ These regulations are preserved in the Library of Congress, and can be viewed at <https://www.loc.gov/resource/rbpe.21201200/?st=text>.

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of interpretation, but rather of specification: the President 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 the President's choice, so long as it was within the range of options created by a reasonable 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,²⁵ facts that call for an exercise of the specification power.²⁶ 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.²⁷ He described this power as the power to "fill up the details" of a general statutory provision. The specification power also inheres in the Take Care Clause because where there is a "gap" in the statute, by definition a course of action must be specified if the law is to be executed at

²⁵ *Chevron*, 467 U.S. at 840, 859-62.

²⁶ Of course, it will sometimes be challenging to distinguish between genuine questions of interpretation and specification, and these powers will sometimes shade into one another. That being so, they are still distinct and useful analytical categories—and indeed powers that the Founding generation understood to be distinct.

²⁷ 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 "Congress may certainly delegate to others," but which it also "may rightfully exercise itself." 23 U.S. (10 Wheat.) 1, 42-43 (1825).

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all. Finally, such a power was described as a prerogative power by both Locke and Blackstone.²⁸ Because the power to fill in the details necessary to enforce the law is an executive power not otherwise limited by the Constitution’s text, it is vested in the President.²⁹

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. TO DEFER, OR NOT TO DEFER?

The *Chevron* decision may be the most cited decision in all administrative law.³⁰ Rather than rehearse the decision in all its details, the brief sections that follow seek only to elucidate the nature of the existing debate, and how it has stalled.

²⁸ See *infra* Part __.

²⁹ Jack Goldsmith and John Manning wrote an essay identifying a power of the President to “complete” laws. Jack Goldsmith & John Manning, *The President’s Completion Power*, 115 YALE L.J. 2280 (2006). We shall have more to say about this paper subsequently. Goldsmith and Manning were right to intuit the existence of this completion power, but they did not recognize that this power is distinct from the power of law-interpretation, which includes the power to interpret statutory ambiguities. See *infra* notes __ - __ and accompanying text. 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. Another way to think about this power is that it is exercised in those classes of cases to which Judge 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 *supra* note __ and accompanying text; see also *infra* note __ and accompanying text.

³⁰ See, e.g., Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1870 n.19 (2015) (“It seems an obligation of the form to point out that *Chevron* is the most cited decision in administrative law.”).

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A. *Chevron* and Its Rationales

The rule announced in *Chevron* is known well enough: When reviewing an agency's implementing regulations, a court must first ask "whether Congress has directly spoken to the precise question at issue."³¹ 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."³² That means the court must defer to the agency's interpretation of the statute even if it is not the "best" reading, i.e., the reading at which the court itself would have arrived if it were asked to interpret the statute in the first instance.³³

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.³⁴ The Court in *Chevron* also relied upon agency accountability and expertise, and later commentators have emphasized these rationales.³⁵ More still, the Court relied on precedent, stating that it has "long recognized

³¹ *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

³² *Id.* at 842-43.

³³ *Id.* at 843 n.11; *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).

³⁴ *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (deference "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."); *City of Arlington v. FCC*, 569 U.S. 290, 319 (2013) (Roberts, C.J., dissenting) (quoting same); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (arguing that *Chevron* announced "an across-the-board presumption that, in the case of ambiguity, agency discretion is meant"); *but see* .

³⁵ *Chevron*, 467 U.S. at 865-66 ("Judges are not experts in the field, and are not part of either political branch of the Government. . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."); *see also Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) ("[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 accorded 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.").

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that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."³⁶ Justice Scalia subsequently sought to root the doctrine in the history of mandamus review.³⁷ A look at the scholarly commentary reveals that 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"³⁸ in life-tenured, salary-protected judges.³⁹ The most systematic critic has been Philip Hamburger, who challenges deference in a long book on administrative law⁴⁰ and in a more recent article.⁴¹ In the latter, Hamburger asks: "[E]ven if an agency has statutory authority to judge what the law is for its purposes, do not the judges under Article III have the constitutional office or duty to exercise their own independent judgment about what the law is for their purposes?"⁴² When one asks this question about independent judgment, "it is unclear how judges can ever defer to executive or other administrative interpretations of law."⁴³ "When a judge defers to an agency's interpretation of a statute, he defers to its judgment about what the law is, and he thereby violates his office or duty to exercise his own independent judgment."⁴⁴ It was this duty of independent

³⁶ *Chevron*, 467 U.S. at 844 & n.14 (citing cases).

³⁷ *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 241-42 (2001) (Scalia, J., dissenting).

³⁸ *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.").

³⁹ 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. The judges, both of the supreme and inferior courts, 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, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 467, 528 (1989).

⁴⁰ PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 309-21 (2014).

⁴¹ Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

⁴² *Id.* at 1195.

⁴³ *Id.*

⁴⁴ *Id.* at 1205.

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judgment that justified not only the power of judges to decide cases, but also “their security in their tenure and salaries.”⁴⁵

Indeed, one of the core rationales for *Chevron* deference has been the relative political accountability of administrative agencies.⁴⁶ Yet judges were accorded life tenure and salary protections precisely to avoid this kind of political accountability when making legal judgments. In the *Federalist*, Hamilton argued that if “the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.”⁴⁷ These concerns have been echoed by a number of Justices of the Supreme Court, particularly Justices Stephen Breyer and Antonin Scalia, who perhaps more than any other judges are responsible for the prominence of modern-day deference.⁴⁸ Notwithstanding their support for deference, both noted the apparent inconsistency between deference to agency legal interpretations and the requirements of Article III.⁴⁹

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

⁴⁵ *Id.* at 1209.

