JUSTICE SCALIA AND THE EVOLUTION OF *CHEVRON* DEFERENCE

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At least half of the title of this panel refers to the "evolution of *Chevron* deference."[1] And to have a productive discussion about *Chevron*'s "evolution," it is necessary to begin with a discussion of where the doctrine began—which may naturally raise the question whether there is a connection between the origins and evolution of judicial deference and the justifications for it.

A fair amount of the debate in the three decades since *Chevron* has occurred on a quite different ground: whether the rule announced in the case appropriately strikes the balance between courts and executive agencies.[2] But one way that a historical approach can be relevant is to help us determine whether that balance has already been struck—by Congress or by the Constitution—in the form of some sort of authoritative text or a sufficiently embedded legal practice that rises to the level of authoritativeness.

On the question of *Chevron*, broadly speaking, there are two legal texts on point. First, there is the federal Constitution, specifically the Due Process Clause and Article III's grant of the judicial power to the courts.[3] And second, the Administrative Procedure Act (APA), which was enacted in 1946[4] and which provides that "a reviewing court shall decide all relevant questions of law" and "interpret constitutional and statutory provisions."[5] I will bracket for present purposes the nuance that some other statutory provision, perhaps an organic statute, expressly

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

2. The *Chevron* opinion invites this kind of analysis by articulating several policy-based justifications for the rule it embraces. *See, e.g., id.* at 865 ("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 . . . .").

3. U.S. CONST. art. III; *id.* amend. V.

4. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

5. 5 U.S.C. § 706 (2012).

or impliedly bears on the topic of *Chevron.*

Let us start with the Constitution. In a set of recent opinions, justices on the Supreme Court, including Justice Scalia, argued that *Chevron* deference and its close cousin, *Seminole Rock* deference,[6] raise serious separation-of-powers concerns by precluding judges from using their own independent judgment in deciding legal questions—the kind of independent judgment that is consistent in this view with Article III's institutional role for the federal judiciary.[7] The takeaway is that, writ large, de novo review is mandated and deferential review prohibited by the lodging of the "judicial power" in the federal courts.[8]

So how can we assess this claim? A term like "judicial power" does not just define itself. We must look to historical practices to see precisely what the boundaries of the court system were understood to be at the time that Article III was adopted and perhaps some time shortly thereafter. And there are at least three practices that might cause us to better understand and to qualify the claim that Article III prohibits deferential review. I am going to address these three.

First, for much of the Nation's history, review of certain—but not all—federal action occurred through the use of a writ of mandamus or some other type of extraordinary writ.[9] This is a point that Justice Scalia himself made in his dissent in *United States v. Mead Corporation,*[10] where he said that "[j]udicial control of federal executive officers was principally exercised through the prerogative writ of mandamus," and the "writ generally

6. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

7. *See* Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (arguing that "*Chevron* deference raises serious separation-of-powers questions" by "preclud[ing] judges from exercising [independent] judgment" and "forcing them to abandon what they believe is the best reading of an ambiguous statute in favor of an agency's construction") (quotation marks omitted); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring) ("[The] line of precedents, beginning with [*Seminole Rock*,] requires judges to defer to agency interpretations of regulations. . . . Because this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns."); Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1341 (2013) (Scalia, J., dissenting) ("[T]here is surely no congressional implication that the agency can resolve ambiguities in its own regulations. For that would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands.").

8. *See Perez*, 135 S. Ct. at 1217–18 (Thomas, J., concurring) (observing that, contra *Seminole Rock*, "the judicial power . . . requires a court to exercise its independent judgment in interpreting and expounding the laws").

9. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation,* 126 YALE L.J. 908, 947–58 (2017).

10. 533 U.S. 218 (2001).

would not issue unless the executive officer was acting plainly beyond the scope of his authority."[11]

In other words, as we know from appellate practice today, the writ of mandamus carries with it a deferential standard of review.[12] And similarly, as articulated in a series of nineteenth-century cases, to obtain a writ of mandamus against a federal officer, you had to show that the officer had violated a "ministerial" duty. That actually comes from part of Chief Justice Marshall's discussion in *Marbury v. Madison.*[13] And in an 1840 opinion, *Decatur v. Paulding,*[14] the Court held that this standard confers interpretive discretion on executive officers—so the act of interpreting a statute itself was non-ministerial and hence not reviewable by mandamus.[15]

This history suggests the following: At least for the kinds of claims that were brought through a writ of mandamus during the nineteenth century, deferential review is constitutionally permissible.[16] Here is a counterfactual to test the thesis. Let us say that Congress created a statutory scheme, with review of government action only by writ of mandamus, and with respect to a kind of claim historically reviewable by mandamus. Would that scheme be constitutional? Would it carry a deferential standard of review? As an initial matter, let me suggest that the answers are "yes" and "yes," if you agree that mandamus comes with a deferential standard of review for legal questions and you agree that the nation's historical practice of mandamus review colors the meaning of the "judicial power."

