ESSAY

Chevron Is a Phoenix

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Judicial deference to agency interpretations of their own statutes is a foundational principle of the administrative state. It recognizes that Congress has the need and desire to delegate the details of regulatory policy to agencies rather than specify those details or default to judicial determinations. It also recognizes that interpretation under regulatory statutes is intertwined with implementation of those statutes. Prior to the famous decision in Chevron, *the Supreme Court had long regarded judicial deference as a foundational principle of administrative law. It grew up with the administrative state alongside other foundational administrative law principles. In* Chevron, *the Court gave judicial deference a particular articulation and set of express justifications that made the principle seem new and bold—and ultimately set it on a path to become convoluted and vulnerable. But judicial deference is no less a foundational principle because* Chevron *took on a life of its own. And foundational principles—particularly those that help to maintain balance among the branches—do not simply go away. They change and reappear in the law. The Court can try to kill* Chevron, *but judicial deference will find its way back to administrative law.*

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INTRODUCTION

Whether or not the Supreme Court overrules *Chevron*,[1] judicial deference to administrative agencies will persist in roughly the same form. Some current Supreme Court Justices want to overrule *Chevron*.[2] While *Chevron* has its problems, overruling the decision, we believe, will have little effect on the deference courts give to agencies for interpretations of their own statutes. Judicial deference is a foundational principle of administrative law. Perhaps more importantly, judicial deference is a foundational principle of the administrative state. Such foundational principles establish the balance of the branches in our governmental system and, as experience shows, are difficult to dislodge. When one doctrine becomes unavailable to maintain the equilibrium, another doctrine often arises to do the work.[3] Because the Court created *Chevron*, logic says that the Court can take it away. But judicial deference has the resilience of any foundational principle of law in this area, whether administrative or constitutional. Judicial deference will find its way back. The only question is how. The Court can try to kill *Chevron*, but it will rise from the ashes like a phoenix.[4]

I. *CHEVRON*'S ORIGINS

The Court has long regarded judicial deference to agency interpretations as a foundational principle of administrative law,

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

2. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2432 (2019) (Gorsuch, J., joined by Thomas, Alito & Kavanaugh, JJ., dissenting) (The APA's "unqualified command requires the court to determine legal questions—including questions about a regulation's meaning—by its own lights, not by those of political appointees or bureaucrats who may even be self-interested litigants in the case at hand."); Michigan v. EPA, 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring) (arguing that *Chevron* undermines Article III by transferring interpretive authority from courts to agencies and also violates Article I by requiring courts to ignore unconstitutional delegations of lawmaking power from Congress to agencies); *see also* Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative State*, 10 N.Y.U. J.L. & LIBERTY 475, 498 (2016) ("*Chevron* deference transfers the judicial function to executive agencies based upon false premises about congressional intent."); Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1206 (2016) ("[W]hen judges acquiesce in *Chevron* deference, they unconstitutionally abandon their very office as judges.").

3. Gundy v. United States, 139 S. Ct. 2116, 2141 (Gorsuch, J., dissenting) ("When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines."), *reh'g denied*, 140 S. Ct. 570 (2019).

4. *Phoenix*, OXFORD ENGLISH DICTIONARY (2d ed. 1989):

> In classical mythology: a bird resembling an eagle but with sumptuous red and gold plumage, which was said to live for five or six hundred years in the deserts of Arabia, before burning itself to ashes on a funeral pyre ignited by the sun and fanned by its own wings, only to rise from its ashes with renewed youth to live through another such cycle.

developing it in much the same way and at much the same time as other foundational principles that developed along with the administrative state. *Chevron* obscured these roots by expressing judicial deference in its own terms—and in so doing, set itself on a trajectory that ended up jeopardizing its own existence. Briefly retracing the history of judicial deference in administrative law highlights how deeply the principle is entrenched there, independent from the articulation in—and the ultimate fate of—the *Chevron* decision itself.

The doctrine that a reviewing court must leave interpretive judgments to the agency appeared well before *Chevron*, and well before the enactment of the Administrative Procedure Act ("APA"). *Skidmore v. Swift & Co.* illustrates this point.[5] *Skidmore* is known for the proposition that courts must give agency interpretations persuasive but not controlling weight in their own judicial interpretations.[6] But what prompted the Court to articulate this standard of judicial review was that the conventional standard—the one that would eventually find its way to *Chevron*—was not applicable. The Court was in need of a framework for determining the weight of an agency's views when Congress had *not* granted the agency power to engage in lawmaking. The Court, explaining the circumstances it confronted in *Skidmore*, wrote: "Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act."[7] The Court dwelt on this contrast: "The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not . . . conclusive, even in the cases with which they directly deal . . . ."[8] The Court made clear that this would have been a different case if the Administrator had been granted power to reach conclusions by adversarial hearing. In that case, the Administrator's judgments would be "conclusive," that is, "controlling upon the courts by reason of their authority."[9]

As famous as *Skidmore* has become by virtue of its persuasive-but-not-controlling-weight standard, a less-known case decided shortly before makes the existence of the controlling deference standard even

5. 323 U.S. 134 (1944).