⁴⁶ See *supra* note __ and accompanying text.

⁴⁷ THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁴⁸ For Justice Breyer’s influence, see Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 365-72 (1986) (arguing in favor of deference on the agency’s “better knowledge of congressional intent”); *but see id.* at 372-82 (arguing against a blanket rule for deference). For Justice Scalia’s, see Scalia, *supra* note __, at 512 (arguing the deference should be accorded even to “pure questions of statutory construction”); *id.* at 514 (explaining that the cases justify deference to administrative legal interpretations on the basis of “‘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”—“[i]n other words, they are more likely than the courts to reach the correct result”); *id.* at 516 (rooting *Chevron*’s theoretical justification in a theory of congressional intent to delegate to agencies interpretive authority to resolve ambiguities).

⁴⁹ Breyer, *supra* note __, at 381 (“[T]he main criticism that one might make of the Supreme Court’s case law describing appropriate judicial attitudes toward traditional agency interpretations of the law is that it overstates the degree of deference due the agency. If taken literally, the Court’s language suggests a greater abdication of judicial responsibility to interpret law than seems wise, from either a jurisprudential or an administrative perspective.”); Scalia, *supra* note __, at 512 (“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 provide and duty of the judicial department to say what the law is.’”) (alteration in original).

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agency—“calls for that exercise of independent judgment.”⁵⁰ According to Thomas, “*Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is ‘the best reading of an ambiguous statute’ in favor of an agency’s construction,” and “thus wrests from Courts the ultimate interpretative authority to ‘say what the law is’ and hands it over to the Executive.”⁵¹ Thomas concludes that “[s]uch a transfer is in tension with Article III’s Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies.”⁵² 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.⁵³ Justice Thomas has been recently joined on the Court by Justice Gorsuch, who shares his views on deference.⁵⁴

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 misplaced. The federal courts never deferred to executive interpretations as such; rather, they 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.⁵⁵ In other words, if agencies are interpreting law, then the constitutional case for deference is weak at best.

C. The Case for Deference: Interstitial Lawmaking

The theoretical defenses of deference to agency interpretations of law, for the most part, are not rooted in constitutional arguments. They are instead rooted in a different, more “realistic” view of law itself: a view in which not only administrators, but judges themselves do not actually “interpret” law, but

⁵⁰ 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (quoting *Perez v. Mortgage Bankers Assn.*, 135 S.Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment)).

⁵¹ *Id.* (quoting *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 983 (2005) and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

⁵² *Id.* (citing U.S. CONST. Art. III).

⁵³ *Id.* at 2713.

⁵⁴ *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”).

⁵⁵ Bamzai, *supra* note __, at 930-47 (showing that these early cases relied on the *contemporanea expositio* and *interpretes consuetudo* canons of constructions, and did not defer to executive interpretations of law *qua* executive interpretations of law).

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rather “make” law. Many scholars have similarly 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.”⁵⁶ 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.⁵⁷ 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.”⁵⁸ 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.”⁵⁹ Once it is recognized that both “administration” of the law and the judicial “interpretation” of the 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.⁶⁰

⁵⁶ Ann Woolhandler, *Judicial Deference to Administration Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 213 (1991).

⁵⁷ *Id.*

⁵⁸ *Id.* at 205.

⁵⁹ *Id.*

⁶⁰ Woolhandler was not the first to make arguments along these lines. *See also, e.g.*, Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 507–08 (1985) (“The Court’s unanimous decision in *Chevron* leads logically to the constitutionally correct solution to the problem of agencies with vast policy-making power. 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.”); Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 307 (1988) (“In many cases in which a search for congressional intent is futile, courts nevertheless purport to resolve conflicts concerning the meaning of specific provisions in a statute through the process of statutory interpretation. In actuality, however, these courts are resolving a policy issue that Congress raised but declined to resolve. The judge’s personal political philosophy influences greatly his resolution of the policy issue.”).

Henry P. Monaghan made similar arguments in his famous article on judicial deference, published one year before *Chevron*. *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983). 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 (emphasis in original).

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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."⁶¹ 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.⁶² 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."⁶³ 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."⁶⁴ 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."⁶⁵

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," resolution of these questions depends on policy considerations.⁶⁶ For example, Bednar and Hickman argue that the Communications Act of 1934 gave the FCC "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.⁶⁷ What was the Court to do, other than defer and review for a minimum quantum of rationality?⁶⁸ "[P]articularly given the complexity of modern statutes," Congress often intends "that agencies have discretion in filling the gap."⁶⁹ More still, 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

⁶¹ Sunstein, *supra* note __, at 2587.

⁶² *Id.* at 2591.

⁶³ *Id.* (quoting Ernst Freund, *Interpretation of Statutes*, 65 U. PA. L. REV. 207, 211 (1917)).

⁶⁴ *Id.* at 2592.

⁶⁵ *Id.* at 2595.

⁶⁶ Bednar & Hickman, *supra* note __, at 1446-47.

⁶⁷ *Id.* at 1448.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1449; *see also id.* at 1458 ("many statutes contemplate that agencies will exercise discretion to fill statutory gaps").