But, by contrast, review in the early republic was not always conducted through the writ of mandamus, with the other avenue typically being common law causes of action.[17] And it could be

11. *Id.* at 242 (Scalia, J., dissenting) (citation omitted).

12. *See id.* at 243 (Scalia, J., dissenting) (observing that, in the context of the issuance of writs of mandamus, "[s]tatutory ambiguities . . . were left to reasonable resolution by the Executive").

13. *See* 5 U.S. (1 Cranch) 137, 149–50 (1803) ("It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer having public duties to perform, should be above the compulsion of law *in the exercise of those duties.*" (emphasis added)); *see* Aditya Bamzai, Marbury v. Madison *and the Concept of Judicial Deference,* 81 MO. L. REV. 1057, 1071–73 (2016).

14. 39 U.S. (14 Pet.) 497 (1840).

15. *Id.* at 514–15.

16. *Id.* at 516; *Marbury,* 5 U.S. (1 Cranch) at 150.

17. *See* Bamzai, *supra* note 9, at 947–58; LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 327–28 (1965) (noting that, in addition to the use of prerogative writs, nineteenth-century courts acontrolled administrative officers and their actions "by permitting common law actions against officers alleged to have exceeded their authority").

argued that Article III *does* mandate de novo review for the kinds of claims brought via common law, rather than mandamus, during the nineteenth century. And so that is the first nuance, and it connects the standard of review to the type of claim brought.

Second, there is a form of deference that is built into the structure of interpretation itself. I think the best way I can make this point is by analogy to a case from the realm of constitutional interpretation. In the recent recess-appointments case, *NLRB v. Noel Canning*[18]—there are many other examples—Justice Breyer's opinion cites three opinions of the United States Attorney General from 1868 in the course of interpreting the Recess Appointments Clause.[19] The obvious reason for doing so is that under appropriate circumstances the Court "respects" or "defers" to certain persuasive executive-branch sources that are either roughly contemporaneous with the enactment of a constitutional provision or provide evidence of a customary practice that is developed under that provision.[20] In other words, de novo constitutional review itself contains a form of what we might call deference to customary and contemporaneous practices.

And so, this is the second nuance: executive-branch interpretations can be used to construe the terms of the federal Constitution itself under appropriate circumstances. But notice the wrinkle. Justice Breyer invokes the customary executive-branch interpretations to reject a present-day executive-branch interpretation.[21] *Chevron*, as later elaborated in cases like *Brand X*,[22] allows the executive branch to change its interpretation of a legal text based on changing circumstances.[23]

In fact, if you look at *Chevron* itself, you will find that the opinion cites a number of cases dating back to the Marshall Court era as support for the rule that the Court announces.[24] The earliest one of these is an 1827 opinion, *Edwards' Lessee v. Darby*,[25] which

18. 134 S. Ct. 2550 (2014).

19. *Id.* at 2562 (citing 12 Op. Att'y Gen. 449 (1868); 12 Op. Att'y Gen. 455 (1868); 12 Op. Att'y Gen. 469 (1868)).

20. *See, e.g.*, Myers v. United States, 272 U.S. 52, 175 (1926) ("a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions").

21. *See Noel Canning*, 134 S. Ct. at 2562–63.

22. Nat'l Cable & Telecomm. v. Brand X Internet Servs., 545 U.S. 967 (2005).

23. *See id.* at 1001 ("[T]he Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change.").

24. *Chevron*, 467 U.S. at 844 n.14.

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

says that when construing an ambiguous law "the contemporaneous construction of those . . . called upon to act under the law . . . is entitled to very great respect."[26] This is Justice Breyer's point from the recess-appointments case applied in the statutory context. Deference to customary understanding—contemporaneous understanding—settled the meaning of text over time.[27] The *Chevron* opinion and later *Chevron* doctrine simply misunderstands what these cases were actually about. The bottom line is that, on the plane of interpretive theory, there was and there is an interpretive rule of "deference," you might call it, but a rule of deference to customary practice and contemporaneous evidence, rather than a rule of deference to executive expertise allowing for executive flexibility that we are more familiar with today. The statutory cases cited in *Chevron*, as I mentioned above, are just an application of this generalized approach.[28]

Third, the Court has long applied a form of deference—sometimes under the rubric of the political-question doctrine—in certain substantive areas, most notably foreign affairs and national security. So, in cases like *Curtiss-Wright*,[29] a 1936 case, or *Department of Navy v. Egan*,[30] a more recent opinion, the Court has explained that "congressional legislation . . . within the international field must often accord to the President a degree of

26. *Id.* at 210.

