How *Chevron* Deference Fits into Article III

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Abstract

U.S. Supreme Court Justices Clarence Thomas and Neil Gorsuch, along with Professor Philip Hamburger, assert that Chevron *deference—under which courts defer to reasonable agency statutory interpretations—violates Article III.* Chevron *does so because, they argue, it either permits agencies, not courts, "to say what the law is" or requires judges to forgo independent judgment by favoring the government's position. If they are correct, Congress could not require courts to accept reasonable agency statutory interpretations under any circumstances. This Article does what these critics, perhaps surprisingly, do not do—situates challenges to* Chevron *within the broad landscape of the Court's current Article III jurisprudence.*

A thorough study of Article III jurisprudence hobbles these blunderbuss Article III challenges to Chevron *but leaves room for narrow attacks. Derived from the plurality in* Northern Pipeline v. Marathon Pipe Line Co.*, a four-quadrant matrix informs Congress's power to limit Article III adjudication or review. The quadrants concern public and private rights, each subdivided by claims Congress created and did not create.* Chevron *does not apply to the most contentious and perhaps most unsettled quadrant—private rights that Congress did not create—and it most often applies in the quadrant in which Congress almost certainly can limit de novo judicial review—public rights that Congress creates. That leaves two other quadrants—public rights that Congress did not create (including, for traditional reasons, criminal law) and congressionally created private rights—where* Chevron *sometimes applies.* Chevron's *application in these latter two quadrants should give pause because the Court has more jealously guarded Article III adjudication there from congressional interference than with public rights that Congress created. Yet even within these two quadrants, other strands of Article III doctrine suggest that Congress has some space to limit de novo judicial review. By considering the full Article III landscape, this Article demonstrates the folly of a wholesale attack on Chevron and its destabilizing effects. Its critics should instead focus their efforts on discrete skirmishes.*

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> *Article III jurisprudence is "a most difficult area of constitutional law. The precedents are horribly murky [and] doctrinal confusion abounds . . . ."*
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> —Thomas G. Krattenmaker[1]

INTRODUCTION

After considering recent Article III attacks on *Chevron*[2] deference, one might think that the murkiness and confusion that Dean Krattenmaker—along with generations of judges, academics, and law students—found in Article III has all but dissipated. Once lauded by judicial conservatives for limiting judicial activism,[3] *Chevron* defer-

1 H.R. REP. NO. 95-595, at 70 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6030 (letter from Thomas G. Krattenmaker).

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

3 *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Thomas W. Merrill, *Confessions of a* Chevron *Apostate*, ADMIN. L. NEWS, Winter 1994, at 1, 14 (noting, despite his later change of heart, "when I started with the Justice Department in 1987, my attitude toward *Chevron* was something like that of a guard toward the crown jewels in the Tower of London: it was part of the patrimony of the Executive Branch to be protected against encroachments at every turn"); *see also* Matthew Noxsel, *From Gorsuch to Gorsuch: Family Reformations on Agency Power*, 13 FLA. A&M U. L. REV. 45, 60–62 (2017) (discussing how then–Professor Scalia sought expressly to use deference as a way of advancing the Republican agenda and limit judicial interference).

ence now faces an existential crisis with attacks from multiple sides. *Chevron* calls for courts to defer to agencies' reasonable statutory interpretations, consistent with Congress's implicit command, when agencies interpret statutes that they administer. The most recent and capacious challenge from two U.S. Supreme Court Justices and a prominent law professor argues that *Chevron*—regardless of its normative force and its consistency with congressional intent—violates Article III in all of its applications.[4] *Chevron* does so, they argue, because it either permits agencies, not courts, to provide authoritative interpretations of law or requires courts to forgo their independence by favoring the position of the government, often a party to the litigation.[5] What is striking about these challenges is they present a simplistic portrait of Article III—where any incursion on courts' ability to provide de novo statutory interpretations is unconstitutional—without engaging with the Court's existing, complicated Article III jurisprudence that permits numerous congressionally imposed limits on Article III courts.

Scholars have recently responded by arguing that, with some theoretical or formal modification, *Chevron* does not offend Article III. These scholars focus on the history of judicial deference to certain discretionary executive "specifications," the varied approaches to judicial deference in the nineteenth century, the nature of "interpretation," or the ease of reframing and limiting *Chevron* as a remedial doctrine.[6] In short, these scholars argue that the *Chevron* challengers' invocation of the famous phrase in *Marbury v. Madison*[7]—that "[i]t is emphatically the province and duty of the judicial department to say what the law is"[8]—only frames, not resolves, the argument over *Chevron*.[9]

This Article continues these scholars' efforts but approaches the Article III challenges to *Chevron* in a different way—by situating

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4 *See infra* Section I.A.

5 *See infra* Section I.A.

6 *See infra* Section I.B.

7 5 U.S. (1 Cranch) 137 (1803).

8 *Id.* at 177.

9 For *Chevron* challengers' invocations of *Marbury*, see Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151–52, 1156 (10th Cir. 2016) (Gorsuch, J., concurring); Egan v. Del. River Port Auth., 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment) ("*Chevron* . . . [is] contrary to the roles assigned to the separate branches of government . . . ."); Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1230–31 (2016). Professor Aditya Bamzai provided a nuanced discussion of *Marbury* and its relationship to deference doctrines. *See* Aditya Bamzai, Marbury v. Madison *and the Concept of Judicial Deference*, 81 MO. L. REV. 1057 (2016).

these challenges within the Court's larger Article III jurisprudence. To do so, it first assumes a counterfactual world where the Court has never created *Chevron* and where Congress seeks to codify the *Chevron* doctrine as we know it under the Court's existing jurisprudence. It then asks: would *Chevron* violate Article III after considering the Court's substantial, existing body of Article III doctrine?

Placing *Chevron* in its Article III context offers two important advantages. First, it demonstrates that the Supreme Court often takes nuanced views of the specific rights at issue—whether private or public, and whether Congress created the public or private right—when considering whether and how Congress can limit Article III courts. Simply arguing that any limit on Article III courts, such as *Chevron* deference, either always or never offends Article III without particularized consideration betrays the general tenor and large swaths of relevant Article III jurisprudence.

Second, it highlights that, unlike in some other separation-of-powers contexts, the Court has accepted a greater-power-includes-the-lesser-power argument whereby Congress's greater power of creating a right includes a lesser power of deciding how and where that right can be adjudicated. In other words, the Court has lowered the Article III ramparts when Congress creates statutory rights. Because *Chevron* applies only to federal statutory interpretations, it applies only in the context of rights that Congress creates and thus only where Article III is usually more permissive of congressional control. Moreover, the Court has accepted significant forms of congressional control over Article III courts, such as precluding review altogether or permitting Congress to influence judicial resolution of a pending case. Lesser forms of control, such as *Chevron*'s reasonableness review, should cause no Article III concern.