6. *Id.* at 140 ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

7. *Id.* at 137.

8. *Id.* at 139.

9. *Id.* at 139–40.

more evident. *Federal Communications Commission v. Pottsville Broadcasting Co.* affirms the idea that courts charged with judicial review will treat an agency's interpretation as conclusive unless the agency makes an error of law.[10] *Pottsville Broadcasting* does so by sharply distinguishing the two ways in which Congress has used courts in review of agency action. On the one hand, Congress has on occasion vested the courts of appeals with the power to "alter or revise" an agency decision "and enter such judgment as to it may seem just."[11] In such a circumstance, Congress vested the court with "administrative rather than judicial" power, so that the court constituted "a superior and revising agency in the same field."[12] Relevant to the case, when Congress enacted the Radio Act of 1927, it placed the courts of appeals in that "administrative" role for review of licensing decisions by the Federal Communications Commission.[13] On the other hand, and more typically, Congress restricts courts to the role of "purely judicial review."[14] When Congress revised the Radio Act of 1927, it moved to this model.[15] The role of "purely judicial review" confined courts to decide only questions familiar to them:

> Whether the [C]ommission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the [C]ommission and govern its action, are appropriate questions for judicial decision.[16]

Subject to review of such "errors of law," enforcing "the legislative policy is committed to [the agency's] charge."[17]

In view of this form of judicial review, the *Pottsville Broadcasting* Court concluded that the order in which license applications are reviewed—a question of statutory interpretation to

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10. 309 U.S. 134, 145 (1940).

11. *Id.* at 144 (quoting the Radio Act of 1927, ch. 169, § 16, 44 Stat. 1169 (amended 1930) (repealed 1934)).

12. *Id.* (quoting Fed. Radio Comm'n v. Gen. Elec. Co., 281 U.S. 464, 467 (1930)).

13. *See id.*

> Under the Radio Act of 1927 as originally passed, the Court of Appeals was authorized in reviewing action of the Radio Commission to "alter or revise the decision appealed from and enter such judgment as to it may seem just." Thereby the Court of Appeals was constituted "a superior and revising agency in the same field" as that in which the Radio Commission acted.

(citation omitted).

14. *Id.*

15. *Id.* (citing the Radio Act of 1927, ch. 788, § 16, 46 Stat. 844 (repealed 1934)).

16. *Id.* at 144–45 (quoting Fed. Radio Comm'n v. Nelson Brothers Bond & Mortg. Co., 289 U.S. 266, 276 (1933)).

17. *Id.* at 145.

which Congress had not spoken—was not for the Court to decide.[18] "The Court of Appeals cannot write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors . . . ."[19] Rather, the agency was to decide whether such a priority rule would serve the statutory standard of "public convenience, interest, or necessity" that applied to licensing decisions, which was the agency's "responsibility at all times."[20] *Pottsville Broadcasting* thus reflects the same fundamental allocation of lawmaking authority reported in *Skidmore*: when the agency had been delegated authority either to conduct adjudications or make rules, its determinations, even those involving interpretive judgments, were entitled to controlling weight or "leeway."[21]

Following the enactment of the APA in 1946, the Court continued to adhere to the basic proposition that when Congress has charged an agency with administration of a statute, the task of the reviewing court is narrow.[22] To sustain the agency's judgment, the court "need not find that [the agency's] construction is the only reasonable one or even that it is the result we would have reached had the question

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18. *Id.*

19. *Id.*

20. *Id.*

21. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 200 (1998) (quoting Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 643 (1986)) (describing a long line of Supreme Court decisions before and after the enactment of the APA that interpret statutory rulemaking authorizations as providing leeway for agencies to interpret statutory texts in the first instance without interference from courts); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1159 (2012) (explaining that pre-APA law, reflected in *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 131 (1944), involved courts defining the scope of the space of agency interpretation, but within that space deferring to agencies). The articulation of the standard of review in such decisions is clear and forceful. *See, e.g.*, Helvering v. Griffiths, 318 U.S. 371, 397–98 (1943) ("We think that in the circumstances of this case the administrative construction in effect at the time of the receipt of the stock dividends here in issue must be given controlling effect."); *Hearst Publ'ns*, 322 U.S. at 131 ("[W]here 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."); Unemployment Comp. Comm'n of Alaska v. Aragon, 329 U.S. 143, 153 (1946) ("To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.").

22. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 11 (1965) ("The interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute."); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 381 (1969) ("[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." (footnote omitted)); United States v. Rutherford, 442 U.S. 544, 553 (1979) ("[T]he construction of a statute by those charged with its administration is entitled to substantial deference."); *accord* United States v. Alexander, 79 U.S. (12 Wall.) 177, 179–81 (1870) (deferring to a reasonable statutory interpretation offered by the Commissioner of Pensions rather than reinterpreting the statute).

arisen in the first instance in judicial proceedings."[23] That standard, articulated in relation to a question of the "specific application of a broad statutory term,"[24] was adopted as a general framework for judicial review of agency actions involving interpretive issues, creating a solid line of precedent repeatedly cited and relied on by the Court.[25] Indeed, just several years prior to the decision in *Chevron*, the Court reiterated that when faced with an agency's construction of a statute that the agency administers, the court's job is a "narrower inquiry into whether the [agency's] construction was 'sufficiently reasonable' to be accepted by a reviewing court," which does not require the agency's position be the "only reasonable one"[26] or even the interpretation the court would have adopted if the question had reached it first.[27] The respect for reasonable constructions by agencies made those constructions conclusive or controlling. As the Court emphasized in its 1965 decisions in *Train v. Natural Resources Defense Council, Inc.* and *Udall v. Tallman*, an interpretation found to be "sufficiently

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23. *Aragon*, 329 U.S. at 153.

24. *Id.*

25. Udall v. Tallman, 380 U.S. 1, 16 (1965):

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings."

(citing *Aragon*, 329 U.S. at 153); Train v. Nat. Res. Def. Council, Inc., 421 U.S. 60, 87 (1975):

> We therefore conclude that the Agency's interpretation of §§ 110(a)(3) and 110(f) was "correct," to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the "correct" one. Given this conclusion, as well as the facts that the Agency is charged with administration of the Act, and that there has undoubtedly been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency.

(citing *Udall*, 380 U.S. at 16–18); FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981):

> Hence, in determining whether the Commission's action was "contrary to law," the task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court. To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.

(citing *Train*, 421 U.S. at 75; *Udall*, 380 U.S. at 16; *Aragon*, 329 U.S. at 153).

26. *Democratic Senatorial Campaign Comm.*, 454 U.S. at 39.

27. *Id.*

reasonable" would "preclude the Court of Appeals from substituting its judgment for that of the Agency."[28]

This background law of deference played a role in the United States Court of Appeals for the District of Columbia Circuit's consideration of the substantive question in *Chevron*—whether the "bubble," or plant-wide, interpretation of "stationary source" in the Clean Air Act was permissible for areas of the country that did not meet federal air quality standards.[29] Prior to the consideration of the *Chevron* appeal, the D.C. Circuit had twice held that the bubble interpretation of "stationary source" was permissible for maintaining—but not for enhancing—air quality, stating, if not correctly applying, the background law of deference.[30] As the D.C. Circuit observed in the first of those decisions, *ASARCO, Inc. v. EPA*,[31] the scope of "judicial review of EPA's regulations interpreting the Clean Air Act is defined in Section 10(e) [codified as section 706] of the Administrative Procedure Act,"[32] quoting the "decide all relevant questions of law" and other related language of section 706.[33] But, as the D.C. Circuit in *ASARCO* was careful to note, those provisions did not foreclose deference to the agency's interpretation. Far from it. "[T]he Supreme Court and this court have both stated that EPA's interpretation of the Clean Air Act is to be given considerable deference."[34] Such deference is the standard that the Supreme Court articulated many times before, including in *Train*: the reviewing court has the responsibility "to examine carefully the words of the statute, the legislative history, and the reasons advanced by the agency to justify its interpretation in order to determine whether the agency's interpretation is 'sufficiently reasonable that it should (be) accepted by the reviewing courts.' "[35] Perhaps misapplying that standard, the D.C. Circuit rejected the bubble interpretation of stationary source.[36]

In the litigation of the *Chevron* case itself, the D.C. Circuit could not assess, under the reasonableness standard of review articulated in

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28. *Train*, 421 U.S. at 87 (citing *Udall*, 380 U.S. at 16–18).

29. Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 720 (D.C. Cir. 1982), *rev'd sub nom.* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

30. ASARCO Inc. v. EPA, 578 F.2d 319, 325–26 (D.C. Cir. 1978).

31. *Id.*

32. *Id.* at 325 (quoting section 706, under which a reviewing court is to "decide all relevant questions of law, interpret . . . statutory provisions, and . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .").

33. *Id.*

34. *Id.*

35. *Id.* at 326–27 (quoting Train v. Nat. Res. Def. Council, Inc., 421 U.S. 60, 75 (1975)).

36. *Id.* at 329.

