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NOTES

PARTING THE *CHEVRON* SEA: AN ARGUMENT FOR *CHEVRON*'S GREATER APPLICABILITY TO CABINET THAN INDEPENDENT AGENCIES

*Andrew T. Bond**

While Chevron in fact involved an interpretive regulation, the rationale of the case was not limited to that context: "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." Quite appropriately, therefore, we have accorded Chevron deference not only to agency regulations, but to authoritative agency positions set forth in a variety of other formats.

—Justice Scalia, *Christensen v. Harris Cnty.*, 529 U.S. 576, 589–90 (2000) (Scalia, J., concurring) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

INTRODUCTION

Consider the following cases over three different administrations and decades:

Under the presidency of Bill Clinton, the Department of Veterans Affairs instituted a compensatory regulation requiring claimants to prove that their disabilities resulted from negligent treatment by the Department of Veterans Affairs or that aggravation of previous disabilities occurred during treatment.¹ The Supreme Court unanimously held that the regulation was inconsistent with the controlling statute, which did not contain any requirement that veterans must prove fault attributable to the Department of Veterans Affairs in causing such injuries.²

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1 *Brown v. Gardner*, 513 U.S. 115, 116 (1994).

2 *Id.* at 122. Congress later amended the statute in question to essentially overturn the Supreme Court's decision in *Brown v. Gardner*. See, e.g., *Spigner v. Shinseki*, 474 F.

Under the presidency of George W. Bush, the State of Oregon brought an action seeking a declaratory judgment and injunctive relief to prevent federal enforcement of the U.S. Attorney General's interpretive rule that physicians who assist the suicide of terminally ill patients under the Oregon Death with Dignity Act violate the Federal Controlled Substances Act.³ The Supreme Court invalidated the Attorney General's rule.⁴ Justice Scalia filed a dissenting opinion, joined by Chief Justice Roberts and Justice Thomas.⁵

Under the presidency of Barack Obama, several Medicare providers brought suit against the Secretary of the Department of Health and Human Services, challenging the Department's reimbursement adjustment for hospitals within the providers' networks that serve a disproportionate share of low-income patients.⁶ The Supreme Court unanimously upheld the Department's reimbursement adjustment methodology.⁷

These cases highlight the daily task of cabinet agencies⁸ to make highly contentious and politically charged policy choices against the backdrop of ambiguous congressional legislation. Just as the judiciary must fulfill its *Marbury v. Madison* function to "say what the law is,"⁹ cabinet agencies must fulfill their *Chevron* function to interpret frequently vague and general statutes enacted by Congress.¹⁰ This challenge, in many ways, is the key legal question of our time: has the judiciary's ability to say what the law is been usurped by the executive's ability to do the same?¹¹

Cabinet department decisions to "say what the law is," at their core, are policy decisions. While the Supreme Court gives independent and cabinet agencies *Chevron* deference under certain circumstances, it seems as though cabinet agencies are inherently a more natural "fit" for receiving *Chevron* deference.¹²

This Note argues that cabinet agencies are better suited to receive *Chevron* deference than independent agencies because voters should desire such policy decisions to be made by those closest to electoral accountability, rather

App'x 763, 765 (Fed. Cir. 2012) ("Moreover, § 1151 has been amended substantially in response to the decision in *Gardner* . . . 'The legislative history is clear that the change [in § 1151] was generated to overturn the U.S. Supreme Court's decision in *Brown v. Gardner*.'") (citations omitted).

3 *Gonzales v. Oregon*, 546 U.S. 243, 250 (2006).

4 *Id.* at 274–75.

5 *Id.* at 275.

6 *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 821 (2013).

7 *Id.* at 828–29.

8 See *infra* notes 83–92 and accompanying text (discussing how to define "cabinet agencies").

9 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

10 *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

11 Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2610 (2006) ("[I]t is emphatically the province and duty of the executive branch to say what the law is.").

12 *Chevron*, 467 U.S. at 844.

than unelected Article III judges with life-tenure.¹³ In other words, the judiciary should accept the countermajoritarian difficulty as fundamentally true and review cabinet agency decisions in light of *Chevron* deference.¹⁴ Part I examines the revolutionary decision of *Chevron* and its aftermath. Central to Part I is an inquiry into whether *Chevron* should be applied on a case-by-case or across-the-board basis, and whether *Chevron* has usurped the judiciary's power to "say what the law is," as cemented by the cornerstone constitutional law case of *Marbury v. Madison*. This Note contends that *Chevron* deference should be applied across-the-board, and that *Chevron* and *Marbury* are not at odds, but rather compatible precedents for the courts.

Part II defines what constitutes "cabinet" agencies in the scope of this discussion. Defining what constitutes a cabinet agency, in practice, is a difficult distinction. Part III turns to *Chevron*'s greater applicability (or inapplicability, as advanced by several critics) to cabinet agencies than independent agencies. Fundamental to Part III is both a theoretical and practical justification for why cabinet agencies are better suited for *Chevron* deference.

I. THE CHEVRON DECISION AND ITS AFTERMATH

Part I briefly summarizes the Supreme Court's pivotal decision in *Chevron*. It then looks at the decision's decades-long aftermath, including whether *Chevron* should be applied in a case-by-case or across-the-board fashion. This Part concludes with an inquiry into whether *Chevron* undermined the judiciary's power, per *Marbury v. Madison*, to "say what the law is."

A. The Chevron Decision

The dispute presented in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* revolved around the Environmental Protection Agency's (EPA) definition of "stationary source" under the Clean Air Act.¹⁵ The EPA exercised its power of informal rulemaking and adopted a liberal interpretation of "stationary source" ("liberal" as in a view more favorable to the energy industry).¹⁶ The Natural Resources Defense Council (NRDC), in addition to other groups, petitioned the D.C. Court of Appeals to review the EPA's inter-

13 U.S. CONST. art. III, § 1.

14 See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our system.").

15 42 U.S.C. § 7602(j) (2012). While the Act defined what the term "major stationary source" meant in relation to the Clean Air Act, it failed to clarify what "stationary source" means in itself. *Id.*

16 Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50,766 (Oct. 14, 1981) (to be codified at 40 C.F.R. pts. 50 and 51). As it turns out, the EPA initially decided to utilize a more "conservative" interpretation of "stationary source," but the agency changed its view and went through the process of informal rulemaking a second time in order to alter its interpretation of the amended Clean Air Act.