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should resolve these ambiguities.⁷⁰ Several other scholars have similarly argued that interpretive ambiguity often calls for policymaking discretion.⁷¹

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 wondrously strange against the backdrop of our 200-year legal tradition.”⁷² 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.”⁷³ In the end, Hamburger argues, it “also is interpretation,”⁷⁴ i.e. the judicial power simultaneously partakes of both an interpretive and lawmaking quality. Thus judges should exercise independent judgment regardless.⁷⁵ 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.⁷⁶

D. Interpretation versus Policymaking

At least two scholars have argued that there are in fact two different 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”⁷⁷ 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.”⁷⁸ The work of “public administration” involves an agency’s “operational mission . . . to carry out statutory programs, not to perform judicial-style statutory

⁷⁰ *Id.* at 1453.

⁷¹ See sources cited note __ *supra*.

⁷² Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 477 (1989)

⁷³ Hamburger, *supra* note __, at 1223.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Sunstein, *supra* note __, at __.

⁷⁷ Foote, *supra* note __, at 675.

⁷⁸ *Id.* at 678-80.

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interpretation.”⁷⁹ “Agencies implement their enabling acts with a combination of expertise, practicality, interest-group input, and political will—not with a strictly legal, neutral, judicial-style methodology that would be principally attentive to the text and structure of the legislation as well as the views of the enacting Congress.”⁸⁰

The inputs that go into the work of public administration, Foote argues, include “the agency’s own understanding of the statutory provisions of its organic act,” but also “technical assessments of on-the-ground facts; expert predictions; the policy views of administrators and staff; input from the public, especially from affected interests; political influence and control from the White House and the current Congress; . . . and the practical needs of the bureaucracy to manage and enforce a statutory program.”⁸¹ Foote argues that this distinction between statutory interpretation or construction on the one hand and the administrative “carrying out” of statutes on the other was the conception shared by the Congress that enacted the APA,⁸² and in the “formative decades of the APA” the courts treated statutory construction and the “operational, implementing work” of agencies as distinct.⁸³

Michael Herz makes a similar point. He argues that agencies “construct” statutes after agencies are finished interpreting or “construing” them, and “interpretation has failed to produce an answer.”⁸⁴ Herz explains that *Chevron* “insists on respect for the delegation of policymaking authority to administrative agencies, but it preserves interpretive authority for the courts.”⁸⁵ 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.”⁸⁶ Herz draws from the interpretation-construction distinction and 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.’”⁸⁷ And where “interpretation” does not suffice, “we must have recourse to construction,” which consists in “drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—

⁷⁹ *Id.* at 678.

⁸⁰ *Id.* at 691.

⁸¹ *Id.* at 681.

⁸² *Id.* at 682-83, 711.

⁸³ *Id.* at 680-84.

⁸⁴ Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1883, 1891 (2015).

⁸⁵ *Id.* at 1871.

⁸⁶ *Id.* at 1881.

⁸⁷ *Id.* at 1894 (quoting FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 5 (William G. Hammond ed., 3d ed. 1880)).

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conclusions which are in the spirit, though not within the letter of the text.”⁸⁸ Herz argues that Lieber’s distinction “maps tidily onto *Chevron*, particularly if step one is not especially capacious.”⁸⁹ 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.

Both Foote and Herz see, correctly, that there are really two distinct powers at issue and that *Chevron* and the debate surrounding it seem to conflate the two. Neither of their accounts, however, is sufficient to resolve the *Chevron* debate because neither provides a satisfying account of the distinction between interpretation and this other, policymaking power, and neither provides a *constitutional* account of why agencies may exercise this policymaking power at all. Foote, for example, is correct to identify distinct powers, but seems incorrectly to suppose that one power belongs to the domain only of agencies, the other only of courts. Indeed, it is not entirely clear what divides statutory construction from “public administration” in her view; she 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.”⁹⁰ Thus she suggests *Zuni Public School District No. 89 v. Department of Education*,⁹¹ a case that has all the hallmarks of being genuinely about statutory interpretation,⁹² should nevertheless be considered as dealing with “public administration” because it involves a “highly technical, specialized interstitial matter.”⁹³

As for Herz’s analysis based on the interpretation-construction distinction, it is not at all clear that the Founding generation ever understood there to be a distinction between interpretation and construction.⁹⁴ Even if the distinction is real, both interpretation and construction still appear to have been (and to remain) tasks for judges. For example, Larry Solum describes “interpretation” as the search for “semantic meaning” of terms, and

⁸⁸ *Id.* (quoting LIEBER, *supra* note __, at 44).

⁸⁹ *Id.* at 1895.

⁹⁰ Foote, *supra* note __, at 711.

⁹¹ 550 U.S. 81 (2007).

⁹² 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 expenditure” allowed the agency to exclude from the calculations schools above and below these percentiles in terms of *total student population*. 550 U.S. at 84-86.

⁹³ Foote, *supra* note __, at 717-18.

⁹⁴ Herz recognizes that historically, and still to this day, courts and commentators often use the terms interchangeably, as if there is no distinction. *Id.* at 1891-92. For an originalist argument that the Framers did not distinguish between the two concepts, see John O. McGinnis & Michael Rappaport, *Original Methods Originalism*, 103 NW. U. L. REV. 751, 773 (2009).

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construction to be determining the “legal effect” of that meaning.⁹⁵ If that is correct, that is exactly what judges do, too: the judicial duty entails determining what legal effect the meanings of statutes have once placed within the context of the existing *corpus juris*.⁹⁶

In the next Part, this Article will begin to supplement these two accounts. It will show that agencies do exercise two distinct powers when implementing a statutory scheme, and will give an account of the distinction between the two. The following Part will then make the constitutional case for why agencies, as a formalist matter, can exercise the “specification” power to fill in interstitial legislative details, even if they cannot have final say over the interpretation of law.