Together, these insights indicate that a contextual inquiry of Article III doctrine forecloses a wholesale Article III attack on *Chevron*. *Chevron* is potentially troubling in only a small set of agency constructions where it appears with relative infrequency. *Chevron* is, at most, problematic within the context of agency regulations that serve as the basis for criminal liability and for agency statutory interpretations related to private rights that Congress has created. Ultimately, *Chevron* is a relatively minor Article III issue within the whole of Article III jurisprudence.

After Part I identifies the Article III arguments against *Chevron* and scholarly responses to them, Part II considers the "quadrants" that the Supreme Court has implicitly created when evaluating Con-

gress's ability to limit Article III adjudication or review. These quadrants first distinguish between public and private rights. Then they distinguish within public and private rights those that Congress created and those that it did not.

Part II concludes by describing how *Chevron* fits within these categories. Importantly, *Chevron* does not apply in one of the most contentious quadrants—private rights that Congress did not create—but it applies in the remaining three. Of those three quadrants, *Chevron* mostly applies when Congress's power to limit judicial review is at its zenith—public rights that Congress creates. It applies less frequently to claims within the other two quadrants, where Article III strikes a more defensive posture. To assess *Chevron*'s propriety in the quadrants where it applies, Part II continues by considering other lines of Article III jurisprudence that concern the ability of Congress to limit Article III power, such as Congress's ability to limit judicial review altogether, to influence how courts decide pending cases, and to limit de novo review.

Applying these Article III strands to *Chevron* in Part III first reveals that *Chevron*'s application to congressionally created public rights almost certainly does not offend Article III. Congress's greater power to create the rights at issue gives it the lesser power to permit and limit judicial review. Moreover, Congress has wide discretion to preclude judicial review of these claims altogether and limit de novo judicial review when judicial review exists. The Court has blessed Congress's use of these powers outside of the *Chevron* context. That leaves two quadrants—congressionally created private rights and a subset of criminal claims traditionally placed within the quadrant of public rights that Congress did not create. Current Article III doctrine and historical practice before *Chevron* suggest that *Chevron* rests uncomfortably in these two quadrants. Nevertheless, Congress's ability to limit de novo judicial review in these quadrants indicates that *Chevron* may not even violate Article III there. Whether or not other considerations allow *Chevron* in these quadrants, for reasons suggested in Part III or for reasons proposed by other academics, the key takeaway is that the Article III battle over *Chevron* should be joined only on these relatively small "darkling plain[s],"[10] not all of Article III, as its chief constitutional critics would have it.

A few caveats. First, I do not provide an originalist inquiry. Although I note my concern over simplistic answers in the complicated

10 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring in judgment).

area of Article III and consider historical practices as they inform current doctrine, I do not intend here to provide a canvasing of nineteenth-century practices. Others, as I discuss in Section I.B, have considered nineteenth-century practices in more depth than I do here. Instead, I focus on how the originalist arguments for *Chevron* would have a significantly destabilizing effect on Article III jurisprudence, mostly developed in the mid-to-late twentieth century. Those who have challenged *Chevron* on Article III grounds have done so in a vacuum—without considering other Article III lines of precedent. Second, I take no position on *Chevron*'s propriety as a matter of first principles or as an inferred doctrine under the Administrative Procedure Act ("APA").[11] Finally, I do not take a position here on the correctness of the Court's Article III doctrine. I have criticized portions of it elsewhere.[12] Instead, I describe and apply the doctrine as it exists—something, perhaps surprisingly, that is mostly or wholly absent from the current discussion over *Chevron* and Article III. What becomes clear is that *Chevron*'s Article III status is one question in a complex Article III ecosystem that current precedent significantly informs, not one that exists in isolation from other Article III questions.

I. *Chevron* and Article III Debates

Chevron upheld an Environmental Protection Agency ("EPA") interpretation of "stationary source" under the Clean Air Amendments of 1977.[13] In doing so, the Court created a two-step process for judicial review of agency statutory interpretations or constructions whenever "a court reviews an agency's construction of the statute which it administers."[14] First, the court should determine if "Congress has directly spoken to the precise question at issue."[15] If Congress has, the agency must do as Congress commands.[16] If instead, as was the case in *Chevron* itself, "the statute is silent or ambiguous with respect to the specific issue," the court asks "whether the agency's answer

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

12 *See* Kent Barnett, *Due Process for Article III—Rethinking* Murray's Lessee, 26 Geo. Mason L. Rev. 677 (2019) (criticizing the Court's ever-expanding definition of "public rights" and noting inconsistency between the doctrine and the purpose of Article III).

13 Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified as amended at 42 U.S.C. §§ 7401–7671q); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 839–40 (1984).

14 *Chevron*, *supra* note 13, at 842.

15 *Id.*

16 *Id.* at 842–43.

is . . . a permissible construction of the statute."[17] If the statute has more than one permissible interpretation, the agency can choose among those interpretations and change its mind over time.[18] The EPA's interpretation was permissible.[19] The Court chiefly grounded *Chevron* deference on notions of congressional delegation of interpretive primacy to agencies.[20] But the Court also pointed to agencies' superior expertise and more significant political accountability as compared to judges.[21] Since then, the Court has indicated that *Chevron* also furthers stabilization in the law over how courts across the country approach agency interpretations.[22]

In the past ten years or so, *Chevron* has come under sustained attack. Some criticism is comparatively minor: courts should modify how *Chevron*'s steps work or reconsider the circumstances under which *Chevron* applies at all.[23] Other critics call for the end of *Chevron* altogether, although on varying grounds. Some argue that *Chevron* is a failed doctrine of administrative common law because it has become too complicated and uncertain to be useful.[24] Others invoke

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17 *Id.* at 843.

18 *See id.* at 863–64.

19 *Id.* at 866.

20 *See id.* at 843–44, 865.

21 *See id.* at 865–66. Early in his tenure on the Supreme Court, Justice Scalia grounded *Chevron* only on notions of delegation, not expertise. *See* Scalia, *supra* note 3, at 514, 516. At the end of his tenure, he also relied on notions of stability among the lower courts. *See* City of Arlington v. FCC, 569 U.S. 290, 307 (2013).

22 *City of Arlington*, 569 U.S. at 307. Relatedly, in past coauthored work, I argued that *Chevron* can also promote judicial uniformity in interpretation by limiting judges' ideological tendencies. *See* Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1468 (2018) (finding, based on empirical analysis of the largest database to date, "that *Chevron* deference significantly curbs (but does not fully constrain) judicial discretion").

23 *See, e.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("*Chevron* encourages the Executive Branch . . . to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."); Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 799–800 (2017) (advocating that the major question doctrine to step zero be limited to Supreme Court review, excluding federal district courts and courts of appeals); Waterkeeper All. v. EPA, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring) ("Truncating the *Chevron* two-step into a one-step 'reasonableness' inquiry lets the judiciary leave its statutory escort to blow on an agency's dice."); Glob. Tel*Link v. FCC, 866 F.3d 397, 419 (D.C. Cir. 2017) (Silberman, J., concurring) (criticizing the "muscular use" of step two to allow agencies to go beyond their statutory authority); Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 743–72, 781–82 (2007) (discussing the Court's turn from intentionalism to textualism as part of step one).