Train, whether to allow the EPA to adopt the "bubble" interpretation of stationary source for areas not currently in compliance with federal air standards because its own precedent in *ASARCO* precluded that conclusion.[37] The Supreme Court, of course, was not bound by the D.C. Circuit's prior constructions of the Clean Air Act and was free to restore the basic law of judicial review under the APA that it had previously established—namely, that a reviewing court should accept an agency's reasonable interpretation of the statute and not "substitut[e] its judgment for that of the Agency."[38]

The Court did exactly that, but in a way that ended up launching *Chevron* on its own distinctive trajectory. Perhaps to make its message clear to a sometimes recalcitrant D.C. Circuit, the Court broke down the law of judicial deference into what seemed like easy-to-apply, hard-to-evade steps: first, ask if Congress has spoken to the precise question at issue, and if not, then accept the agency's construction so long as it is reasonable.[39] In substance, the Court carried forward what was already the law on judicial review of agency interpretations, as Justice Stevens, the author of the opinion, long insisted.[40] But it did not connect this framework to the APA, notwithstanding the heavy citations and footnotes in the decision.[41] Moreover, it gave the two-step test express justifications—congressional delegation and the relative institutional competence of courts and agencies[42]— that seemed to establish a stand-alone foundation. It also featured particular terminology for congressional delegation—"explicit" and "implicit"—that created a similar impression.

Once decided, *Chevron* was off and running. Justice Scalia joined the Court the next term and turned Step One into a cottage industry.[43] The decision, shorn from the prior law of judicial review, produced a

37. Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 720 n.7 (D.C. Cir. 1982) ("We express no view on the decision we would reach if the line drawn in *Alabama Power* and *ASARCO* did not control our judgment.").

38. *Train*, 421 U.S at 87 ("[T]he Agency is charged with administration of the Act . . . [and] we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency.").

39. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

40. *See* JOHN PAUL STEVENS, THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS 202 (2019) (explaining that the case's significance was not immediately clear to the Court); Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 398, 420 (Peter L. Strauss ed., 2006) (noting that Justice Stevens frequently maintained that *Chevron* was just a statement of existing law).

41. 5 U.S.C. § 706. *Chevron* notoriously does not cite this APA provision. 467 U.S. at 837.

42. *Chevron*, 467 U.S. at 843–44.

43. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520–21 ("How clear is clear? It is here [at Step One], if *Chevron* is not abandoned, that the future battles over acceptance of agency interpretations of law will be fought.").

steady stream of specifications and adornments. Does this *Chevron*-style review apply when the agency lacks a general grant of rulemaking authority or has not exercised that authority (*Mead*)?[44] Does *Chevron* apply when Congress delegates authority to resolve so-called major questions of great economic or political significance (*Brown & Williamson*)?[45] Do agency interpretations trump a prior judicial interpretation of the same statutory language (*Brand X*)?[46] Does *Chevron* apply when multiple agencies have been vested with rulemaking power?[47] And so on. One judicial decision issued with little fanfare in 1984 became the fount for this entire multifaceted, nuanced doctrinal artifice. It also became the most cited decision of administrative law.[48] Although Justice Stevens did not foresee *Chevron*'s prominent status, the Court certainly cultivated it.

As the scheme became intricate, it also became a flash point for disagreement. Justice Scalia's views proliferated in number and intensified in tone. Justice Breyer's voice often provided an equally forceful counterweight. Other Justices joined in with their own strongly worded opinions. Meanwhile, administrative law scholars fanned the flames, writing article upon article about what the *Chevron* framework did to the law.

Now the debate among some Justices and scholars is whether *Chevron*'s run has come to end. To detractors, *Chevron*'s framework is nothing short of disaster. Congressional delegation has run amok, executive authority is out of whack, and lower courts are just plain

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44. United States v. Mead Corp., 533 U.S. 218, 231–32 (2001) (declining to apply *Chevron* unless Congress has delegated to the agency the authority to issue interpretations with the force of law, and the agency has used that authority).

45. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (quoting Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.").

46. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

47. *See* Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 146 (1991) (determining which of two agencies that jointly implement a regulatory statute possesses delegated lawmaking authority to issue *Chevron*-worthy interpretations of the statute).

48. *Chevron* has had pride of place for a long while. *See* Peter M. Shane & Christopher J. Walker, *Foreward:* Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 (2014) ("*Chevron* has been cited in over 68,000 total sources available on Westlaw . . . ."); Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 703 (2014) (discussing the thousands of articles, opinions, and briefs written concerning and citing *Chevron* in the decades following the decision).

confused by the "dispersion" of judicial responsibility.[49] Questions of law are for courts to resolve, yet *Chevron* claims that role for agencies and is cited in case after case for that strident proposition. To these critics, *Chevron* must be overruled to correct the impression, if not the actuality, that it justifies an abdication of judicial responsibility.

But these arguments neglect that *Chevron* carries forward a fundamental principle of administrative law. Moreover, as we next address, *Chevron* embodies a fundamental principle of the administrative state. The centrality of judicial deference to the administrative state ultimately means that it cannot be vanquished simply by overruling *Chevron*, the decision.