pretative rule defining “stationary source.”¹⁷ The Court of Appeals found the statute¹⁸ and legislative history¹⁹ to be inconclusive as to the definition of a “stationary source.” It also held that the EPA’s interpretation of “stationary source” was at odds with the general “purpose” of the Clean Air Act.²⁰ The court declared the regulation inconsistent with Congress’s purpose in enacting the Clean Air Act and vacated the EPA’s regulation.²¹

In a unanimous opinion, the Supreme Court overturned the decision of the Court of Appeals.²² Justice Stevens stated that once the Court of Appeals determined that Congress did not have a clear intent with regard to the EPA’s lenient view of what constitutes a “stationary source,”²³ the Court of Appeals should not have asked, “whether in its view the concept is ‘inappropriate’ in the general context of a program designed to improve air quality.”²⁴ Instead, the correct question was “whether the Administrator’s view that it is appropriate in the context of this particular program is a reasonable one.”²⁵ This inquiry underlies what would become known as *Chevron*’s two-step framework.

Justice Stevens articulated a two-step framework with which courts should analyze the actions of an agency when its interpretation of a statute is in question. The first step is for the court to consider “whether Congress has directly spoken to the precise question at issue.”²⁶ If Congress’s intent is clear, then the court (and the agency) must “give effect to the unambiguously expressed intent of Congress.”²⁷ This would be the end of the judicial inquiry, and the court need not enter into step two of the framework.

If, however, Congress’s intent is not clear, “the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.”²⁸ This second step of the framework is where the Court of Appeals erred. If the statute is ambiguous or silent with regard to the issue at question, then the “question for the court is whether the agency’s answer is based on a permissible construction of the statute.”²⁹

17 *Natural Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718, 728 (D.C. Cir. 1982), *rev’d sub nom. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

18 685 F.2d at 723.

19 *Id.* at 726.

20 *Id.* at 726–28.

21 *Id.*

22 *Chevron*, 467 U.S. at 845 (“In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue.”).

23 *Id.* at 860.

24 *Id.* at 845.

25 *Id.*

26 *Id.* at 842.

27 *Id.* at 843.

28 *Id.* (footnote omitted).

29 *Id.* The word “permissible” is synonymous with the word “reasonableness” for purposes of the opinion. *Id.* at 863.

To summarize, the basic holding of *Chevron* is fairly straightforward: “Step One” requires courts to determine if Congress has “directly spoken to the precise question at issue.”³⁰ If Congress has directly spoken, that is the end of the judicial inquiry, and Congress’s interpretation governs. However, if Congress has not directly spoken, then “Step Two” directs courts to ask whether the agency’s interpretation is “based on a permissible construction of the statute.”³¹ If the construction is permissible (or reasonable), then the court must uphold the agency’s interpretation.

Justice Stevens’s articulation of the two-step framework is broad and not constrained to the precise facts of the case at hand.³² Even though the framework seems simple in the abstract, its application across the several decades that have followed since *Chevron* has been anything but straightforward.

B. *Chevron*’s Aftermath

The decades after *Chevron* have resulted in the application of the case’s two-step framework in a fairly inconsistent fashion. Indeed, the dilemma of *Chevron* seems to center around two distinct questions: (i) when does *Chevron* govern the case at issue (the so-called “*Chevron* Step Zero”),³³ and (ii) whether *Chevron* deference should be a case-by-case inquiry (as advanced by Justice Breyer)³⁴ or an across-the-board presumption (as argued by Justice

30 *Id.* at 842.

31 *Id.* at 843.

32 Justice Scalia often reminds the Supreme Court, albeit in concurring and dissenting opinions, that the two-step framework in *Chevron* was written in broad language and not cabined to specific contextual circumstances. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 256 (2001) (Scalia, J., dissenting) (“To decide the present case, I would adhere to the original formulation of *Chevron*. ‘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 *Chevron*, 467 U.S. at 843); *Christensen v. Harris Cnty.*, 529 U.S. 576, 589–90 (2000) (Scalia, J., concurring) (“While *Chevron* in fact involved an interpretive regulation, the rationale of the case was not limited to that context: ‘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 *Chevron*, 467 U.S. at 843).

33 See Thomas W. Merrill & Kristin E. Hickman, *Chevron*’s Domain, 89 GEO. L.J. 833, 836 (2001) (“Together, these principles comprise what might be called ‘step zero’ in the *Chevron* doctrine: the inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all, as opposed to the *Skidmore* framework or deciding the interpretational issue de novo.”); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 247 (2006) (describing Step Zero as “the inquiry into whether the *Chevron* framework applies at all”).

34 See generally Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 397–98 (1986) (arguing for a case-by-case *Chevron* presumption).

Scalia).³⁵ These questions are intimately related and will be discussed in turn.

1. *Chevron* Step Zero

Chevron's "Step Zero" inquiry deals with the question that courts ask before arriving at the two-step framework: does *Chevron* even apply to the case at issue?³⁶ If the answer is yes, then the court's analysis proceeds as it did in *Chevron* itself. If, however, the answer is no, then courts typically apply the *Skidmore v. Swift & Co.* standard, or even engage in de novo review.³⁷ *Skidmore*'s approach considers the "rulings, interpretations and opinions" of agencies to be "not controlling upon the courts by reason of their authority."³⁸ Additionally, the weight that courts place on the judgments of agencies "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."³⁹ *Skidmore* is certainly a less deferential standard of review for agencies than that articulated in *Chevron*. *Skidmore*'s approach both makes it harder for the agency's interpretation to govern and increases the odds that a judicial construction of the statute at hand will govern. The substantial disparity in the level of deference the *Skidmore* standard affords agencies should give one pause in comparison to the seemingly broad holding of *Chevron*, and the countermajoritarian nature of judicial review.⁴⁰

The potential ambiguity in applying *Chevron*'s Step Zero came to a head in *United States v. Mead Corp.*⁴¹ At issue in *Mead* was the legality of a tariff clarification ruling by the U.S. Customs Service.⁴² The Supreme Court began its analysis by distinguishing between cases that are entitled to *Chevron*'s two-step framework and those that are entitled only to the less deferential *Skidmore* standard.⁴³ In so holding, the Court seems to imply that Step Zero involves asking if Congress "would expect the agency to be able to speak with the force of law."⁴⁴ If yes, then the *Chevron* framework governs. If not, then the *Skidmore* framework governs.

35 See generally Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520–21 (advocating for an across-the-board *Chevron* presumption).