24 *See* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 783 (2010); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* has

statutory grounds—namely, that the APA's call for "the reviewing court [to] decide all relevant questions of law"[25] indicates that federal courts are to review all matters of interpretation de novo.[26] In other words, they question *Chevron*'s assumption that Congress intended to delegate interpretive primacy to agencies merely by creating a statutory gap or ambiguity. The final group relies upon constitutional grounds. *Chevron* violates Article III because agencies, not courts, "say what the law is."[27] Conversely, if *Chevron* doesn't involve judicial interpretive authority under Article III, *Chevron* offends Article I because Congress has unconstitutionally delegated legislative authority to agencies.[28] Alternatively, *Chevron* violates due process and Article III by requiring courts to privilege the government's interpretation over other parties in a systemic way.[29]

I focus on these latter Article III challenges. The three key (and recent) Article III challenges to *Chevron* come from Justice Clarence Thomas, Justice Neil Gorsuch, and Professor Philip Hamburger. The next two subsections consider their arguments and the recent academic responses.

A. The Article III Challenges to Chevron

In the span of about fifteen years, Justice Thomas has gone from a proponent,[30] to a skeptic,[31] to a detractor of *Chevron* deference.[32] He has argued most recently that

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presented its fair share of practical problems in its administration."); *see also* Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91, 93 (2021) (arguing that the Court should scuttle *Chevron* because the doctrine permits dramatic policy shifts in our politically polarized time and undermines useful investment and reliance interests).

25 5 U.S.C. § 706.

26 *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 985–94 (2017). *But see* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1615 (2019) ("*Chevron* is not incompatible with the original meaning of the governing provision of the Administrative Procedure Act (APA).").

27 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see* cases cited *supra* note 9.

28 *See* Michigan v. EPA, 576 U.S. at 761 (Thomas, J., concurring); Egan v. Del. River Port Auth., 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring in the judgment). Although leading scholar Cass Sunstein once argued that *Chevron* was "in tension with the nondelegation doctrine," he has since disavowed this view. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 927 n.140 (2003).

29 *See* Hamburger, *supra* note 9, at 1189 (arguing that *Chevron* is a form of systemic bias favoring the government and is offensive to due process).

30 Perhaps his most significant *Chevron* opinion was *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005), in which he held that courts must defer to agency statutory interpretations when *Chevron* requires, *even if* courts had previously provided a judicial interpretation of the ambiguous statutory phrase. Since writing the

> *Chevron* compels judges to abdicate the judicial power without constitutional sanction. The Vesting Clause of Article III gives "[t]he judicial Power of the United States" to "one supreme Court, and . . . such inferior Courts as the Congress may from time to time ordain and establish." As I have previously explained, "the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." The Framers anticipated that legal texts would sometimes be ambiguous, and they understood the judicial power "to include the power to resolve these ambiguities over time" in judicial proceedings. The Court's decision in *Chevron*, however, "precludes judges from exercising that judgment."[33]

According to Justice Thomas, by allowing agencies to interpret ambiguous statutory provisions, the courts permit agencies either to assume the judicial power of the United States in violation of Article III or, alternatively, to exercise the legislative power in violation of Article I by establishing policy with the force of law.[34]

Relying on scholarship by Professor Aditya Bamzai, Justice Thomas also rejects any special historical justification for *Chevron*, although it is not clear whether he thinks that the lack of historical justification is relevant to constitutional concerns, on the one hand, or matters of statutory interpretation or congressional delegation, on the other.[35] He argues that courts did not defer to agency interpretations when interpreting statutes as part of a common law claim or federal question jurisdiction. To be sure, he argues, courts would use interpretive canons that respected the government's longstanding interpretations and the government's contemporaneous interpretations with the

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Brand X decision for the Court, he has indicated that he would revisit it. Baldwin v. United States, 140 S. Ct. 690, 690–91 (2020) (Thomas, J., dissenting from the denial of certiorari).

31 *See* Michigan v. EPA, 576 U.S. at 760 (Thomas, J., concurring) ("I write separately to note that its request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes.").

32 *See Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from the denial of certiorari).

33 *Id.* (citations omitted) (first quoting U.S. CONST. art. III, § 1; then quoting *id.*; then quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in judgement); then quoting *id.*; and then quoting Michigan v. EPA, 576 U.S. at 761 (Thomas, J., concurring)).

34 *See id.*

35 *See id.* at 692–93. Justice Thomas's opinion specifically calls for the Court to reconsider *Brand X*. To that end, he first argues in Part I that *Chevron* is problematic in three sections. The first section argues that *Chevron* is unconstitutional. The second section argues that *Chevron* is inconsistent with the APA's provisions on judicial review. The final section—where he discusses whether *Chevron* has historical justification—considers whether *Chevron* or one of its ancestors was an accepted principle of statutory interpretation. *Id.* at 691–93.

statute's enactment.[36] But he argues that *Chevron* goes further by permitting agencies to change their interpretations over time and ignoring the interpretation's contemporaneity.[37] Finally, although the Court's mandamus practice looks similar to *Chevron* because the Court would only enforce ministerial, not discretionary acts, he rejects reliance on mandamus to support *Chevron*.[38] He argues that mandamus practice existed as it did only because of the remedy requested, not because of any requirement that the Court defer.[39] When mandamus was inapplicable, courts would refuse to defer to an agency's interpretation in a later common law claim based on the same provision at issue in mandamus.[40]

Justice Gorsuch's constitutional arguments resemble Justice Thomas's. Before Justice Gorsuch's elevation to the Supreme Court,[41] he argued that *Chevron* deprives courts of the ability to determine the status of an individual's private legal rights, as required by *Marbury v. Madison*.[42] Even if *Chevron* allows courts to decide if the law is ambiguous, it does not permit the courts to "interpret the law and say what it is."[43] Notably, Justice Scalia had earlier rejected this argument.[44]

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36 *See id.* at 693.

37 *See id.* at 694.

38 *See id.* at 693–94.

39 *See id.*

40 *See id.* at 694.

41 More recently, Justice Gorsuch again indicated his concern over *Chevron* deference, although not framed in Article III terms. *See* Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 789–90 (2020) (Statement of Gorsuch, J.). Other circuit judges have also suggested that *Chevron* may offend Article III. *See* Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 104 n.4 (2018) ("An Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name." (quoting Waterkeeper All. v. EPA, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring in the judgment))); Egan v. Del. River Port Auth., 851 F.3d 263, 278–79 (3d Cir. 2017) (Jordan, J., concurring in the judgment) (criticizing both *Chevron* and *Auer* as "push[ing courts] further and further away from [their] constitutional responsibility to 'say what the law is'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))); *see also* Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323 (2017) ("One may fairly ask, therefore, whether [*Chevron*] allocates core judicial power to the executive—or perhaps simply blocks the exercise of judicial power in cases where the doctrine applies.").

42 *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151–52, 1156 (10th Cir. 2016) (Gorsuch, J., concurring).

43 *Id.* at 1152 (emphasis omitted). Moreover, he questions whether Congress has any authority to delegate legislative power under *Chevron* in a way that passes muster under Article I or whether due process finds offense when courts do not interpret law de novo. *See id.* at 1154, 1156–58.