II. THE DISTINCT POWERS OF 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.

⁹⁵ Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

⁹⁶ 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. 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.* The court knows everything there is to know about “meaning”—it’s simply that each party to the contract 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.*

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 __, 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 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.

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Yet there comes a point when the law runs out. The law may have nothing more to say. 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 since the early years of the Republic. Early on Congress instructed heads of departments “to superintend” the business of the various departments.⁹⁷ 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.⁹⁸

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.”⁹⁹ Thus, over time, Hamilton instructed his collectors on several points of law: “whether a vessel is liable to pay tonnage at each entry; whether American produce exported and returned for lack of a foreign market is liable to pay duty; whether the tonnage of a foreign vessel could be taken from its

⁹⁷ LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 204 (1948) (citing 1 Stat. 65, § 2 (Sept. 2, 1789); 1 Stat. 232, § 3 (Feb. 20, 1792). 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 1 Stat. 376, § 4 (June 5, 1794)).

⁹⁸ *Id.* at 204-05 (quoting _____ July 20, 1792, Hamilton, *Works* (Hamilton ed.), III, 557-59). [Full cite: *The Works of Alexander Hamilton* (J.C. Hamilton, ed., 7 vols., New York: John F. Trow, 1850-51).

⁹⁹ *Id.* at 205. This letter is also discussed in PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 89-90 (2014).

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register; [and] whether an inspector put on board a vessel in one district to go to another superintends the landing of goods in the second district.”¹⁰⁰

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.¹⁰¹ “[P]enalties and forfeitures were imposed by [a] judge,” which “gave the court opportunity to decide upon the legality and correctness of official action.”¹⁰² 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.”¹⁰³ 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.”¹⁰⁴

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*,¹⁰⁵ 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. 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. On the

¹⁰⁰ *Id.* at 207 (White). 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.

¹⁰¹ *Id.* at 446 (White).

¹⁰² *Id.* at 446 (White). 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 105 (2012) (“Customs collectors or naval officers could detain ships that they believed intended to violate or had violated the embargo statutes. But the ship and its cargo were not forfeited, nor would other penalties attach, unless the U.S. Attorney for the district brought an action against the vessel or the owner and prevailed on the merits. The judgment in that action would determine, at least implicitly, whether the official detention or seizure had been proper.”); *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.”).

¹⁰³ White, *supra* note __, at 205 (quoting letter).

¹⁰⁴ The *Federalist* No. 78 (Hamilton).

¹⁰⁵ 39 U.S. (14 Pet.) 497 (1840).

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first point, Chief Justice Taney wrote: “The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act.”¹⁰⁶ But in a traditional non-*mandamus* case “which involved the construction of any of these laws,” 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 judges’ “duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them.”¹⁰⁷ 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, “it 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.”¹⁰⁸

In short, the President and other executive officers have, and always have had, an incidental power, indeed 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.¹⁰⁹

B. The Executive’s Specification Power

Since the beginning of the Republic, the executive has exercised another power, one distinct in kind from the incidental executive power of interpretation. This power has been referred to with different terminology over the last two and a quarter centuries. Jack Goldsmith and John Manning have recently suggested the existence of a power similar to what is contemplated

¹⁰⁶ *Id.* at 515.

¹⁰⁷ *Id.* This element of the case is discussed in Bamzai, *supra* note __, at 951. 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 __.

¹⁰⁸ 40 U.S. (15 Pet.) 141, 162 (1841).

¹⁰⁹ The separation of powers scholar M.J.C. Vile elegantly puts 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 __ (3d ed. __). [p. 328 in 1960s edition].

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here, and referred to it as the President’s “completion power.”¹¹⁰ 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.”¹¹¹ This is the power that administrators exercise when the statutory requirements are clear, but simply do not specify a course of action.¹¹²

1. Early examples

The instances of this power’s exercise in the early years of the Republic are legion, and few raised any controversy whatever. The first collection act of 1789 directed only that shipowners keep manifests of their goods.¹¹³ 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 in the course of business” at the Treasury, which included the precise form to be used for the manifest of imported goods and merchandise by shipowners,¹¹⁴ the precise form of the certification of the manifests to be made by customs officials,¹¹⁵ the form to be used to report on spirits brought by the vessel,¹¹⁶ and many other details of administration. Congress subsequently adopted these procedures in the collection act of 1799.¹¹⁷

In 1798, Congress enacted an act “to provide for the valuation of Lands and Dwelling-Houses, and the enumeration of Slaves within the United States.”¹¹⁸ This statute granted significant discretion to the executive branch to fill in statutory details. The statute assigned existing counties into 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.”¹¹⁹ It provided that the first meeting of

¹¹⁰ Goldsmith & Manning, *supra* note __.

¹¹¹ FRANK GOODNOW, *POLITICS AND ADMINISTRATION* 17 (1900).

¹¹² 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 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.

¹¹³ White, *supra* note __, at 206 (explaining that Hamilton first devised these procedures); *see also* 1 Stat. 29 (July 31, 1789), §§ 4, 10.

¹¹⁴ 1 Stat. 627, § 23.

¹¹⁵ *Id.* § 25.

¹¹⁶ *Id.* § 30.

¹¹⁷ White, at 206 (citing 1 Stat. 627 (March 2, 1799)).

¹¹⁸ 1 Stat. 580 (July 9, 1798).

¹¹⁹ *Id.* § 1.