36 See *supra* note 32 and accompanying text.

37 *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (articulating a standard of review for agency decisions in the face of congressional ambiguity less favorable than the approach in *Chevron*).

38 *Id.*

39 *Id.*

40 BICKEL, *supra* note 14, at 16.

41 *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

42 *Id.*

43 *Id.* ("We agree that a tariff classification has no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the force of law, but we hold that under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the ruling is eligible to claim respect according to its persuasiveness.")

44 *Id.* at 229.

Mead raises the question as to why the Court found the need to revitalize *Skidmore*, a case decided in 1944 it could easily have left for dead after its decision in *Chevron*. In deciding not to do so, the Court complicated the *Chevron* framework by adding a wrinkle to the pivotal “Step Zero.” *Mead* gave two clues as to when *Chevron* deference is appropriate: first, “express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed” and second, a “relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”⁴⁵ Even with these clues, it is difficult to discern the underlying force between the distinction (of when to apply *Chevron* or *Skidmore* deference) articulated in *Mead* and the scope of its holding.⁴⁶ Parsing the precise holding and greater importance of *Mead* is outside the scope of this Note, but it is important to observe that *Mead* exemplifies a division within the Court after *Chevron*: how readily should the judiciary apply the two-step framework?

2. Case-by-Case vs. Across-the-Board Approach

Justice Breyer and Justice Scalia offer two contrasting points of view as to the depth and breadth of *Chevron*.⁴⁷ Both agree, however, that *Chevron* is properly understood as a judicial framework that serves as a conduit for what Congress wants.⁴⁸ Post-*Chevron*, Congress knows that if it leaves ambiguous language in statutes, it is implicitly deferring to agencies to work through those ambiguities.⁴⁹ The legislature also knows that the judiciary will defer

45 *Id.* at 229–30.

46 See Sunstein, *supra* note 11, at 2603 (“For the future, *Mead* should not be taken to establish anything like a presumption against *Chevron*-style deference in cases in which the agency has not proceeded through formal procedures. Instead *Mead* should be seen as an unusual case in an exceedingly unusual setting”); cf. Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 Nw. U. L. REV. 799, 805 (2010) (“Accordingly, many scholars, including those who think deference should be justified by administrative expertise, concluded after *Mead* that deference turns on a general congressional delegation of lawmaking power to agencies” (footnote omitted)). Several scholars also note the chaos and confusion that *Mead*’s “force of law” test causes. See, e.g., William S. Jordan III, *Judicial Review of Informal Statutory Interpretations: The Answer is Chevron Step Two, Not Christensen or Mead*, 54 ADMIN. L. REV. 719, 719–20 (2002) (arguing that *Mead*’s force of law test has caused “chaos” by creating a “cumbersome, unworkable regime under which courts must draw increasingly fine distinctions using impossibly vague standards”).

47 See *supra* notes 34–35 and accompanying text.

48 This observation is supported by the very text of the *Chevron* opinion itself. Justice Stevens began “Step One” of the *Chevron* framework by explicitly looking to congressional actions: “First, always, is the question whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

49 Congressional reliance on the straightforward framework of *Chevron* is, of course, muddled by the Court’s decision in *Mead*. See *supra* notes 41–46 and accompanying text. This complexity of when *Chevron* governs serves as at least a partial impetus for the debate between Justice Breyer and Justice Scalia over *Chevron*’s breadth and depth.

to agencies' reasonable interpretations of ambiguous statutes.⁵⁰ Alternatively, if Congress prefers not to leave room for agencies to shape the meaning of a law, it can either draft a more precise statute or amend the statute to "overrule" an agency's interpretation.⁵¹ At the end of the day, Congress is still very much in the driver's seat with respect to agency delegation.

Although Justices Breyer and Scalia agree on the theoretical underpinning of *Chevron*, their opinions diverge with regard to *Chevron's* greater importance and applicability. This difference requires careful examination and also serves as an important philosophical backdrop for whether *Chevron* applies more to cabinet than independent agencies.

Justice Breyer's primary argument for a case-by-case approach to *Chevron* is articulated in his 1986 essay, *Judicial Review of Questions of Law and Policy*, by then-Judge Breyer serving on the First Circuit.⁵² Justice Breyer's basic claim is that judicial review of agency interpretations should be "tailor[ed] [to the judiciary's] institutional capacities and strengths."⁵³ The kind of case-by-case approach he advocates seems directly at odds with the broad language of *Chevron's* holding,⁵⁴ but stems from an interest in cabining the *Chevron* framework to fewer instances of judicial review.

This approach comes from a fundamental disagreement with the proposition that when Congress legislates via ambiguous statutes it does so against a backdrop expectation that agencies will fill in the gaps.⁵⁵ Instead, Justice Breyer views the judicial inquiry to be more complicated: "[Courts] have looked to practical features of the particular circumstance to decide whether it 'makes sense,' in terms of the need for fair and efficient administration of that statute in light of its substantive purpose, to imply a congressional intent that courts defer to the agency's interpretation."⁵⁶ He goes on to say that there is "nothing new in the law for a court to imagine what a hypothetically 'reasonable' legislator would have wanted (given the statute's objective) as an interpretive method of understanding a statutory term surrounded by silence."⁵⁷ In sum, Justice Breyer states "there is no reason why one could not apply these general principles . . . to the question of the extent to which Congress intended that courts should defer to the agency's view of the proper interpretation."⁵⁸ If one accepts Justice Breyer's principles and conclusion as true, it is not difficult to see why a case-by-case application of

50 See *supra* notes 29–31 and accompanying text.

51 It is, of course, an unrealistic view to expect Congress to precisely draft every statute. With that admission in mind, the option of Congress to go back and amend statutes to overrule agency interpretations likely does more work here.

52 Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 397–98 (1986) (arguing for a case-by-case approach to *Chevron* deference).

53 *Id.* at 398.