44 *See* Scalia, *supra* note 3, at 514.

Professor Hamburger, too, attacks *Chevron* on similar Article III grounds. He argues that whatever the merits of the Court's current understanding of when Congress delegates interpretive primacy to agencies, delegation itself offends Article III judges' duty of what Justice Thomas had referred to as "independent judgment."[45] He cites Alexander Hamilton's statement in the Federalist Papers that "[t]he interpretation of laws is the proper and peculiar province of the courts."[46] In contrast, deferring to agencies' judgment under *Chevron* renders interpretation of legal questions the province of agencies.[47]

Aside from his Article III challenge, Hamburger argues that *Chevron*'s default rule causes judges to engage in systemic bias for the government and against other parties, thus violating the Fifth Amendment's Due Process Clause.[48] This systemic bias applies whenever the government is a party or a party in interest to litigation.[49] It presumably does not apply to disputes between private parties where the government has no stake in the outcome.[50] Moreover, although he argues that judges can and must consider government interpretation, even *Skidmore*[51] deference is problematic because it functions as a softer form of deference.[52] Nonetheless, Hamburger does exempt executive determinations concerning the calculation of benefits.[53] For

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45 *See* Hamburger, *supra* note 9, at 1195–97. Justice Thomas used the phrase "independent judgment" in his concurring opinion in *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in the judgment) ("For the reasons I explain in this section, the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws."). Professor Cynthia Farina argued that the *Chevron* Court had failed to grapple with the separation-of-powers implications of its decision. Although her arguments sound much in the same vein as the Article III challenges, they are not presented as Article III challenges per se. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 527 (1989). Moreover, although she was critical of the Court's analysis, she did not decide whether the Court correctly decided *Chevron* and other separation-of-powers challenges. *See id.*

46 Hamburger, *supra* note 9, at 1208 (quoting THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

47 *See id.* at 1211.

48 *See id.*

49 *See id.*

50 *See id.* ("Whereas the independent judgment problem arises in all cases in which the judges apply the *Chevron* doctrine, the bias problem comes up only [when] the government is a party—or at least the party in interest. In some *Chevron* deference cases, the parties are merely private bodies and the government usually is not involved."). His Article III independent judgment argument, he says, would preclude *Chevron* in litigation between private parties. *See id.*

51 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

52 *See* Hamburger, *supra* note 9, at 1201–02. He also contends that deference to policy decisions—that is, mixed legal and factual determinations—is unlawful because it requires deference to both legal and factual determinations. *See id.* at 1203–04.

53 *Id.* at 1200–01.

Hamburger, the courts are simply recognizing the executive's discretion, not deferring to its calculation.[54] Even if forms of deference may exist for particular legal questions, they are episodic and fail to present the same systemic dangers of *Chevron*.[55]

What these Article III challenges to *Chevron* share is their capaciousness. Except for Hamburger's limited exception for benefits determinations, they do not restrict their criticism of *Chevron* to particular applications.

B. Academic Responses

In perhaps the most sustained response to modern Article III challenges,[56] Professor Jonathan Siegel argues four key points. First, courts interpret a statute consistently with Article III when they determine that the statute's best reading delegates authority to the agency to resolve the ambiguity or gap.[57] In fact, he notes, the Supreme Court does something similar when it allows the other branches to resolve constitutional questions over, say, the Census Clause or the Apportionment Clause.[58] The Court still determines with finality what the statute—or Constitution—means; it merely does so by permitting a range of permissible answers.[59] Second, *Chevron* should be understood as recognizing that Congress delegates to agencies the authority to choose among acceptable options, not to interpret the statute.[60] Third, policymaking delegations that arise by express statutory provisions—which *Chevron*'s critics would permit[61]—are not different in kind than those that arise from ambiguity.[62] Finally, Congress has au-

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54 *Id.*

55 *See id.* at 1216–17. Abstention doctrines are admittedly a form of deference, but the deference is to other judges, not the government or a party. *See id.* at 1217–18.

56 For an earlier discussion of limits on judicial deference before the Court decided *Chevron*, see Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

57 *See* Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 941–42, 963, 982 (2018).

58 *See id.* at 965–72 (considering *Utah v. Evans*, 536 U.S. 452 (2002) (Census Clause) and *U.S. Dep't of Com. v. Montana*, 503 U.S. 442 (1992) (Apportionment Clause)).

59 *See id.* at 976.

60 *See id.* at 942.

61 A recent decision authored by Justice Thomas suggests as much. In *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379–82 (2020), he upheld a rule based on an expansive express delegation to the agency to identify mandatory covered healthcare coverage and exemptions. *See also* Sunstein, *supra* note 26, at 1638–40 (rejecting Article III argument that Congress lacks power to delegate interpretive authority to agencies implicitly if one accepts, consistent with longstanding congressional practice, that Congress can expressly delegate interpretive policy choices to agencies).

62 *See* Siegel, *supra* note 57, at 942.

thority to clarify how courts should interpret its instructions, and it could establish that its ambiguous instructions be interpreted as delegations to executive authority.[63]

Presenting an originalist response to the Article III challenge, Professor Ilan Wurman argues that *Chevron* is consistent with early federal courts' longstanding respect for the executive's authority to specify a course of action when a statute's terms or silence would not forbid more than one acceptable action—what he refers to as "the specification power."[64] His understanding of the specification power is similar to Siegel's reframing of *Chevron* as permitting agencies to choose among acceptable actions.[65] According to Wurman, specification differed from interpretation,[66] even if the line between the two could be hazy.[67] *Chevron*'s error was to conflate notions of interpretation—a power which courts jealously guarded—with specification, although the decision itself is best categorized as a specification case.[68] Wurman's account allows originalists and formalists—such as those who have challenged *Chevron* under Article III—to classify *Chevron* as concerning something other than interpretation and thereby protect judicial interpretive supremacy.[69] The terminology surrounding *Chevron* would change under his approach—moving from notions of interpretation to specification—and courts would have to ensure that their deference extends only to matters of specification.[70] But the Article III challenges are, in his words, "overblown."[71]

Perhaps the chief criticism of Wurman's account is not historical, but pragmatic because of the difficulty in distinguishing interpretation from specification. Sensing readers' skepticism over differentiating them, he presents a "breakfast" hypothetical—where the instruction is to "[g]o make breakfast."[72] He asserts that whether a meal of stones and leaves constitutes breakfast is an interpretive question, as is a meal of pizza.[73] But a meal of eggs and bacon would be a matter of specification.[74] It appears that the distinction between interpretation

63 *See id.* at 942–43.

64 Ilan Wurman, *The Specification Power*, 168 U. PA. L. REV. 689, 693–95 (2020).

65 *See* Siegel, *supra* note 57, at 942.

66 *See* Wurman, *supra* note 64, at 693–95.

67 *See id.* at 714.

68 *See id.* at 725–27.

69 *See id.*

70 *See id.* at 726.

71 *See id.* at 732.

72 *Id.* at 714.