27. *See Noel Canning*, 134 S. Ct. at 2560 ("[T]his Court has treated practice as an important interpretive factor . . . .").

28. Indeed, as I have previously explained, there is good reason to believe that the Court's 1945 opinion in *Seminole Rock* was also an application of this generalized interpretive approach. *See* Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the* Seminole Rock *Opinion*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 12, 2016), http://yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai [https://perma.cc/D8BS-T2S4]. Justice Murphy's initial draft of the *Seminole Rock* opinion relied on the "meaning that an administrative agency *intended* to attach to one of its regulations," thereby suggesting that the contemporaneous intention of the legal text's author was the relevant criterion for interpreting ambiguous language. *Id.* (emphasis added). That language was edited—and dropped—during the opinion-drafting process for reasons that appear to be inadvertent. *See id.* Moreover, the brief for the Federal Government—which was filed by Professor Henry Hart, who argued the case while on leave from the Harvard Law School faculty—argued for deference on these grounds. *See* Brief for the United States at 20, Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) (No. 914) (arguing that "[t]he weight to be given to [the agency's] construction of [its] own regulations should obviously be much greater" than for the interpretation of a statute, "for then [it] is explaining [its] own intention, not that of Congress"). "The court's sole function," the brief argued, "was to interpret the regulation—that is, to give it the meaning which the Administrator intended it to have"—with "the ultimate criterion [being] the intention of the writer of the document." *Id.* at 21–22.

29. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

30. Dep't of the Navy v. Egan, 484 U.S. 518 (1988).

discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved,"[31] and that "unless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[32] These cases rely on precedents dating all the way back into the early nineteenth century about deference in the context of national security or in foreign affairs.[33]

That suggests that the argument that Article III prohibits deferential review needs to be qualified with the recognition that in certain substantive areas deferential review has historically been viewed as constitutionally permissible.

I mentioned at the start that two legal texts are relevant to the question posed by *Chevron*. It is time to turn to the second: the text of the APA. In a nutshell, that text says that a "reviewing court shall decide all relevant questions of law" and "interpret constitutional and statutory provisions."[34] And, as the face of the text indicates, the most plausible interpretation of the APA is that it seeks to equate the interpretive approach for the federal Constitution and the interpretive approach to statutes. And what that means is that the APA seeks, broadly speaking, to establish de novo review coupled with what we might call "deference" to contemporaneous and customary interpretations, as in the recess-appointments case.[35]

Consider two pieces of evidence on the point. First, the text of the statute itself says that courts must "interpret constitutional and statutory provisions," so there is a parallelism there.[36] What that suggests is that statutory and constitutional interpretation should be conducted more or less in the same general manner. Second, if you look at the statutory history of this part of the APA, in enacting the judicial-review provision, Congress took as

31. *Curtiss-Wright*, 299 U.S. at 320.

32. *Egan*, 484 U.S. at 530.

33. *See Curtiss-Wright*, 299 U.S. at 319 ("In this vast external realm [of foreign affairs] . . . the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates.") (citing 6 ANNALS OF CONGRESS 613; 6 COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 1789–1901, at 21 (1901)); *see also* Bamzai, *supra* note 13, at 1066–17.

34. 5 U.S.C. §706.

35. *See Noel Canning*, 134 S. Ct. at 2553–54 (retracing historical interpretations of the Recess Appointments Clause and using those customs to determine the meaning of the term "recess").

36. 5 U.S.C. §706.

the baseline a pre-existing proposed bill, with a single, glaring alteration.[37] Congress removed a proviso that would have required a reviewing court to give "due weight" to agency "technical competence" and "specialized knowledge."[38] This was a proviso removed by the 1946 Congress.[39]

There is a lot to be said about the statutory and case-law developments that led to the APA's adoption. But rather than discuss that in detail, let me step back and make a larger conceptual point. One of the important justifications for the rule announced in *Chevron* is that, notwithstanding any subsequent caveats and qualifications, at least it sets forth a legal standard of greater rule-like simplicity than the alternative.[40] Take a broader view about interpretation generally, comparing statutory interpretation to constitutional interpretation or even contract interpretation, where we have the analogues to contemporaneous and customary practice in the parol-evidence rule or course of conduct. What *Chevron* does is it introduces a complication by suggesting that the interpretation of some public legal documents, namely statutory legal text, ought to be done differently than the interpretation of other legal text and other public legal documents, like contracts or like the Constitution. And the question I will leave everyone with is this: Should we have one standard of review for public documents—the Constitution, statutes, and regulations—generally, or should we have different doctrines for each kind of legal text?

37. *See* Bamzai, *supra* note 9, at 985–90 (detailing the statutory history of section 706 of the APA).

38. *See id.*; *see also* John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broad Judicial Review*, 33 A.B.A. J. 434, 517–18 n.40 (1947).

39. *Id.*

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