54 See *supra* note 31 and accompanying text.

55 See *supra* note 48–49 and accompanying text.

56 Breyer, *supra* note 52, at 370.

57 *Id.*

58 *Id.*

Chevron makes sense: the correct result depends upon what a “reasonable” legislator thought she was doing at the time the statute was enacted.⁵⁹

Justice Breyer then proceeds to apply his generally articulated principles as to why *Chevron* deference should be judicially administered on a case-by-case basis. First, Justice Breyer states that applying *Chevron* in an across-the-board method would simply be insufficient to capture the wide array of issues in which agencies interpret ambiguous congressional statutes: “To read *Chevron* as laying down a blanket rule, applicable to all agency interpretations of law, such as ‘always defer to the agency when the statute is silent,’ would be seriously overbroad, counterproductive and sometimes senseless.”⁶⁰ Second, Justice Breyer recognizes that a potential outcome of applying the *Chevron* framework will be to remand a case back to the agency in order for it to provide a “reasonable” interpretation.⁶¹ This, to Justice Breyer, would be a “waste of time”: “What, then, does the court expect the agency to learn about the statute that the court does not already know?”⁶² Third, Justice Breyer contends an across-the-board approach to *Chevron* would “ask[] judges to develop a cast of mind that often is psychologically difficult to maintain,” as a judge could believe an agency’s interpretation is both reasonable and legally inaccurate at the same time.⁶³

To summarize, Justice Breyer believes that *Chevron* is properly viewed as a tool courts may use to better discern the legislative intent of Congress at the time it enacted a statute, but not as an across-the-board presumption that defers to any reasonable agency interpretation. This characterization of *Chevron* is a formidable one, and certainly mirrors the judicial approach to agency interpretations pre-*Chevron*.⁶⁴ However, as Justice Scalia contends, it is inevitably a flawed position.

Justice Scalia’s primary argument for an across-the-board approach to *Chevron* is articulated in his 1989 essay, *Judicial Deference to Administrative Interpretations of Law*.⁶⁵ As previously noted, Justice Scalia has a similar view to Justice Breyer of the underpinnings of pre-*Chevron* jurisprudence and the

59 Justice Breyer notes that Congress, in the face of statutory ambiguity, likely intended to delegate highly technical questions to agencies. *Id.* If, on the other hand, statutory ambiguities raise a “major” or “important” question, it is unlikely Congress intended to delegate this kind of power to agencies: “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.” *Id.*

60 *Id.* at 373.

61 *See id.* at 370.

62 *Id.* at 378.

63 *Id.* at 379.

64 Indeed, Justice Scalia agrees with Justice Breyer’s characterization of pre-*Chevron* jurisprudence, although he disagrees with his post-*Chevron* viewpoint: “*Chevron*, however, if it is to be believed, replaced this statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant.” Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989).

65 *Id.* at 521 (arguing for an across-the-board approach to *Chevron* deference).

Chevron decision itself, but significantly differs in the framework's application. While Justice Breyer views *Chevron* as an incremental step to complement previous administrative deference jurisprudence, Justice Scalia views *Chevron* as a fundamental rethinking of the judiciary's proper role in interpreting agency deference.

Justice Scalia concedes Justice Breyer's point that *Chevron* is not an errorless framework, and that it potentially does not perfectly capture Congress's "presumed intent,"⁶⁶ but counters by laying the foundation for an across-the-board approach. He writes: "[A]ny rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate. If that is the principal function to be served, *Chevron* is unquestionably better than what preceded it."⁶⁷ Justice Scalia goes on to state, "Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known."⁶⁸ He acknowledges that *Chevron* is perhaps not a flawless framework, but that it provides Congress with a consistent and predictable background of judicial philosophy by which it may legislate and reasonably ascertain the potential judicial outcomes of its choice to include ambiguities or avoid them.⁶⁹

In sum, Justice Scalia contends that the *Chevron* framework provides Congress a known and consistent judicial process against which Congress is able to draft statutes however ambiguously or unambiguously it pleases. Any potential litigation of agency interpretations of those statutes will return predictable judicial outcomes under the *Chevron* two-step framework.

While there is merit to Justice Breyer's case-by-case approach to *Chevron*, Justice Scalia's approach should be favored, not for its oft-noted "simplicity,"⁷⁰ but rather its more accurate portrayal of how the government pragmatically functions. If one accepts that interpretive decisions of ambiguous statutes are, at their core, policy determinations, then the judiciary must recognize and respect that decisions of policy are *not* decisions of law, and therefore, their proper place is within the elected branches of government. Indeed, this is the heart of the countermajoritarian difficulty that the judiciary must confront and take seriously.⁷¹

Justice Scalia's approach accounts for these interests better than that of Justice Breyer as it both more accurately respects the countermajoritarian

66 *Id.* at 517.

67 *Id.*

68 *Id.*

69 *Id.*

70 The *Chevron* framework seems to be unfairly attacked as "simplistic." While the framework itself is indeed simplistic from the perspective of judicial implementation, the policy issues that *Chevron* may be applied to are nothing but simplistic. Indeed, these may be the hardest questions that any branch of government may face. It is for that reason that such decisions should be left to the electable and accountable branches of government, not the judiciary.

71 BICKEL, *supra* note 14, at 16.

dilemma and provides Congress with a more reliable background against which to legislate. After all, reliable decisions under the *Chevron* framework across different administrations cannot be decisions of policy, but must be decisions of law. This is the judiciary's proper role.

3. Did *Chevron* Usurp *Marbury v. Madison*?

If Justice Scalia's across-the-board approach is superior to Justice Breyer's case-by-case approach to *Chevron* deference, as this Note advocates,⁷² then the next inquiry must be whether *Chevron* is at odds with *Marbury v. Madison*, the cornerstone of constitutional caselaw.⁷³ Many critics argue that *Marbury* and *Chevron* are indeed inconsistent, and continue to coexist on a potentially unsustainable, long-term trajectory.⁷⁴ If this proposition is true, which this Note will argue it is not, then the application of *Chevron* deference to cabinet agencies over independent agencies would be a troublesome usurpation of power from the judicial to the executive branch.⁷⁵ This Note will contend that *Chevron* and *Marbury* are not at odds, but are instead compatible cases that both support the across-the-board *Chevron* presumption of deference.

⁷² See *supra* notes 70–71 and accompanying text.

⁷³ See *supra* note 9 and accompany text.