73 *Id.*

74 *Id.*

and specification comes down to how snugly a response fits within a term's common usage. Leaves are an extremely uncommon choice for breakfast, pizza is rare (outside of college campuses), and eggs and bacon are quotidian. Where would seeds fit? Rice pudding? Asparagus with hollandaise? For all proposed meals, the meaningful issue is whether the response is a reasonable one—no matter how characterized—to the instruction provided. Wurman's hypothetical reveals that the formalist's interpretation/specification distinction is, at the very least, problematic as a useful judicial tool and that *Chevron*'s collapsing of the two categories into "interpretation" is itself hardly unreasonable. If anything, the distinction's collapse and Wurman's hypothetical indicate that *Chevron* should have gone further—as some, including the Roberts Court at least once,[75] have argued[76]—by simply asking in one step whether the government's response to the instruction is reasonable. After all, asking whether any of the hypothetical meals would be a reasonable understanding of "breakfast" would not meaningfully change the analysis, judicial disagreements, or outcomes in Wurman's hypothetical. As the formal distinction falters, it becomes more difficult to see why *Chevron* causes constitutional concern, even when deemed a matter of interpretation.

Responding to Bamzai's historical scholarship upon which Justice Thomas relied, Professor Craig Green challenges the premise that nineteenth-century courts would not have deferred to executive interpretations. Bamzai—while recognizing deference as it applied with mandamus—argues that courts reviewed agency statutory interpretations de novo, although they considered the contemporaneity and longstanding nature of agency interpretations as part of their analysis.[77] Green's chief response is that the history is murkier and that judicial review was not consistent throughout the nineteenth century.[78] Although Bamzai never expressly argues that *Chevron* violates Article III, Green goes a step further than Bamzai by rejecting the

75 *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 n.4 (2009) (responding to the dissent's concern over the Court's forgoing of a separate step-one inquiry by saying, "surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable"); *see also* United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring in part and concurring in the judgment).

76 *See, e.g.*, Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598 (2009).

77 *See* Bamzai, *supra* note 26, at 916–17.

78 *See* Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 679–81 (2020).

argument[79] and noting that courts did not seem to think that deference implicated constitutional concerns.[80]

Green has more recently argued that the constitutional attack on *Chevron* was of recent invention within conservative circles. He has argued that leading conservative judges, think tanks, and politicians embraced *Chevron* deference from its creation until the end of President Obama's first term.[81] These conservative voices included noted originalists Robert Bork and Antonin Scalia.[82] Conservatives directed their attacks at what they perceived as the "Imperial Congress" and the federal government's lack of appreciation for state autonomy.[83] Even when conservatives attacked what they described as overreaching federal regulators, they argued that the answer rested in changing political actors, not the courts or the nature of judicial review.[84] Only beginning around 2012 did conservatives focus on separation of powers and argue that *Chevron* was unconstitutional.[85] The anti-*Chevron* argument gained adherents, Green argues, as conservatives increased their power on the federal courts and adopted a more deconstructive approach to the federal administrative state.[86] Whether or not Green correctly identifies why conservatives shifted on the wisdom and constitutionality of *Chevron*, his work indicates that the Article III attack on *Chevron* is of remarkably recent vintage considering that its proponents are often self-professed originalists and enemies of "judicial activism."

Finally, Professor Andrew Hessick proposes recasting *Chevron* as a remedial doctrine, not a deference doctrine.[87] Instead of deferring to an agency interpretation in any case in which *Chevron* currently applies, courts would simply withhold the remedy of setting aside agency action if the agency's interpretation were reasonable.[88] If the agency's interpretation were relevant to a dispute between two individuals where no party sought to vacate an agency action, courts would, at

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79 *See id.* at 712–16. He also rejects other constitutional challenges to *Chevron*. *See id.* at 706–07 (nondelegation argument); *id.* at 716–21 (equal protection and due process arguments).

80 *Id.* at 693–94.

81 Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. Rev. 619, 642–68 (2021).

82 *Id.* at 656; *see also* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 Admin. L. Rev. 253, 280 (2014).

83 *See* Green, *supra* note 81, at 646.

84 *Id.* at 646–47.

85 *See id.* at 657–61.

86 *See id.* at 679–82.

87 F. Andrew Hessick, *Remedial* Chevron, 97 N.C. L. Rev. 1, 5 (2018).

88 *See id.* at 5.

most, give the agency interpretation *Skidmore* deference.[89] Along with resolving certain pragmatic and statutory criticisms of *Chevron*, his proposal addresses Article III challenges because *Chevron* would concern remedial practice—which Article III unquestionably permits the legislature to alter—as opposed to interpretation.[90] His approach would likewise keep *Chevron* consistent with longstanding mandamus and certiorari practice that used deferential standards of review for executive action.[91] Further, it would address what appeared to be Justice Gorsuch's chief, although likely not only, concern over deference to legal interpretations concerning private rights.

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Before proceeding further, I want to clarify the nature of my argument. I am unashamedly approaching the question of *Chevron*'s constitutionality as a doctrinal question that focuses on Article III doctrine, as opposed to a historical question of judicial review of agency statutory interpretation or consideration of proto-*Chevron* deference. My purpose here is not to rethink or reconceptualize Article III doctrine. Nor is it to present an originalist argument or historical analysis of agency statutory interpretation; for that, one can turn to Bamzai, Green, and Wurman. Instead, my purpose is to do something perhaps quotidian, yet challenging and surprisingly absent from the current conversation: consider how *Chevron*—had it not been created and used for more than thirty-five years—would fit within the existing doctrinal landscape of Article III. Steadfastly skeptical of any constitutional grand theory, I do not invoke one here. Instead, I approach the question much as a lower court appellate judge or judicial minimalist Justice likely would, recognizing the limits of text and history and considering how a new problem fits within well-worn doctrinal grooves. Even for those who find doctrinal arguments unexciting, Article III may prove an exception. Article III doctrine is a complicated, yet worthwhile, subject of study in part because it has spent its existence seeming to defy text, bright lines, and consistent theory. Moreover, regardless of academic interest in doctrinal questions, doctrinal questions matter to litigants and judges, as well as scholars, to situate their historical or normative theories.

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89 *See id.* at 23–24.

90 *See id.* at 5.

91 *See id.* at 20 & n.103.

Because of Justice Thomas's admitted willingness to overturn precedent[92] and Justice Gorsuch's less clear views on precedent in the area of administrative law,[93] they may find my arguments less than satisfying or responsive to their concerns. Alas, they are likely not my audience. Instead, my étude is for those who care about precedent, doctrinal cohesion, and the state of the law that their theories or history may inform, buttress, or undermine.