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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.”¹²⁰ The commissioners were empowered “to divide their respective states into a suitable and convenient number of assessment districts,” 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.¹²¹ 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 value and enumerate houses, lands, and slaves, according to the principles established by Congress.¹²²

Even where a statute was entirely silent the executive sometimes filled in details as 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.¹²³ “They performed an essential function without whose aid,” wrote Leonard White, “the Treasury system would have broken down.”¹²⁴ In another entertaining example, Congress directed that surveyors mark the corners of townships with trees; but “nature was not so kind,” and subsequent regulations permitted the use of stones.¹²⁵

Jerry Mashaw has detailed numerous statutes, some only a single line long, granting tremendous discretion to administrative agencies to fill in statutory details.¹²⁶ 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

¹²⁰ *Id.* § 4.

¹²¹ *Id.* § 7.

¹²² *Id.* § 8.

¹²³ White, *supra* note ___, at 340-41.

¹²⁴ *Id.* at 340.

¹²⁵ JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 126 (2012).

¹²⁶ 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.” JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 46 (2012). Mashaw discusses several other examples. *Id.* at 47 (“The statute authorizing the Bank provided a charter and specified the total capitalization of the enterprise. It also provided voting rules for stockholders, limits on total debt and the amount of interest to be charged, and a limit on the subscription to be made to the Bank by the federal government. But 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 (registers and receivers of land offices could make corrections so long as buyers provided “testimony satisfactory to the register and receive of public moneys”); *id.* at 192 (steamboat inspectors “authorized to adopt any means they thought necessary to test the sufficient of a steamboat or its equipment”).

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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.”¹²⁷ President Washington’s regulations stated that the sums owed were to be paid in “two equal payments,” the first on March 5, 1789, and the second on June 5, 1789; 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.¹²⁸

This is a particularly clear example of the President exercising a power not of interpretation, but of specification. The regulation that the payments were to be made in two equal payments one month apart was, to be sure, a reasonable *interpretation* of the statute, which required the payments to be made within one year. Yet the President could have chosen any number of other options—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 President’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.¹²⁹ 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.¹³⁰ 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.¹³¹

¹²⁷ Act of July 16, 1790, 1 Stat. 129.

¹²⁸ These regulations are preserved in the Library of Congress, and can be viewed at <https://www.loc.gov/resource/rbpe.21201200/?st=text>.

¹²⁹ Goldsmith & Manning, *supra* note __, at 2282-87; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹³⁰ Goldsmith & Manning, *supra* note __, at 2283; *Youngstown*, 343 U.S. at __.

¹³¹ 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)

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Goldsmith and Manning argue that Chief Justice Vinson’s dissent may have had the better framework. 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 from executing the laws.”¹³² 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.”¹³³ 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.”¹³⁴

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[.]”¹³⁵ This analysis requires a slight 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*.¹³⁶

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 a statutory silence, the executive has a power to

“[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 636-38 (Jackson, J., concurring). For a recent and intriguing rejection of this framework, see Michael McConnell, *The President Who Would Not Be King* __ (manuscript on file with author).

¹³² *Id.* at 701-02 (Vinson, C.J., dissenting).

¹³³ *Id.* at 700.

¹³⁴ Goldsmith & Manning, *supra* note __, at 2285.

¹³⁵ Goldsmith & Manning, *supra* note __, at 2308.

¹³⁶ *See, e.g., 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.”).

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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 President's exercise of interpretive power, but rather the scope and breadth of the gap left by the statute as determined by the interpretation power. Beyond the limit imposed by the interpretation power, the only other limit is the nondelegation doctrine: the point at which the gap the executive is seeking to fill is simply too big.

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. I have settled upon 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, i.e. whether pizza even falls within the scope of the permissible options.

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 it's been determined 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

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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 is deficient in two respects. 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 with judicial deference to agency interpretations of law.¹³⁷ Second, their argument in favor of the completion power rests largely on Chief Justice Vinson’s dissent in *Youngstown*, and they give only cursory analysis to the Constitution’s text and structure.¹³⁸ This Part supplies the constitutional argument from the text and structure of both the legislative power and executive power provisions of the Constitution.

In brief, Chief Justice John Marshall noted long ago that Congress may in fact delegate some of its policymaking authority to the other two branches of government so long as the authority in question is not of an “exclusively legislative” nature. The specification power might simply be an exercise of what we might call “nonexclusive legislative power,” a power partly but not wholly legislative and which Congress may but need not exercise itself.

Second, the specification power may follow independently from both the Take Care Clause and the Vesting Clause. If gaps by definition must be filled in order to execute the law, then the President has a duty to exercise the specification power to ensure the faithful execution of the laws. Moreover, the prevailing formalist account of executive power maintains that all such power is vested in the President, except where limited by the Constitution’s text. If the specification power is a historically executive power—and I argue below that it was—then it may be vested in the President by virtue of the Vesting Clause because it is not elsewhere limited in the Constitution. The evidence advanced here supports a formalist or originalist argument in favor of the specification power, and thus in favor of 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.¹³⁹

¹³⁷ “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.” Goldsmith & Manning, *supra* note ___, at 2299

¹³⁸ 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. 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.

¹³⁹ 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

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A. Nonexclusive Legislative Power

Wayman v. Southard,¹⁴⁰ the Court's first major nondelegation case,¹⁴¹ 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 federal court proceedings in those states.¹⁴² The statute included a proviso: subject to the rules and regulations prescribed by the federal courts.¹⁴³ The nondelegation question in *Wayman* (which the Court did not even need to decide¹⁴⁴) was whether this proviso was an unconstitutional delegation of legislative power to the courts.

constitutional text, history, and structure, on legal and political precedent, or on practical consequences, without necessarily privileging any one in particular").

¹⁴⁰ 23 U.S. 1 (1825).