II. *CHEVRON*'S PREMISE

Judicial deference will persist because it is the proper counterpart to congressional delegation and statutory implementation in our governmental system. At the most basic level, judicial deference allows Congress to delegate implementation of a regulatory scheme to an agency rather than resolving the granular issues itself or leaving them to be sorted out by courts. In this sense, judicial deference is as much a premise of regulatory government as congressional delegation itself. When courts wind up resolving the granular issues that Congress has left to agencies, something is amiss as far as regulatory statutes are concerned and designed. This is not a defense of judicial deference or congressional delegation, but an explanation of the connection. In the administrative state, the connection between deference and delegation is fundamental, which is what the Court recognized when it developed its doctrines of review. If agencies are charged with statutory implementation, then judicial deference to their interpretations is a logical inference.

First consider what we know about Congress. Empirical studies suggest that *Chevron* likely got the basis for judicial deference right—namely, that Congress intends for agencies to resolve interpretive questions and for courts to defer to agency resolutions. A survey of more than one hundred congressional staffers who draft legislation—in both the House and the Senate, across many committees, and from both political parties—shows that Congress likely expects agencies to have interpretive authority and views it as part of what comes with an express delegation of lawmaking power. These staffers indicated that

49. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496–97 (2010) (characterizing the constitutional problem with statutory dual layer for-cause removal restrictions on agency officials as a "dispersion of responsibility").

they often draft against *Chevron*, which they take to mean that agencies will resolve ambiguities in statutes.[50] Moreover, the staffers often use ambiguity deliberately, not inadvertently.[51] They rely on legislative history to communicate with agencies about implementation,[52] which is important because it suggests that they do not always use the text of the statute to say everything that they mean. And they aim for agencies, not courts, to be the ones to resolve issues in regulatory statutes.[53] When courts end up resolving ambiguities that arise, something has gone wrong. Another empirical study, this time from the agency side, shows that these messages are not lost on agencies.[54] Agency drafters read statutes as Congress intends them to.

Although the studies are not conclusive on the relationship between congressional delegation and judicial deference, what they suggest about that relationship is powerful. Congress seeks to delegate interpretive authority to agencies and expects courts to defer. The Court has been right all along about the connection between congressional delegation and judicial deference. *Chevron* attempted a clear articulation of the connection, and, ironically, its particular characterization led some to question the validity of its premise.[55] But that is a *Chevron* problem, not a problem with the premise that

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50. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 995 (2013) ("Of [ ] respondents, 82% were familiar with *Chevron*."); *id.* at 996 ("Eighty respondents (58%) said that *Chevron* plays a role when they are drafting."). Even if the Court overrules *Chevron*, these findings are still important as to the multitude of statutes enacted before that time and still requiring interpretation after. *See also* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 601 (2002) (noting that staffers for the Senate Judiciary Committee volunteered several interpretive principles, including the *Chevron* doctrine).

51. *See* Gluck & Bressman, *supra* note 50, at 997 ("Almost half of [ ] respondents (45%) expressed agreement with the statement that the deference rules allow drafters to leave statutory terms ambiguous because they know that agencies can fill the gaps.").

52. *Id.* at 1014 ("Ninety-four percent of [ ] respondents [explained] that the purpose of legislative history is to shape the way that agencies interpret statutes, and 21% separately described legislative history as a mechanism of agency oversight." (footnote omitted)).

53. *Id.* at 997 (showing that when asked, congressional staffers explained a predominant view that *Chevron* permits agencies rather than courts to interpret statutory ambiguities); *see also* Kent Barnett, *Codifying* Chevmore, 90 N.Y.U. L. REV. 1, 33–36 (2015) (arguing that "Dodd-Frank's provisions [codifying the standards of judicial review] suggest that Congress . . . uses *Chevron* as a background norm when drafting.").

54. Using the survey of congressional legislative drafters developed by Bressman and Gluck, Christopher Walker surveyed agency rule drafters. His study revealed similar results. The majority of agency rule drafters surveyed understand that when Congress does not specify a particular statutory goal, it intends for agencies, rather than courts, to make final determinations. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1055 (2015).

55. *See* Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 562 n.51 (2009) (collecting articles).

undergirds regulatory statutes and prior cases. Judicial deference is the norm, and de novo judicial interpretation is the aberration.