⁷⁴ See John M. Dempsey, *Administrative Law: Michigan Sides with Marbury, Not Chevron, on Agency Deference*, 55 WAYNE L. REV. 3, 5 (2009) (“The Michigan Supreme Court . . . invoked *Marbury v. Madison* and the Michigan Constitution to find that agency interpretations of law are not binding on the courts.” (citations omitted)); Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2637 (2003) (“*Chevron*’s command to courts to defer to certain reasonable agency interpretations of statutes is superficially an uneasy fit with the declaration in *Marbury v. Madison* that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” (citations omitted)); Harold M. Greenberg, *Why Agency Interpretations of Ambiguous Statutes Should be Subject to Stare Decisis*, 79 TENN. L. REV. 573, 604 (2012) (“[E]ven if the coexistence of the *Chevron* and *Marbury* conventions is not by itself problematic, the Judiciary’s inability to signal which convention applies is.” (citations omitted)); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1262 (2002) (“The concern among scholars and judges that *Chevron* may have gone too far in relinquishing judicial authority—and their corresponding efforts to reinvigorate the judicial role—may be motivated in part by an underlying sense that *Chevron*’s surrender of power is at odds with *Marbury*’s declaration that the ‘judicial Power’ under Article III includes the power to ‘say what the law is’” (citations omitted)); Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1108 (2001) (“Since it was decided in 1984, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*—a case commonly associated with strong deference to agency interpretations of law—has taken on canonical status as the ‘counter-*Marbury*’ for the administrative state.” (citations omitted)).

⁷⁵ See Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 743 (2007) (“*Chevron* vastly expanded the scope of agency lawmaking and interpretive power. In doing so, *Chevron* changed the political landscape by redistributing interpretative power from the Judiciary to the Executive.”).

Marbury firmly cemented the judiciary's role of judicial review against the backdrop of the separation of powers under the Constitution. In 1803, Chief Justice John Marshall wrote: "It is emphatically the province and duty of the judicial department to say what the law is."⁷⁶ In so doing, he essentially transformed the judiciary into the final arbiter of the meaning of the Constitution. Allowing the judicial branch this power makes intuitive sense from a separation of powers perspective, as to allow the executive branch to both execute and decide the meaning of the Constitution would lead to unchecked power.⁷⁷ Instead, *Marbury* tasks the judiciary with being a dispassionate observer, free from political pressure and accountability, in its effort to determine the meaning of the Constitution.⁷⁸ This is the judiciary's greatest strength, but also its highest point of fragility.⁷⁹

If one starts with the baseline of *Marbury*'s holding, it is not difficult to see how the judiciary's role as the final arbiter of the Constitution could lead to its ancillary role as the final arbiter of ambiguous statutes.⁸⁰ This logical inference, however, would put *Marbury* at odds with *Chevron* and, additionally, be a venerable argument against applying *Chevron* deference to cabinet agencies.

Instead, the proper way to view *Chevron*'s impact is to contextualize the case as one that upheld the judiciary's power to say what the law is (but to cabin its ability to draft judicial legislation and policy), while staying true to the tenant of judicial review as articulated by *Marbury*. Indeed, judicial review of agency decisions remains more strenuous than that of congressional or executive actions, given the baseline Step One inquiry of *Chevron*.⁸¹

The *Chevron* decision presents a pragmatic and consistent two-step framework by which the judiciary can review agency interpretations of statutes. The Supreme Court's decision in *Mead* unnecessarily complicated the inquiry as to when the *Chevron* two-step framework should be applied. However, such added complexity raises the question whether *Chevron* deference should be applied on a case-by-case or across-the-board approach. The across-the-board approach Justice Scalia articulated is the more persuasive of the two, due not merely to its simplicity, but rather its more accurate view of how our government functions on a day-to-day basis.

When the across-the-board approach to *Chevron* is viewed against the backdrop of *Marbury*, it can be seen that *Chevron* vindicates the traditional

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

77 See Sunstein, *supra* note 11, at 2584 ("Why is the executive not permitted to construe constitutional ambiguities as it sees fit? The simplest answer is that foxes are not permitted to guard henhouses, or, in other words, those who are limited by law cannot decide on the scope of the limitation.").

78 See *supra* note 13 and accompanying text.

79 See *supra* notes 14 and 71 and accompany text.

80 See Sunstein, *supra* note 11, at 2585 ("It should be easy to see how this view might be transplanted to the arena of ordinary statutory law. Perhaps statutory law has the same relationship to the executive as the Constitution has to the government in general.").

81 See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

role of judicial review.⁸² Judges are still called upon to “say what the law is,” but are cabined from creating judicial policy that could oversee administrative agencies. Under *Chevron*, when Congress is silent and the agency speaks, the decision is one of policy, not law, and therefore most appropriately left to the branches accountable to the electorate.

II. DEFINING “CABINET” AGENCIES

Prior to engaging in the assessment of whether cabinet agencies are more entitled to *Chevron* deference than independent agencies, we must first differentiate the two. It seems common in today’s lexicon to refer to those advisors closest to the President as “cabinet officers,” namely, the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, and the Secretary of Justice. The historical foundation for what constitutes a cabinet agency, however, is not quite as intuitive.

Indeed, there is no explicit definition of the term “cabinet” in the Constitution, the United States Code, or the Code of Federal Regulations. There are, however, a few clues as to the prerequisites for being a “cabinet officer.” Title 3, Section 302 of the United States Code states that, in regard to presidential delegation of power, “nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President.”⁸³ This passage implies that principal officers do not need to request their power to act separately; rather, they may use power either expressly or implicitly delegated by the President each time that power is utilized.⁸⁴ This additionally implies that being a principal officer is a prerequisite, although not the end of the inquiry, to being a cabinet officer.

The initial use of the term “cabinet” dates back to the first President of the United States, George Washington.⁸⁵ President Washington’s Cabinet

82 See Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 312 (1986) (“Above all, *Chevron* chastens the excessive intrusion of courts into the business of agency policy-making. Policy, which is not the natural province of courts, belongs properly to the administrative agencies, and, ultimately, to the executive and legislature that oversee them.”).

83 3 U.S.C. § 302 (2012) (stating principal officials need not appeal to the President each time they use generally delegated power).

84 The term “principal officer” is implicitly defined in Article II, Section 2, Clause 2 of the Constitution:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

85 See Cabinet Members, GEORGE WASHINGTON’S MOUNT VERNON, <http://www.mountvernon.org/educational-resources/encyclopedia/cabinet> (last visited Oct. 10, 2014).

contained four members: Thomas Jefferson (Secretary of State), Alexander Hamilton (Secretary of the Treasury), Henry Knox (Secretary of War), and Edmund Randolph (Attorney General).⁸⁶ Across centuries, the positions within the President's cabinet retain several common traits. First, each cabinet member is nominated by the President and then presented to the Senate for confirmation (or rejection) by a simple majority vote.⁸⁷ Second, all members of the cabinet receive the title of "Secretary."⁸⁸ Third, cabinet members serve at the absolute pleasure of the President, meaning that the President may dismiss them at any time, for any or no reason at all.⁸⁹

Throughout the many presidencies that followed President Washington, the President's cabinet has grown to include several other cabinet officers,⁹⁰ as well as "cabinet-level" (or "cabinet-rank") positions.⁹¹ With history as a guide, there seems to be three options in defining "cabinet" agencies. First, one may use the original four cabinet agencies under President Washington. Second, one may use the current cabinet agencies under President Obama (fifteen executive departments). Third, one may use the fifteen executive departments and seven cabinet-level positions under President Obama.