¹⁴¹ An earlier case, *The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813), in which the Court upheld Congress's conditioning of the existence of an embargo on a presidential finding of non-neutrality among foreign states, *id.* at 388, is also taken as a nondelegation case. It is not particularly controversial, however, and the Court did not give any sustained treatment to a nondelegation principle.

¹⁴² The statute enacted "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." 23 U.S. at 31; Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276. The statute referred to 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 in the Supreme Courts of the same." 23 U.S. at 26-27; Act of Sept. 29, 1789, ch. 21, § 2, 1 stat 93, 93.

¹⁴³ ". . . 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." 23 U.S. at 31.

¹⁴⁴ *Id.* at 48-49 ("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.").

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The plaintiff in *Wayman* had sought an execution of judgment against the defendant in hard currency.¹⁴⁵ The defendant sought the application of a 1792 Kentucky law providing that a plaintiff must accept state paper currency in satisfaction of a judgment.¹⁴⁶ 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.¹⁴⁷ 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 intended for it to reach outside the courtroom to the manner in which a judgment was executed.¹⁴⁸ 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.¹⁴⁹

The Court, however, rejected this argument, holding that the law did in fact reach to matters outside of courtroom procedures to all “proceedings at common law,” including execution of judgments.¹⁵⁰ 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.”¹⁵¹ 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.”¹⁵² Yet it also “will not be contended” that “mak[ing] rules, directing the returning of writs and processes,

¹⁴⁵ 23 U.S. at 1.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 32, 41.

¹⁴⁸ *Id.* at 13-17, 42.

¹⁴⁹ 23 U.S. at *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.” 23 U.S. 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 __, at __. That may be correct, and for present purposes it does not matter whether Marshall’s dictum in this respect is correct.

¹⁵⁰ *Id.* at 42-43.

¹⁵¹ *Id.* at 42-43.

¹⁵² *Id.* at 43.

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the filing of declarations and other pleadings, and other things of the same description, . . . may not be conferred on the judicial department.”¹⁵³

“The line has not been exactly drawn,” 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*.”¹⁵⁴ 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.

Marshall then assessed whether the power delegated by the proviso was an impermissible delegation, i.e., fell within the class of powers that was “exclusively legislative.” He observed that it 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.¹⁵⁵ 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.¹⁵⁶

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 source is the Take Care Clause; the second, the Vesting Clause.

¹⁵³ *Id.*

¹⁵⁴ *Id.* (emphasis added).

¹⁵⁵ 23 U.S. at 44-46.

¹⁵⁶ This view is also consistent with Marshall’s analysis in *Marbury*, where he argued that where a statute (or the Constitution) gives the President discretion to act, such discretion was generally not examinable; only where a statute gives more specific instructions are the President’s actions pursuant to such statute examinable by the courts. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) (“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.”).

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A specification power likely inheres in the President's duty to take care that the laws be faithfully executed. If Congress left a detail to be specified, even if Congress did not know it had left out a necessary detail and even if Congress did not explicitly grant the executive the power to make regulations, how is the President 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 President was required to regulate "stationary sources." To execute this instruction, the President had to decide what to consider as a stationary source when more than one of the statutory definitions applied. 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, Marshall remarked:

The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.¹⁵⁷

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."¹⁵⁸

The Vesting Clause is also a likely source of the specification power. There is, to be sure, a debate in the executive power literature over the structure of Article II. Michael McConnell reflects and refines the prevailing formalist account in a recent study that shows how all historically executive powers are likely vested in the President, subject to express limitations

¹⁵⁷ 10 Annals of Congress 596, 613—614 (1800), *quoted in Youngstown*, 343 U.S. at 684 (Vinson, C.J., dissenting).

¹⁵⁸ *Youngstown*, 343 U.S. at 700 (Vinson, C.J., dissenting).

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elsewhere in the text.¹⁵⁹ The Vesting Clause vests the President with all the executive powers,¹⁶⁰ but the various executive-prerogative powers listed in Blackstone were then distributed across the national government.¹⁶¹ For example, the Constitution grants Congress the historically prerogative powers over war and peace, letters of marque and reprisal, and coining money (among other such powers);¹⁶² it grants the Senate a say in the appointment and treaty powers;¹⁶³ and it grants courts equity jurisdiction.¹⁶⁴ If the specification power is a prerogative power not limited elsewhere in the text, then it is vested in the President.¹⁶⁵

The executive in Britain was historically understood to have a kind of specification power. Both Locke and 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:

For the Legislators not being able to foresee, and provide, by Laws, for all, that may be useful to the Community, the Executor of the Laws, having the power in his hands, has by the common Law of Nature, a right to make use of it, for the good of the Society, in many Cases, where the municipal Law has given no direction, till the Legislative can conveniently be Assembled to provide for it.¹⁶⁶

¹⁵⁹ Michael McConnell, paper at ____.

¹⁶⁰ 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”).

¹⁶¹ See, e.g., McConnell, paper at 55-58. McConnell writes that William Crosskey “was the first to notice that the enumeration of powers by the Committee of Detail was as much about legislative-executive separation of powers as it was about federalism.” Paper at 35 n.160; see also WILLIAM W. CROSSKEY, 1 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, __ (Chapter XV) (date).

¹⁶² U.S. CONST. Art. I, § 8.

¹⁶³ *Id.* at Art. II, § 2.

¹⁶⁴ *Id.* at Art. III, § 2.