The idea that Congress intends to delegate authority to agencies, without resolving detailed issues itself or leaving those issues for courts, is also evident from the regulatory statutes that Congress enacts. The whole nature of regulatory statutes makes interpretation a routine, intrinsic part of implementation in two overlapping senses. First, regulatory statutes do not expressly divide interpretive and implementation issues, parceling some off for judicial elaboration and leaving others for the agency. They give implementation issues to the agency, and those issues regularly require interpretation. Second, regulatory statutes do not treat the task of interpretation as distinct from the task of implementation. They prompt interpretive questions that depend for resolution on how the agency implements them.[56]

Consider the issue in *Chevron*: the meaning of "stationary source" in the Clean Air Act for areas that did not meet federal air quality standards.[57] No doubt that this phrase required "interpretation." The EPA was deciding whether to apply the same definition to the dirtiest areas of the country as it did to cleaner areas. But the interpretive question undeniably depended on facts and judgments, some the product of experience and some the result of political change. The EPA did not interpret the phrase and then implement it; rather, the agency interpreted the phrase by implementing it.

There is nothing exceptional in this relationship between interpretation and implementation. It is akin to saying that regulatory statutes require agencies to sort out "mixed questions of law and fact."[58] When an agency is determining the meaning of an ambiguous term, it

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56. *See* Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 898 (2007) (explaining that the "notion that policy choice is not interpretive simply ignores many of the necessary mental operations involved in administrative implementation").

57. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

58. *See* NLRB v. Hearst Publ'ns, 322 U.S. 111, 130–31 (1944):

> In making [the Board's] determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record. . . . 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. . . . [T]he Board's determination . . . under this Act is to be accepted if it has "warrant in the record" and a reasonable basis in law.

(citations omitted); *see also* Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976) ("[G]reat deference must be given to the decisions of an administrative agency applying a statute to the facts and [ ] such decisions can be reversed only if without rational basis . . . .").

is making a mixed sort of judgment, with both the law part and the fact part contingent on the other. The Court moved away from this characterization by the time that it decided *Chevron*,[59] as it had moved away from other formal descriptions of allocated institutional power in regulatory statutes toward more functional ones.[60] Regardless of the particular framing, the Court has correctly recognized that judicial deference accommodates the character of interpretation under regulatory statutes. Why else would resolving statutory ambiguity involve making "policy" as to which agency "expertise" is necessary (and, of course, presidential "accountab[ility]" is beneficial), as the Court expressed it in *Chevron*?[61] Just as respect for the jury requires a margin of appreciation for that body's resolution of mixed questions, so too a margin of appreciation is required when the agency is specifying the meaning of an ambiguous aspect of a statute.

That does not mean courts have no role. Regulatory statutes do not deprive courts of interpretive authority that is familiar to them—resolving questions of what Congress required, prohibited, or did not delegate at all in a statute. The foundational principle of judicial deference that empirical studies confirm and common sense bears out is not about transferring judicial responsibility to agencies.[62] Rather, it recognizes that de novo judicial review of every question that could be characterized as interpretive does not fit with how Congress writes regulatory statutes and how those statutes operate, nor could it.

III. *CHEVRON*'S ASHES

Judicial deference is a fixture of the administrative state, as the Court understood well before *Chevron* eclipsed its own origins. Whether *Chevron* survives or not, judicial deference will persist because fixtures

59. *See* Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 224 (1992) (noting that *Chevron* makes a distinction between law and policy, not law and fact).

60. *Compare* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (using categories of quasi-judicial and quasi-legislative power to evaluate the constitutionality of a statutory removal restriction on an agency official), *with* Morrison v. Olson, 487 U.S. 654 (1988) (using a more functional approach); *compare* Crowell v. Benson, 285 U.S. 22 (1932) (using categories of private and public rights to evaluate the constitutionality of a statute delegating certain claims to non-Article III courts), *with* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (using a more functional approach).

61. *Chevron*, 467 U.S. at 865–66 (stating that interpretations of ambiguous statutory language involve "policy choices" better left to accountable "political branches").

62. As Peter Strauss writes, under *Chevron*, properly understood, the judicial role is to independently decide "the limits of the authority Congress has conferred on the agency," that is, whether the agency's action is ultra vires. Peter L. Strauss, *A Softer, Simpler View of* Chevron, ADMIN. & REGUL. L. NEWS, Summer 2018, at 7.

of the administrative state do not disappear from the law. They morph and reappear out of their own ashes.

When the Court no longer enforces a foundational principle through one doctrine, another doctrine often arises in its place.[63] This phenomenon is not new to the law and has loomed particularly large in administrative law. When the Court did not enforce the nondelegation doctrine to keep Congress from passing power to agencies in extremely broad terms, the concerns about such broad transfers—concerns for congressional responsibility and agency accountability—did not simply disappear. These concerns, instead, found an alternative outlet in the law—in fact, more than one outlet.[64] For example, the Court has used the constitutional avoidance canon to effectively rewrite a particular statute in a way that addresses nondelegation concerns about agency authority under that statute.[65] Nondelegation concerns did not vanish with the demise of the nondelegation doctrine; they just found expression elsewhere.[66]

Similar dynamics are at work with judicial deference. If Congress can delegate authority to agencies, subject to only limited constraints, then judicial deference is necessary to ensure that agencies can exercise their delegated authority. Congressional delegation and judicial deference go hand-in-hand. If the Court were to get rid of judicial deference in one swoop by overruling *Chevron*, the entire U.S. corpus of regulatory statutes, with broad delegations, would remain on the books. What happens then? Some form of judicial deference will recur. The grounds that animate judicial deference (agencies, not courts, should make the basic choices of regulatory policy) will not go away any less than the worries that underlie the nondelegation doctrine (that Congress, not agencies, should make the overarching law) have.