Including the seven cabinet-level positions within the definition of "cabinet agencies" raises implicit problems, as the White House Chief of Staff is technically the highest-ranking employee in the White House and not a principal officer under the Constitution. The first option seems equally implausible, as it accurately reflects neither the current way in which the President defines her own cabinet, nor the way in which the public generally views the cabinet. Therefore, this Note will proceed to define "cabinet agencies" as the fifteen executive departments under the current President's control.

86 *Id.*

87 *See supra* note 85.

88 One notable exception is the head of the Department of Justice, who is referred to as the "Attorney General."

89 This distinction, at its core, is what separates principal officers from inferior officers or employees of the President. The cabinet is very much the public face of the President's policy initiatives. Therefore, the President must have the ability to control her cabinet, which necessarily entails the ability to fire cabinet members at will.

90 President Obama's Cabinet includes fifteen departments: Department of State, Department of the Treasury, Department of Defense, Department of Justice, Department of the Interior, Department of Agriculture, Department of Commerce, Department of Labor, Department of Health and Human Services, Department of Housing and Urban Development, Department of Transportation, Department of Energy, Department of Education, Department of Veterans Affairs, and Department of Homeland Security. *The Cabinet*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/administration/cabinet> (last visited Oct. 10, 2014).

91 Cabinet-rank positions and agencies as of the Obama Administration include: the White House Chief of Staff, the Environmental Protection Agency, the Office of Management and Budget, the United States Trade Representative, the United States Mission to the United Nations, the Council of Economic Advisers, and the Small Business Administration. *Id.*

III. CHEVRON'S GREATER APPLICABILITY TO CABINET AGENCIES

With the *Chevron* decision contextualized and cabinet agencies defined, it is now time to turn to why *Chevron* deference is better suited for cabinet agencies than independent agencies. Making a compelling case for *Chevron* deference requires both a theoretical and practical justification. Part III proceeds with two theoretical justifications and four practical justifications as to why *Chevron* deference is more applicable to cabinet agencies.

A. *The Theoretical Justification*

The theoretical justification for why *Chevron* deference is more applicable to cabinet agencies is similar to why *Chevron* deference should be applied across-the-board as opposed to on a case-by-case basis.⁹² First, the judiciary's *Marbury v. Madison* power to "say what the law is" exists against the backdrop of the judiciary's countermajoritarian difficulty.⁹³

The countermajoritarian difficulty endures because the judiciary is the only branch that is unelected, and therefore unaccountable, to the electorate.⁹⁴ This is a burden that the judiciary alone must bear, and one that unequivocally separates it from the executive and legislative branches.

The countermajoritarian difficulty, however, does not delegitimize the judiciary's traditional function to "say what the law is." Rather, it forces the judiciary to base its jurisprudence on decisions of law, not policy.⁹⁵ Interpretation of law is the exclusive domain of the judiciary, and a domain for which it is well suited. With that said, the countermajoritarian difficulty comes back into focus when the judiciary decides cases based on judicial policy preferences rather than the law.⁹⁶ It is this dilemma that *Chevron* deference specifically counteracts.⁹⁷

92 See *supra* notes 70–71 and accompanying text.

93 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 ("It is emphatically the province and duty of the judicial department to say what the law is."); *supra* notes 9 and 14 and accompanying text. The countermajoritarian difficulty, at its core, is a problem with the institution of judicial review. When unelected judges use their power of judicial review to nullify the actions and decisions of elected executives or legislators, they inherently act contrary to the collective desire of the American people, as articulated by their political representatives. This overruling of the "majority will" seems appropriate when the judiciary decides a question of law, as that is its domain and area of expertise, but not when it decides a question of policy, for that is the domain and expertise of the elected branches. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (opinion of Roberts, C.J.) ("Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.")

94 See *supra* note 13 and accompanying text.

95 See *supra* note 13 and accompanying text.

96 See *supra* note 13 and accompanying text.

97 See *supra* note 13 and accompanying text. Under the *Chevron* two-step framework, the judiciary must abide by an agency's reasonable interpretation of an ambiguous statute.

Under pre-*Chevron* jurisprudence, as Justice Stevens articulated, judges would often insert their own judicial preferences in the place of statutory ambiguity from Congress.⁹⁸ This approach is fundamentally mistaken. When Congress delegates power to agencies, it delegates power *to agencies*, not to the judiciary. Post-*Chevron*, Congress legislates against the proper backdrop that ambiguities in statutes will be interpreted utilizing the *Chevron* two-step framework. If Congress dislikes how an agency interprets a statutory ambiguity, it can amend the statute in question.⁹⁹ The post-*Chevron* framework simultaneously vindicates the judiciary's power to "say what the law is" and maintains the executive's and legislature's respective abilities to make policy decisions, as they were elected (and are held accountable) to do.¹⁰⁰ As Chief Justice Roberts implicitly noted in his majority opinion in *Sebelius v. National Federation of Independent Businesses*: The executive and legislature can be thrown out. The judiciary cannot.¹⁰¹

Second, the text of the *Chevron* opinion itself supports a broad interpretation of its applicability to agencies (including cabinet agencies). As noted previously, Justice Scalia often reminds the Court that the text of the *Chevron* holding is written in broad and general language, which is not cabined to the precise case at issue.¹⁰² An examination of Justice Stevens's pivotal paragraph in *Chevron*, defining the two-step framework, supports this view:

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). The *Chevron* framework implicitly prevents the judiciary from crafting its own policy prescriptions to fill the gaps left by Congress.