¹⁶⁵ Congress in the “Decision of 1789” seems to have adopted this view of Article II. See, e.g., 1 Annals of Cong. 463 (Joseph Gales, ed. 1790) (James Madison) (“The 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.”); *id.* at 496 (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.”).

¹⁶⁶ JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 159, in LOCKE, TWO TREATISES OF GOVERNMENT 374 (Peter Laslett ed. 1960) (1714).

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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.”¹⁶⁷ 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.” 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.”¹⁶⁸

Blackstone, whose work heavily influenced the Founders,¹⁶⁹ 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.”¹⁷⁰ Therefore, the executive’s edicts or proclamations on these points (its rules 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.”¹⁷¹ 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 President because such a power is not otherwise limited by the constitutional text.

The precise scope of the prerogative specification power, however, 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 “time, manner, and circumstance” 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 even 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

¹⁶⁷ *Id.* § 160.

¹⁶⁸ *Id.* § 164.

¹⁶⁹ **Cite.**

¹⁷⁰ 1 WILLIAM BLACKSTONE, COMMENTARIES, at *270 (1765).

¹⁷¹ *Id.*

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specification power rooted in the executive power clauses 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. And in neither case does its exercise amount to interpretation.

IV. IMPLICATIONS

This Part revisits the debates with which this Article began, and shows how they can now be advanced or at least clarified. It shows how the Court in *Chevron* conflated these two powers and that although some of the Court's rationales are unsupportable, others 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 the executive interpretation and specification powers 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 (and within the limits of the nondelegation doctrine).

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. It “remains necessary to identify a legal justification for the categorical presumption that, *Marbury* and the APA notwithstanding, Congress would prefer agencies rather than courts to have binding authority to resolve residual ambiguities.” Their view is that “the best explanation for this 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.”¹⁷² 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. In fact, it would not even be appropriate to call it “deference,” because judges would

¹⁷² *Id.* at 2301.

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simply have no authority in this domain except to ensure that the agency stays within the limits of the gap created by the statute.

Moreover, Goldsmith and Manning treat “resolv[ing] residual ambiguities” as tantamount to the completion power, as they do elsewhere.¹⁷³ Others have similarly argued that resolving statutory ambiguities should be *treated* as an exercise of policymaking rather than interpretation.¹⁷⁴ 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.

But 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”¹⁷⁵—and, as explained here, ambiguity is often conflated with other concepts such as gaps or silences¹⁷⁶—at a minimum ambiguity entails the proposition that a particular linguistic command is susceptible to more than one *meaning* in a

¹⁷³ 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.” Goldsmith & Manning, *supra* note __, at 2299.

¹⁷⁴ See *supra* note __ and accompanying text. (Siegel et al)

¹⁷⁵ See, e.g., Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry Into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257 (2010) (identifying at least two different types of ambiguity, viz. ambiguity based on external judgment of the ordinary reader or internal judgment of the particular interpreter); Brian Slocum

¹⁷⁶ 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 __, 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 __. However, we might note right away that if that is the case, it’s unclear what’s 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 transference 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.

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particular context.¹⁷⁷ And ascertaining the legal effect of statutes in light of ambiguous meaning has always been understood to be a judicial task.¹⁷⁸ 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.¹⁷⁹

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,”¹⁸⁰ that proposition need no longer be objectionable to *Chevron* 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 interpretations of law, while recognizing that courts have a limited role in policing the outer boundaries of the executive’s specification power.

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 the specification power, 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 might be insulated from the political accountability that forms so core a rationale for *Chevron* deference. Yet these judges might use all their reasoning and legal resources and they might conclude that the statute

¹⁷⁷ 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.” (emphasis in original)); Farnsworth, *supra* note ___, at 258 (in the case of external judgment the question is whether ordinary interpreters can “disagree about [a provision’s] meaning,” and in the case of internal judgment the question is whether “the reader is unsure how best to read the text”).

¹⁷⁸ See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *59-*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 *context*,” and also from the “*subject-matter*” of the statute and the “*effects* and *consequence*” of the signification of the words (emphasis in original)).

¹⁷⁹ See Part II.C.3 *supra*.

¹⁸⁰ Bednar & Hickman, *supra* note ___, at 1398.

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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.

2. Revisiting *Chevron* and its predecessors

Re-reading *Chevron* in light of the above analysis reveals that the Court in that seminal case also conflated the interpretation and specification powers. *Chevron* involved the decision of the 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).¹⁸¹ The importance of the bubble policy was that it 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.¹⁸² Put simply, the Act’s statutory definition plausibly could refer either to any individual installation within a plant, or to the plant as a whole. The Act defined stationary source as “any building, structure, facility, or installation” which emits air pollution.¹⁸³

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.”¹⁸⁴ The Court, in other words, assumed the agency’s exercise of power was one over 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.”¹⁸⁵

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.”¹⁸⁶ 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 “in

¹⁸¹ 467 U.S. 837, 840, 859-62.

¹⁸² *Id.* at 853-55.

¹⁸³ *Id.* at 860 (quoting 42 U.S.C. § 111(a)(3)).

¹⁸⁴ *Id.* at 844.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 843-44 (quoting *Morton v. Ruiz*, 415 U. S. 199, 415 U. S. 231 (1974)).