With the nature of my project in mind, let us return to the specific question that this Article asks: if the Court had never created *Chevron* and if Congress sought to codify what we currently know as *Chevron*

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92 *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1421–22 (2020) (Thomas, J., concurring in the judgment) ("As I have previously explained, 'the Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law.'" (quoting Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring))). Justice Thomas has further argued that the Supreme Court "should restore [its] *stare decisis* jurisprudence to ensure [it] exercise[s] 'mere judgement' . . . achieved through adherence to the correct, original meaning of the laws [it is] charged with applying." *Gamble*, 139 S. Ct. at 1981 (quoting THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). I do find some irony in Justice Thomas's willingness to overturn numerous precedents concerning deference on originalist grounds while also invoking Alexander Hamilton's assurance that judges would adhere to "strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 120 (2015) (Thomas, J., concurring in the judgment) (quoting THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

93 Justice Gorsuch indicated at his confirmation hearing that he plans to abide by precedent. *See, e.g.*, William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 314 (indicating at his confirmation hearing "Justice Gorsuch repeatedly answered questions about past cases by promising to analyze them under the 'law of precedent'"); Evan Halper, *Gorsuch Signals Reluctance to Overturn Long-Standing Court Precedents like* Roe vs. Wade, BALT. SUN (Mar. 21, 2017, 7:32 AM), https://www.baltimoresun.com/la-na-essential-washington-updates-gorsuch-says-he-would-be-reluctant-to-1490106071-htmlstory.html [https://perma.cc/DL99-PEAA] ("Part of being a good judge is coming in and taking precedent as it stands . . . ." (quoting Justice Gorsuch, confirmation hearing testimony)). That said, Justice Gorsuch indicated his support for overturning key administrative law precedents, including those related to *Chevron* and the nondelegation doctrine. *See* Justin Walker, *The Kavanaugh Court and the* Schechter*-to-*Chevron *Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 940–41, 955–56 (2020) (discussing, specifically, Justice Gorsuch's views on nondelegation and *Chevron*); Heather Elliott, *Gorsuch v. the Administrative State*, 70 ALA. L. REV. 703, 706–07 (2019) (discussing then–Judge Gorsuch's views on the administrative state). Legal scholars still are waiting to see the effects of Justice Gorsuch's statements—about precedent, generally, and *Chevron*, specifically—and if he follows the textualist based interpretation of his predecessor, Justice Scalia. *See, e.g.*, Hillel Y. Levin, *Justice Gorsuch's Views on Precedent in the Context of Statutory Interpretation*, 70 ALA. L. REV. 687, 700 (2019) (comparing what is known about Justice Gorsuch's views with Justice Scalia's); Max Alderman & Duncan Pickard, *Justice Scalia's Heir Apparent?: Judge Gorsuch's Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185, 190 (2017) (discussing potential differences between Justice Scalia and now–Justice Gorsuch on precedent).

tomorrow, would *Chevron* offend Article III based on its fit with Article III jurisprudence?

II. ARTICLE III MATRIX

Article III jurisprudence defies "easy synthesis."[94] Issues often appear discreetly from one another, and the formalist and functional approaches to Article III each win sets, but never the match.[95] The recent challenges to *Chevron* have focused on interpretation without considering the wider Article III landscape. Stepping back, one assumes a better vantage point for surveying the *Chevron* issue and recognizing how other doctrinal strands can inform it. This Part begins by considering the four-category matrix that emerges from the Court's Article III precedent—of public and private rights, both subdivided (mostly) into rights that Congress has or has not created—and then turns to other longstanding practices of precluding and limiting Article III review.

A. Article III Quadrants

Justice White once said that "Article III, § 1, of the Constitution is straightforward and uncomplicated on its face."[96] As relevant here, it provides, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[97] The difficulty comes in defining exactly what the "judicial Power of the United States" is and what authority Congress has over the courts' operation. The Court has, over time, left us with four categories that frame—if not always

94 Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 847 (1986) (confessing "precedents in [adjudicatory power of non-Article III courts] do not admit of easy synthesis"); *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 105–13 (1982) (White, J., dissenting) (outlining the history of "unsuccessful attempt[s] to articulate a principled ground by which to distinguish Art. I from Art. III courts"); William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1513–14 (2020) (highlighting the confusion resulting from the difference between a "simple account" of federal judicial power in Article III but a "longstanding" and "inconsistent" practice applying Article III's text).

95 *Compare Schor*, 478 U.S. at 847–48 (taking a functionalist approach to deciding if state law counterclaims may be adjudicated by a non-Article III court), *and* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1942, 1944–45 (2015) (using *Schor*'s functional approach, emphasizing the role of consent), *with N. Pipeline Constr. Co.*, 458 U.S. at 69–72 (plurality opinion) (using a formalist framework distinguishing between public and private rights to determine if a non-Article III court adjudicating claims violates the Constitution), *and* Stern v. Marshall, 564 U.S. 462, 481, 486–87 (2011) (adding consent as a nondispositive factor to a more formal approach to Article III analysis).

96 *N. Pipeline Constr. Co.*, 458 U.S. at 92 (White, J., dissenting).

97 U.S. CONST. art. III, § 1.

resolve—how Congress can limit Article III courts' intervention into agency, and other forms of non-Article III, adjudication. As this Section describes, the Court treats judicial review differently depending on whether the rights at issue are public or private rights, and whether Congress created them.

TABLE 1. ARTICLE III QUADRANTS

Public rights created by Congress	Private rights created by Congress
Public rights not created by Congress	Private rights not created by Congress

1. Public and Private Rights

One of the most important decisions about Article III turf battles is *Murray's Lessee v. Hoboken Land & Improvement Co*.[98] The Court in that case rejected, among other things, the argument that Article III prohibited the government from issuing a distress warrant concerning the land of a federal tax collector who had absconded with federal funds.[99] In doing so, the Court first established that not all adjudication qualifies as "judicial power of the United States" because executive officials have to determine facts and apply them to law routinely.[100] The Court noted Congress's Article I authority to raise revenue and the historical practice of the executive to decide revenue and taxing matters.[101] By waiving federal sovereign immunity, Congress could and did permit the matter to be both executive and judicial in character.[102] Congress has authority to set the terms of its immunity waiver in judicial proceedings.[103]

The Court ended its discussion by clarifying that some matters are purely judicial, some purely nonjudicial, and some both—as Congress chooses.

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under

98 59 U.S. (18 How.) 272 (1856).

99 *See id.* at 278–80.

100 *Id.* at 275, 280–81.

101 *See id.* at 281–82.

102 *See id.* at 282–83.

103 *See id.* at 283–84.

> the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[104]

Public rights are, therefore, matters that do not concern common law, equity, or admiralty. Congress can choose to keep them from judicial consideration altogether.[105] Private rights, in contrast, are any that are not public rights and that require judicial adjudication or review of some kind.[106]

Because private rights are all rights that are not public rights, it is necessary to know what public rights are. That's unfortunate. *Murray's Lessee* provided no clear definition, although it suggested at least three explanations or justifications for permitting the government to issue the distress warrant. Congress may have the privilege of keeping tax collection matters from the courts for historical reasons.[107] Or maybe Congress can keep matters in which it bestows privileges, including the privilege of suing the government when the government waives its sovereign immunity, out of Article III courts.[108] Or, relat-

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104 *Id.* at 284.