98 See *supra* notes 55–59 and accompanying text.

99 See *supra* note 51 and accompanying text.

100 While this Note pays particular attention to the problematic nature of the judiciary usurping policymaking power, siphoning it away from the executive and legislative branches, it is similarly problematic for the legislature to burden (or "punt" to) the judiciary with politically contentious decisions that should be made by elected and accountable officials. As one example, *Roe v. Wade*, 410 U.S. 113, 165–66 (1973), weighed into the contentious and politically charged debate over whether a woman has a fundamental right to an abortion. *Id.* In the absence of clear congressional action on the subject, the judiciary formulated an awkward trimester framework that reads more like judicial legislation than a judicial opinion. *Id.* at 164–65. Indeed, the trimester-based framework eventually became unworkable due to advances in medical technology and had to be amended by Justice O'Connor's plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which dispensed with the trimester framework in favor of an "undue burden" standard. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (joint opinion of O'Connor, Kennedy, and Souter, J.J.).

101 See *supra* note 13 and accompanying text.

102 See *supra* note 32 and accompanying text. Again, admittedly, Justice Scalia's view often comes up in concurrences and dissents, but it is not all that uncommon for his viewpoints to become the majority, especially in the context of administrative law. See William K. Kelley, *Justice Antonin Scalia and the Long Game*, 80 GEO. WASH. L. REV. 1601, 1604 (2012) ("From the beginning of his time on the Court, Justice Scalia has been playing the long game. Slowly but surely, he has fundamentally transformed the terms of legal debate in this country—in the courts, in the academy, and in the political process.").

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, 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.¹⁰³

Justice Stevens's language is sweeping and broad. It is not cabined to certain agencies or agency decisions with regard to ambiguous statutes. Additionally, *Chevron* contained no concurrences or dissents: all six justices agreed to it (three took no part in the decision).¹⁰⁴ Critiques such as those Justice Breyer offers seem to be attempts at revisionist history, a plea to return to the pre-*Chevron* framework that granted the judiciary power to dictate policy in the face of congressional ambiguity.¹⁰⁵

Admittedly, some post-*Chevron* cases, and *Mead* in particular, seem to be sympathetic toward Justice Breyer's view and attempt to cabin the applicability of *Chevron* deference.¹⁰⁶ But if Justice Stevens' words in the *Chevron* opinion are to be taken seriously, then it must be read as the broad opinion that it was. If not, it would seem rather disingenuous for the Court to announce 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 then only apply that theoretical rationale to certain circumstances that the judiciary deems appropriate.¹⁰⁷ The theoretical rationale of the *Chevron* two-step framework is one that demands application across the board. Again, Justice Scalia often notes: "While *Chevron* in fact involved an interpretive regulation, the rationale of the case was not limited to that context."¹⁰⁸

To summarize, the theoretical justification for *Chevron*'s applicability to cabinet agencies is twofold. First, the judiciary's proper role is arbiter of law, not policy. In the face of congressional ambiguity, cabinet agencies must have the ability to dictate a policy path of their choosing, as they are closest to the electorate and accountability. Second, the *Chevron* opinion itself was written in broad and general language. If the text of the opinion is to have meaning, it must be interpreted in an across-the-board fashion and applied to cabinet agencies.

103 *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (citations omitted).

104 *Id.* at 839.

105 *See supra* notes 52–64 and accompanying text.

106 *See supra* notes 41–46 and accompanying text.

107 *Chevron*, 467 U.S. at 843 (citation omitted).

108 *Christensen v. Harris Cnty.*, 529 U.S. 576, 589–90 (2000) (Scalia, J., concurring).

B. *The Practical Justification*

There are four main practical justifications for why *Chevron* deference is more applicable to cabinet agencies than to independent agencies: (i) political accountability and presidential prerogative; (ii) agility and quickness to respond to national security matters; (iii) inherent expertise and technical advantage; and (iv) the encouragement of careful statutory drafting by Congress. Each practical justification is discussed in turn.

1. Political Accountability and Presidential Prerogative

Beginning with the basic premise that interpretive decisions of ambiguous statutes, at their core, are decisions of policy, it follows that the elected and politically accountable branches should be left to make these policy decisions.¹⁰⁹ Cabinet agencies are visible and vocal conduits of the President's policy on a variety of fronts: foreign affairs, national security, and healthcare regulation, among others.¹¹⁰ Although not directly accountable to the voters themselves, these cabinet heads are but one step away from direct accountability to the President, and able to be fired by the President at will.¹¹¹ The President knows that unwise political and policy choices by cabinet heads will have an adverse effect on the viability of both the President's re-election chances and the political capital necessary to accomplish the President's policy goals. It is for this reason that the President's cabinet must have the political ability to interpret ambiguous statutes enacted by Congress.¹¹² If the populous disagrees with the cabinet agency's interpretation, then the President can fire the cabinet head, or the President can be thrown out.¹¹³

Any interpretive decision by cabinet agencies undeniably has an aspect of political calculation and policy choice. Such judgments are the province of the executive and congressional branches, but not the judicial branch.

109 See, e.g., Sunstein, *supra* note 11, at 2587 (“[I]nterpretation of statutes often calls for technical expertise, and here the executive has conspicuous advantages over the courts. . . . When the executive is seeking to expand or limit the Endangered Species Act or deciding whether to apply the Clean Air Act to greenhouse gases, democratic forces undoubtedly play a significant role.”). But see Gary S. Lawson, Commentary, *Reconceptualizing Chevron and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377, 1380 (1997) (“But defining what counts as a ‘reasoned explanation’ for choosing from among a range of permissible interpretations of a statute is a bit more complicated than it seems.”).

110 Sunstein, *supra* note 11, at 2588–89 (“This argument [to apply *Chevron* deference] applies most obviously to the national government, operated by the Chief Executive, who stands as the most visible official in the United States.”).

111 See *supra* note 88 and accompanying text.

112 See Starr, *supra* note 82, at 309 (“When Congress has not spoken to an issue, *Chevron* forbids the courts to engage in supervisory oversight of the agencies. Ours [the judiciary’s role] is not to supervise; that role is allotted to the political branches, those directly accountable to the people. *Chevron* affirms that fundamental allocation of responsibility.”).

113 See Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 928 (2003) (“[I]t is not irrelevant that agencies are subject to a degree of democratic supervision.”).

This fundamentally separates the executive from the judicial branch: it is the duty of the executive to say what the policy is and the duty of the judiciary to say what the law is.

2. Agility and Quickness to Respond to National Security Matters

The ability to respond quickly and decisively to national security matters has become increasingly important in the twenty-first century after the stark events of September 11th, 2001, and its aftermath. It is for this reason that the cabinet agencies, namely the Department of Defense and the State Department, must have the ability to interpret a vague statute enacted by Congress at a moment's notice.