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such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”¹⁸⁷ Thus, the Court held that the EPA’s choice was “a permissible construction of the statute.”¹⁸⁸

Properly understood, the Court in *Chevron* was not concerned with the interpretation power. The statute seemed to call rather for an exercise of the specification power. 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, i.e., 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 are. 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 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 the specification power and not the interpretation power. In *NLRB v. Hearst Publications*,¹⁸⁹ for example, which is often considered to be a predecessor to *Chevron* deference,¹⁹⁰ 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.”¹⁹¹ This was crucial: courts historically had not only an interpretation power, but a common-law lawmaking function akin to the specification power. It is *this* function that the Court appeared willing to give to the administrative agencies, not final authority over the interpretation power. “Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute.”¹⁹² But “where the question is one of specific application of a *broad statutory term* in a proceeding in which the agency administering the statute must determine it initially, the reviewing court’s function is limited.”¹⁹³

¹⁸⁷ *Id.* at 866 (emphasis added).

¹⁸⁸ *Id.*

¹⁸⁹ 322 U.S. 111 (1944).

¹⁹⁰ See, e.g., Bamzai, *supra* note ___, at 918 & n.27; Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 CARDOZO L. REV. 2241, 2243 (2011).

¹⁹¹ 322 U.S. at 120.

¹⁹² *Id.* at 130-31.

¹⁹³ *Id.* at 131 (emphasis added).

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In other words, broad terms call not for the interpretation power, but rather the specification power to fill in the details.¹⁹⁴ That is because the 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 the specification power was historically considered part of the interpretation power. Justice Thomas has argued that if deference is justified on the basis of legislative delegations from Congress, then that, too, violates the Constitution for Article I reasons.¹⁹⁵ 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.¹⁹⁶ *That* much of the legal realist critique formalists really ought to accept. And Congress can, of course, revise the federal common law by legislation, a power it does not have over judicial decisions.¹⁹⁷ If Congress could have obviated the need for this interstitial lawmaking power by legislating in more

¹⁹⁴ 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.

¹⁹⁵ *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring).

¹⁹⁶ *See, e.g., Clearfield Trust 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., Inc. v. FDIC*, 315 U.S. 447, 469-70 (1942) (Jackson, J., concurring) (“The federal courts have no general common law, But this is not to say that, wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone, we may not resort to all of the source materials of the common law or that, when we have fashioned an answer, it does not become a part of the federal nonstatutory or common law. . . . Were we bereft of the common law, our federal system would be impotent. *This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.*” (emphasis added)); *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1841) (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, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case”).

¹⁹⁷ *United States v. Klein*, ___ [full cite].

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detail—and if, as this Article has aimed to show, the executive *also* 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,¹⁹⁸ there are still genuine lines dividing legislative, executive, and judicial powers. Our entire constitutional system depends on there being such boundaries.

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. We can even recognize that the line between interpretation and specification will often be thin, even blurred, but that a distinction nevertheless exists and that it is a matter of discerning whether the judicial act in question falls more in one or the other category. This Article does not seek to resolve the issue of how to differentiate the interpretation power from the specification power in hard cases. But, as explained, it *does* resolve who gets to decide whether a question is an interpretive one or not.¹⁹⁹

Finally, as a historical matter, judges often looked to statutory purposes and policy considerations in arriving at their judgments of what a statute required.²⁰⁰ The distinction between the interpretation and specification powers 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 a specification power best left

¹⁹⁸ 3 Annals 238; *see also id.* at 698-99 (“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.”).

¹⁹⁹ *See supra* notes ___ and accompanying text.

²⁰⁰ Justice Scalia noted this. Scalia, *supra* note ___, at 515 (“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.”).

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to the agency. At least that much is justified by the modern shift from common-law to administrative regulation.²⁰¹

B. Enforcing Nondelegation (As-Applied)

As explained, the specification power is bounded by the interpretation power: 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.²⁰² The idea was to treat each statutory ambiguity the same way *Chevron* does, as an implicit delegation of power 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.²⁰³ 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.²⁰⁴

The distinction between the interpretation and specification powers clarifies this framework, which can replace the *Chevron* framework altogether. When judges are confronted with an ambiguous statute, they must do all the interpretation they can do 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. 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 that are too big, or too important, or that otherwise meet the requirements (whatever they happen to be) for "exclusively legislative power."

²⁰¹ Sunstein, *supra* note ___, at 2591.

²⁰² [Omitted], *As-Applied Nondelegation*, __ TEX. L. REV. __ (2018).

²⁰³ *Id.* at __ - __.

²⁰⁴ *Id.* at __ - __.

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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.²⁰⁵ 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.²⁰⁶ 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 agency has promulgated a legislative rule.²⁰⁷ 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 rulemaking²⁰⁸—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

²⁰⁵ 5 U.S.C. § 553(b); *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111-12 (D.C. Cir. 1993).

²⁰⁶ *Am. Min. Cong.*, 995 F.2d at 1112.

²⁰⁷ *United States v. Mead Corp.*, 533 U.S. 218 (2001).

²⁰⁸ *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

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Chevron's second step?²⁰⁹ 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 its decisions “on a consideration of the relevant factors,”²¹⁰ and the relevant factors are found in the statute, then Step Two and hard-look are identical. Several scholars and courts have therefore concluded that *Chevron*'s second step is tantamount to hard-look review.²¹¹

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 act was 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.²¹²

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 are

²⁰⁹ Hard-look review is sometimes also called *State Farm* review after *Motor Vehicles Manufacturers Association v. State Farm*, 463 U.S. 29 (1983), which is often taken as the origin of hard-look review. *But see also*

²¹⁰ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

²¹¹ *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 ___, 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, 1266-79 (1997) (arguing that the two inquiries overlap).

²¹² *See* 5 U.S.C. § 706(2)(a) (arbitrary and capricious review).

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correct, but likely overblown—at least if what agencies are usually doing is exercising not a power of interpretation, but of specification.