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63. Gundy v. United States, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting) (noting the shift from the nondelegation doctrine to the major questions doctrine "to rein in Congress's efforts to delegate legislative power").

64. *Id.*

65. *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 639–43 (1980) (interpreting narrowly a statutory grant of agency authority to avoid a constitutional nondelegation issue). Likewise, the Court created the major questions doctrine, which requires Congress to make the significant choices of regulatory policy rather than delegating those decisions to agencies. *See, e.g.*, King v. Burwell, 576 U.S. 473, 486 (2015). Similarly, *Mead* requires Congress to decide whether an agency has lawmaking authority at all, rather than allowing courts to presume it. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

66. *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000) ("[The nondelegation doctrine] has been relocated rather than abandoned."); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223 (explaining the doctrine is used through the constitutional avoidance canon).

Judicial deference is part of the "separation-of-powers triangle between the legislative, executive, and judiciary."[67]

Judicial deference is not foundational in the same way that the nondelegation doctrine or other underenforced separation-of-powers norms are—*Chevron* is not a constitutional decision. But its constitutional status does not matter. What matters is it reflects an arrangement fundamental to our current structure of government.

To see the point in the most practical terms, just consider the position of reviewing courts. In the immediate aftermath of a decision overruling *Chevron*, lower courts will feel pressure—they will face a new demand to choose the best interpretation for every statutory provision implicated in every agency decision. But given the complexity of statutory schemes, the specialized expertise and experience that implementing those schemes requires, and the sheer number of routine interpretive issues that the schemes involve, courts will confront the natural fault lines of their own competence as generalists and lawyers. They will have every incentive to find a way out.

That way will have to involve a different form of judicial deference. Reviewing courts unable to explicitly invoke *Chevron* deference will begin to characterize agency statutes and agency interpretations differently. For example, they might find more express delegations of interpretive power to agencies, placing them beyond the *Chevron* default, but still requiring controlling deference.[68] Or they might reject a litigant's characterization of the flaws in an agency action as interpretive and instead view them as a matter of policymaking discretion. Either way, courts will default to or persist in deferring to agencies on routine issues, just using a different label or different characterization of the issues to do so. This prediction is not fanciful. After *Mead* was decided, lower courts were uncertain which procedures confer lawmaking authority on agencies and quickly found work-arounds.[69] The pressure will be even greater to find a work-around

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67. *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting) ("Nor have we abandoned enforcing other sides of the separation-of-powers triangle between the legislative, executive, and judiciary. . . . [W]hen the separation of powers is at stake, we don't just throw up our hands.").

68. *See, e.g.*, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984):

> If 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. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute;

Mead, 533 U.S. at 227 (noting that whenever there is an express delegation to the agency, the agency's ensuring regulation "is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute").

69. *Id.*; *see* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005) (collecting and analyzing cases).

given the mismatch between the capacity of courts and the complexity of regulatory policymaking. The operational details typically and understandably fall outside of the judicial ken. And so judicial deference will return.

Judicial deference might reemerge in other, more explicit ways. Even if the Supreme Court overrules *Chevron*, it could still recognize the need for a more modest, moderate form of judicial deference. There is nothing inconsistent in wishing to be done with the elaborate, multi-faceted, nuanced artifice that is *Chevron* and offering a version of judicial deference that is closer to its roots. The Court might determine that *Chevron* is no longer a viable method for handling interpretive issues because the framework is an unruly mess and creates the misimpression that judicial deference justifies judicial abdication. Nevertheless, the Court might still acknowledge that judicial deference is necessary, and not only because of the plight of lower courts and the sheer number of interpretive issues in regulatory statutes. Judicial deference is proper when viewed as a foundational principle of administrative law, as explained in Part I. Judicial deference is proper when considered in light of congressional design and statutory structure, as shown in Part II. And so judicial deference might return through another administrative law decision.