105 *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929) ("The mode of determining matters [concerning public rights] is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals."); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 632 (1984) ("[T]he whole point of the 'public rights' analysis was that no judicial involvement at all was required—executive determination alone would suffice." (emphasis omitted)). The Court has hinted that some kinds of public rights, such as those that impose fines, may require some form of Article III judicial review. *See* Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 455 n.13 (1977) ("We note that the decision of the administrative tribunal in these cases on the law is subject to review in the federal courts of appeals, and on the facts is subject to review by such courts of appeals under a substantial evidence test. Thus, these cases do not present the question whether Congress may commit the adjudication of public rights and the imposition of fines for their violation to an administrative agency without any sort of intervention by a court at any stage of the proceedings.").

106 The contrast between private and public matters was foundational to the nineteenth-century legal zeitgeist. *See* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) ("Although one can find the origins of the idea of a distinctively private realm in the natural rights liberalism of Locke and his successors, only in the nineteenth century was the public/private distinction brought to the center of the stage in American legal and political theory.").

107 *See Murray's Lessee*, 59 U.S. (18 How.) at 283–84

108 *See id.*

edly, it may be that Congress can exclude matters from Article III courts whenever the government is a party.[109]

The Court has since relied on these three rationales at different times. Professor Gordon Young in his pathbreaking scholarship on the development of public rights has noted that the public rights cases, both before and after *Murray's Lessee*, concerned government benefits, the vehicle through which the early government would have most often affected private interests.[110] By the 1930s, the Court no longer relied on the benefits rationale. In one case, the Court prominently relied upon the tax collection rationale.[111] Only a year later in one of the most significant Article III decisions, *Crowell v. Benson*,[112] the Court defined public rights as concerning cases that "arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative department[]."[113] *Crowell* thus indicated that public rights are those in which the government is a party. In 1982, a plurality of the Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[114] affirmed that public rights must arise between an individual and the government, even if something more were required.[115]

Yet only three years later, the Court clarified that public rights were not limited to only disputes in which the government was a party. In *Thomas v. Union Carbide Agricultural Products Co.*[116] —a decision to which I shall return in more detail—the Court extended public rights to disputes between private parties as part of a licensing regime for pesticides and thus did not rely on *Crowell*'s party based justification.[117] In fact, the Court disagreed that *Crowell* had created a bright line test based on whether the government was a party.[118] Moreover, the Court did not rely upon a benefits based or tax collec-

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109 *See id.*; Barnett, *supra* note 12, at 684–85 (discussing the various rationales).

110 *See* Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 795–801 (1986).

111 *See* Phillips v. Comm'r, 283 U.S. 589, 596 (1931).

112 285 U.S. 22 (1932).

113 *Id.* at 50.

114 458 U.S. 50 (1982).

115 *See id.* at 69 (plurality opinion) ("The distinction between public rights and private rights has not been definitively explained in our precedents. . . . [I]t suffices to observe that a matter of public rights must at a minimum arise 'between the government and others.'" (footnote omitted) (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929))).

116 473 U.S. 568 (1985).

117 *See id.* at 586–87.

118 *See id.* at 586.

tion justification.[119] Instead, the Court adopted a functionalist approach to Article III.[120] The public rights exception applied because the adjudicatory process at issue "serve[d] a public purpose as an integral part of a program safeguarding the public health" within "a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication."[121]

Although Congress can remove matters concerning public rights from Article III courts altogether, it has less room with private rights—whatever they might be. Traditionally, courts adjudicated all private rights.[122] But *Crowell* permitted an expert agency to adjudicate private rights—a claim between two private parties under a maritime federal workers' compensation program—because Congress had allowed courts to retain their "essential attributes of the judicial power."[123] As most relevant here, the *Crowell* Court emphasized—more than once—that the courts reviewed agency legal determinations de novo[124] and facts for evidence.[125]

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Where does this exceptionally brief discussion of public and private rights leave us? The Supreme Court has left us without a "definitive[]" principle for distinguishing public from private rights, as it itself has recently conceded.[126] Nonetheless, whatever the exact contours of the distinction, Congress can remove matters concerning public rights from Article III courts altogether, but it must provide courts some

119 *See* Barnett, *supra* note 12, at 689.

120 *See Union Carbide*, 473 U.S. at 586–87.

121 *Id.* at 589.

122 *See* Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 65–66, 66 n.268 (2000) (referring to *Crowell* when stating that "[i]t was not until the New Deal's dramatic expansion of the administrative state that the operation of administrative tribunals was allowed to extend beyond the confines of those 'public rights' historically committed to executive or legislative officials").

123 Crowell v. Benson, 285 U.S. 22, 51 (1932).

124 *See id.* at 45–46, 49, 54.

125 *See id.* at 46.

126 Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018) ("This Court has not 'definitively explained' the distinction between public and private rights, and its precedents applying the public-rights doctrine have 'not been entirely consistent.' But this case does not require us to add to the 'various formulations' of the public-rights doctrine." (citations omitted) (first quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982) (plurality opinion); then quoting Stern v. Marshall, 564 U.S. 462, 488 (2011); and then quoting *id.*)).

supervisory role over non-Article III private rights adjudication. That supervision requires, at least after *Crowell*, that Article III courts exercise de novo determination of legal questions and a limited review of the fact determinations for evidentiary sufficiency.

2. Congress's Role in Creating Rights

In *Northern Pipeline*, a plurality complicated the public/private distinction by differentiating rights that Congress creates from those that it does not.[127] The plurality stated, "it is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges."[128] Although in prior cases the Court had not expressly recognized the difference between rights that Congress did and did not create, the plurality argued that the difference explained the divergent ways that the Court had approved of non-Article III adjudication.[129]

For instance, the Court permitted Congress to assign the factfinding functions to an agency when it had created the private right to workers' compensation in *Crowell*, but it noted that the courts retained full power to decide issues of law and review facts for evidentiary support.[130] When Congress had not created the public rights at issue, however, such as the constitutional claims that magistrate judges could decide in *United States v. Raddatz*[131] as part of a criminal prosecution, the Court upheld the non-Article III adjudication. It did so only after noting that federal magistrate judges could provide recommended decisions for the Article III district court at the district court's request, the district court retained de novo review over all matters, and the magistrate judges remained under the district court's "total control."[132] In short, "the Court's scrutiny of the adjunct scheme in *Raddatz*—which played a role in the adjudication of constitutional rights [as part of a criminal prosecution]—was far stricter than it had

127 *N. Pipeline*, 458 U.S. at 80.

128 *Id.*

129 *See id.* at 83.

130 *See Crowell*, 285 U.S. at 45–47.

131 447 U.S. 667 (1980).