Allowing cabinet agencies to make these policy calls advances a swift response to national security matters for two reasons. First, if the judiciary must follow the *Chevron* two-step framework, then this reduces the likelihood that such an interpretation by the agency will result in protracted litigation or an abrupt change in policy dictated by the unelected judiciary.¹¹⁴ Second, if appellate courts apply a *Chevron* presumption across the board, this reduces the risk of potential circuit splits, which would also cause prolonged litigation.¹¹⁵

3. Inherent Expertise and Technical Advantage

Cabinet agencies are, at their core, individual departments within the executive branch that focus on one particular aspect of the President's policy prerogatives. In comparison to the judiciary, which is composed of general courts that must review cases across a wide spectrum of disciplines and subject matters, cabinet agencies deal with one particular aspect of the President's policy agenda and solely focus on implementing that vision.¹¹⁶

Since *Marbury v. Madison*, our country placed the power of judicial review within the judiciary, in part, due to the belief that the judiciary is the branch best suited for that function.¹¹⁷ Analogously, cabinet agencies within

114 See Sunstein, *supra* note 11, at 2588 ("Deference to the executive reduces the likelihood that judicial disagreement will result in time-consuming remands to the agency for further proceedings.")

115 *Id.* ("[S]uch deference combats the risk that different lower courts will disagree about the appropriate interpretation of statutes—and thus counteracts the balkanization of federal law.")

116 *Id.* at 2587 ("[I]nterpretation of statutes often calls for technical expertise, and here the executive has conspicuous advantages over the courts. The question in *Chevron* itself was highly technical, and it was difficult to answer that question without specialized knowledge.")

117 See E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 14 (2005) ("Our desire to have courts determine questions of law is related to a belief in their possession of expertness in regard to such questions. It is from that very desire that the nature of questions of law emerges." (quoting JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 152 (1938) (emphasis omitted))).

the executive branch are the governmental actors that are best suited to interpret ambiguous statutes enacted by Congress, as cabinet agencies have a distinct expertise and technical advantage in interpreting the statutes at issue.¹¹⁸

4. Encouragement of Careful Statutory Drafting by Congress

Post-*Chevron*, Congress knows that if it leaves statutory ambiguities in place, it is implicitly delegating to agencies the authority to work through those ambiguities.¹¹⁹ Additionally, Congress knows that the judiciary will defer to agencies' reasonable interpretations of ambiguous statutes.¹²⁰ If Congress wishes to not leave such interpretive choices open to cabinet agencies, then it can either draft a precise statute from its inception or amend the statute to essentially "overrule" the agency's reasonable interpretation.¹²¹ Allowing cabinet agencies to reasonably interpret ambiguities in statutes both encourages careful statutory drafting by Congress and allows cabinet agencies to quickly respond by interpreting ambiguities in the event of a pressing national security concern.¹²²

To summarize, there are four main practical justifications for why *Chevron* deference is more applicable to cabinet agencies than to independent agencies: political accountability and presidential prerogative (the executive is politically accountable, the judiciary is not); agility and quickness to respond to national security matters (an increasingly necessary ability in a post-September 11th world); inherent expertise and technical advantage (agencies are specialists, while courts are necessarily generalists); and the encouragement of careful statutory drafting by Congress (post-*Chevron* Congress remains in the driver's seat of the administrative state train).

CONCLUSION

Cabinet agencies must, against the backdrop of often-ambiguous statutes, make daily policy choices that are frequently highly contentious and politically charged. Cabinet agencies must "say what the policy is" from the

118 *Id.* ("One result of this *Chevron* induced shift of power to agencies within the Executive Branch . . . is that agency experts are making more policy decisions rather than agency lawyers and federal courts."); Lawrence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990) ("*Chevron's* importance is its recognition that, expertise aside, the agencies, nevertheless, maintain a comparative institutional advantage over the judiciary in interpreting ambiguous legislation that the agencies are charged with applying.").

119 *See supra* note 49 and accompanying text.

120 *See supra* notes 30–31 and accompanying text.

121 *See supra* note 51 and accompanying text.

122 *See* Sunstein, *supra* note 11, at 2587 ("[T]he executive administers laws that apply over extended periods and across heterogeneous contexts. Changes in both facts and values argue strongly in favor of considerable executive power in interpretation. Unlike the executive, courts are too decentralized . . . to do the relevant 'updating,' or to adapt statutes to diverse domains.").

perspective of the executive branch. Such policy interpretations are the exclusive domain of the electable and accountable branches. The elected branches ability to “say what the policy is” does not conflict with the judiciary’s *Marbury v. Madison* ability to “say what the law is,” as questions of policy and questions of law are two separate inquiries that should be decided by the branches best suited to answer them: questions of policy by the executive and legislative branches, and questions of law by the judiciary.

The theoretical justification for *Chevron*’s applicability to cabinet agencies is twofold. First, the judiciary’s proper role is arbiter of law, not policy. In the face of congressional ambiguity, cabinet agencies must have the ability to dictate a policy path of their choosing, as they are closest to the electorate and accountability. Second, the *Chevron* opinion itself was written in broad and general language. If the text of the opinion is to have meaning, it must be interpreted in an across-the-board fashion and applied to cabinet agencies.

The practical justification for *Chevron*’s applicability to cabinet agencies is fourfold. First, cabinet agencies are politically accountable and serve the prerogative of the President. Any interpretive decision by cabinet agencies undeniably has an aspect of political calculation and policy choice. Second, cabinet agencies must be agile and quick to respond to national security matters in a post–September 11th world. It is for this reason that cabinet agencies, namely the Department of Defense and the State Department, must have the ability to interpret a vague statute enacted by Congress at a moment’s notice. Third, cabinet agencies are best suited to interpret ambiguous statutes enacted by Congress, as cabinet agencies have a distinct expertise and technical advantage in interpreting the statutes at issue over generalist courts. Fourth, by allowing cabinet agencies to reasonably interpret ambiguities in statutes, this both encourages careful statutory drafting by Congress, and also allows cabinet agencies to quickly respond by interpreting ambiguities in the event of a pressing national concern.

Cabinet agencies are better suited to receive *Chevron* deference than independent agencies, because voters should desire for such policy decisions to be made by those closest to electoral accountability rather than unelected Article III judges with life-tenure. The judiciary should accept the counter-majoritarian difficulty as fundamentally true and review cabinet agency decisions in light of *Chevron* deference.