That new doctrine is not difficult to imagine. A natural way for the Court to reunite judicial deference with its administrative law roots is through an interpretation of the APA's judicial review provision, section 706. Although that section is not a model of clarity, it was enacted in the context of judicial decisions that recognized the basic structure of judicial review, and the Court might read it as a congressional codification of judicial deference.[70] It might seem too late in the day (or the next century) to tie judicial deference back to the APA, but the Court has not been shy about putting a gloss on the APA years after its enactment. A case in point is *State Farm*, decided in 1983 and elaborating arbitrary and capricious review.[71] *Chevron* was decided a year after *State Farm* and appeared to obviate the need for the Court to

70. *See* Strauss, *supra* note 21, at 1160 (arguing that the APA worked no necessary changes in the bifurcated judicial role of primary review—"with courts deciding for themselves the possible meanings of statutes allocating authority to agencies, but then, within that 'space,' accepting the agency's responsibility and policing its exercise for reasonableness"); Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1652 (2019) (stating that section 706 declares the existing law concerning "the scope of judicial review" and is a codification "of the principles of judicial review embodied in many statutes and judicial decisions" (quoting U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 93, 108 (1947)); Kisor v. Wilkie, 139 S. Ct. 2400, 2419 (2019) (Kagan, J., plurality) ("Section 706 was understood when enacted to 'restate[ ] the present law as to the scope of judicial review.' " (quoting U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947))).

71. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

connect judicial deference to the APA. If *Chevron* is gone, the Court will have a new opportunity to revisit the APA's connection to judicial deference.

Reading the APA to contain a principle of judicial deference might better serve the administrative state. The Court might then take the occasion to explain carefully what that principle entails, as it has with arbitrary and capricious review. If the Court reads the APA to require judicial deference, it could seek to avoid the unnecessary complexity of our current doctrine. It also could retain control of the transition to the new regime, promoting predictability for reviewing courts and consistency among them. If judicial deference emerges as an elaboration of the APA, Congress, not the Court, would be the acknowledged source for the standard of judicial review. That message is significant for those annoyed by any suggestion in *Chevron* that the Court does not want to do its job of interpreting statutes.

Of course, such a new judicial doctrine is improbable if the Court announces that *Chevron* has deeper flaws, and the likely pattern will be more varied, accumulated, and ad hoc. Lower courts would persist in their efforts to avoid making difficult implementation choices, gravitating, as they must, toward judicial deference. The Court would have little choice but to decline review of anything other than the most egregious examples of judicial deference in the lower courts. And if the Court works harder to systematically impose its own interpretations on regulatory statutes, it could even end up losing more control over statutory interpretation as a general matter—provoking a response from Congress to codify judicial deference more specifically by amending the APA or otherwise.[72] Congress has relied on *Chevron* in drafting statutes and may express a mood of disagreement upon seeing lower courts thrown into the role of ill-suited, decentralized interpreters of regulatory statutes.

The claim that judicial deference will remain with or without *Chevron* is not a claim about whether the legal and practical dimensions of the administrative state, as they now exist, will remain. The Justices who are willing to oust *Chevron* also are willing to reinvigorate the nondelegation doctrine in direct constitutional form and to invalidate

72. *See* Barnett, *supra* note 53, at 4–7 (providing an overview of congressional reluctance to provide guidance on the standard of review and examining implications of it doing so in Dodd-Frank). The Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. § 2 (2016), passed in the House but not the Senate of the 114th Congress, would require courts to review de novo all agency interpretations of federal law, overruling *Chevron*. We see this as one among the occasional instances of dissent from Congress's long-term and persistent demand for judicial deference to agencies on interpretive issues, which has been firmly entrenched since long before *Chevron*. *See* Barnett, *supra* note 53, at 52 (noting difficulties faced in past attempts to codify a general standard of review).

broad regulatory statutes.[73] We believe courts will find ways to avoid striking down a vast swath of regulatory statutes, even if those Justices succeed, but that is a story of another phoenix. Our claim here is that even a dramatic overruling of *Chevron* will not eradicate judicial deference to agency interpretations of regulatory statutes.

CONCLUSION

Judicial deference to agency interpretations of their own statutes is a foundational principle of the administrative state. It recognizes that Congress has the need and desire to delegate the details of regulatory policy to agencies rather than to specify those details or default to courts. It also recognizes that interpretation under regulatory statutes is a fundamental part of implementation. The Court once regarded judicial deference as a foundational principle of administrative law. When *Chevron* came along, judicial deference developed along a track that made it seem new and bold—and ultimately convoluted and vulnerable. But judicial deference is no less a foundational principle because *Chevron* took on a life of its own. And foundational principles—particularly those that help to maintain balance among the branches—do not simply go away. If the Court no longer enforces them in a certain way, they often morph and reappear in the law. Judicial deference is one such principle. It will persist in administrative law for as long as the administrative state continues to define our government.

Maybe the Court will overrule *Chevron* to do away with the albatross some think the decision has become. But *Chevron* is a phoenix, and phoenixes do not die. They rise from the ashes with renewed vigor.

73. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting) (reasoning the authority granted by SORNA poses a nondelegation issue).