132 *Id.* at 681–82. Further, the district court could hire and remove the magistrate judges. *See id.* at 685 (Blackmun, J., concurring).

been in *Crowell*"[133] because of Congress's creation of the rights in the former, but not the latter.[134]

The plurality's reason for treating rights that Congress did and did not create differently under Article III is probably best understood as endorsing a greater-includes-the-lesser argument. The plurality invoked the "delicate accommodations required by the principle of separation of powers reflected in [Article] III"[135] to justify the distinction, but its reasoning is not easy to follow:

> [W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created. No comparable justification exists, however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created.[136]

This argument strongly suggests that Congress's greater power to create a right at issue includes the lesser, incidental power of addressing, among other things, the adjudication of the right.[137] If Congress does not create the right at issue, then the incidental power to choose non-Article III adjudication never arises. But what does this greater-includes-the-lesser argument have to do specifically with the separation of powers? In a footnote, the plurality says that when Congress creates a right, "[t]he interaction between the Legislative and Judicial Branches is at its height,"[138] perhaps suggesting that Article III courts must defer to congressional choices over adjudication to avoid inter-

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133 *N. Pipeline*, 458 U.S. at 82–83 (emphasis omitted).

134 *See id.* at 83 ("Although *Crowell* and *Raddatz* do not explicitly distinguish between rights created by Congress and other rights, such a distinction underlies in part *Crowell*'s and *Raddatz'* recognition of a critical difference between rights created by federal statute and rights recognized by the Constitution.").

135 *Id.* at 83.

136 *Id.* at 83–84 (footnote omitted).

137 *See id.* at 83 n.35 ("Thus where Congress creates a substantive right, pursuant to one of its broad powers to make laws, Congress may have something to say about the proper manner of adjudicating that right.").

138 *Id.*

branch conflict. Why, exactly, the greater-includes-the-lesser argument applies to Article III but not other separation-of-powers provisions, such as the Appointments[139] or Due Process Clauses,[140] goes unexplored.

Without explicitly fashioning four Article III quadrants, the decision provides the outlines. It first distinguishes public and private rights. Then it subdivides public and private rights into rights that Congress does and does not create. The Court's precedent, thus, provides guidance on how to approach the rights in each quadrant.

First, Congress has the most discretion over the public rights that it creates. These claims are "completely within congressional control."[141] As I shall discuss in more detail in Section II.C.1, *infra*, the Court in *Johnson v. Robison*[142] recognized Congress's ability to preclude judicial review of statutory legal questions concerning veterans' benefits, i.e., public rights.[143] Applying the canon of constitutional avoidance, the Court read the express preclusion of judicial review to apply only to factual matters and statutory or regulatory legal issues.[144] Statutory preclusion did not apply to constitutional claims, notably concerning rights that Congress did not create.[145] These public rights would include large swaths of claims, such as social security benefits claims, veterans benefits claims, regulatory enforcement claims like those brought by the EPA or Securities and Exchange Commission, licensing and grant claims, and even reconsideration of previously awarded benefits like patents.[146]

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139 *Cf.* Buckley v. Valeo, 424 U.S. 1, 132 (1976) (per curiam) ("The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause.").

140 *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (rejecting, once more, the "bitter with the sweet approach" to due process, a theory under which the government in creating a property right can also decide what process is due).

141 Crowell v. Benson, 285 U.S. 22, 50–51 (1932) (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929)).

142 415 U.S. 361 (1974).

143 *See id.* at 367.

144 *See id.*

145 *See id.* at 367–68.

146 *See, e.g.*, Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018) ("This Court has recognized, and the parties do not dispute, that the decision to *grant* a patent is a matter involving public rights—specifically, the grant of a public franchise. Inter partes review is simply a reconsideration of that grant, and Congress has permissibly reserved the [Patent and Trademark Office's ("PTO")] authority to conduct that reconsideration. Thus, the PTO can do so without violating Article III."); *see also infra* Section II.C.1.

Second, Congress has some, although lesser, discretion over private rights that it creates. If the non-Article III adjudicator is sufficiently adjunct to the Article III court, as the agency in *Crowell* was with judicial de novo review of legal matters and deferential factual review over matters within the agency's expertise, Article III takes no offense.[147] Indeed, the *Crowell* model for agency adjudication is, by far, the most common model of federal adjudication.[148] Claims within this quadrant would include claims where Congress creates rights as between two private parties, such as the employment disability benefits in *Crowell*, disputes that arise between a commodities broker and client,[149] or reparation disputes between private parties concerning agricultural products.[150]

Third, for public rights that Congress did not create—or others of especial sensitivity—it is likely that Congress can permit non-Article III adjudicators to hear those claims only if those adjudicators are significantly adjunct to Article III courts, like federal magistrate judges. The Court has given this quadrant the least attention and has not defined its parameters well. But it would include, perhaps among others, constitutional claims, like the ones in *Raddatz*, and common law and equity claims if the government is a party, despite the Court in *Murray's Lessee* referring to them and admiralty claims as private rights.[151] Other claims in this group include federal criminal laws, likely based on common law traditions[152] even if Congress did create them. As a caveat, the Supreme Court has not, as far as I am aware, referred to these kinds of claims as concerning "public rights." But because the government is generally a party to these claims—at least for all that require state action—I have placed these claims within the category of public rights.

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147 *See* Crowell v. Benson, 285 U.S. 22, 50–51 (1932).

148 *See* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 742 (2004) ("Since the New Deal, Congress has established a range of adjudicatory agencies, relying upon the model of *Crowell* and structuring the agencies to perform specialized work as assistants, or adjuncts, to federal courts that bear ultimate responsibility for resolution of the dispute.").

149 Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

150 *See* John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 310–14 (1992).

151 United States v. Raddatz, 447 U.S. 667 (1980); *see also supra* note 104 and accompanying text.

152 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 n.24 (1982) (plurality opinion) ("Of course, the public-rights doctrine does not extend to any criminal matters, although the Government is a proper party." (citing United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955))).

Finally, Congress has some room to delegate to non-Article III courts adjudication of private rights that it did not create. Most notably, these claims would include state law contract and tort claims and reach all other claims created by another sovereign. But its power to do so is contested under current doctrine. *Northern Pipeline* held that the bankruptcy court's adjudication of state law private rights violated Article III.[153] But in doing so, the plurality did not have to establish under which conditions Congress could permit a non-Article III tribunal to decide these private claims because the Court determined that the bankruptcy courts failed to satisfy the *Crowell* model at any rate.[154] Later in *Schor*, the Court upheld the Commodity Futures Trading Commission's ("CFTC") consensual adjudication of state law private rights because the CFTC's adjudication tracked the *Crowell* model, aside from adjudicating private rights that Congress had not created.[155]

Since *Schor*, the Supreme Court has indicated through a couple of bankruptcy decisions that the propriety of non-Article III adjudication of noncongressionally created private rights may depend upon the parties' consent to the adjudication. In *Stern v. Marshall*,[156] the Court held that the challenging party had not consented to the bankruptcy court's jurisdiction and that the bankruptcy court, despite revisions to the bankruptcy code after *Northern Pipeline*, was still not sufficiently adjunct to Article III courts to avoid offending Article III.[157] A few years later, however, the Court determined in *Wellness International Network, Ltd. v. Sharif*[158] that the party had implicitly consented to the bankruptcy court's jurisdiction and that the bankruptcy could adjudicate the claims.[159] What may be the most surprising development is that the Supreme Court blessed the bankruptcy court's adjudication in *Sharif*, despite the bankruptcy court's failure to satisfy the *Crowell* model.[160]

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153 *Id.* at 50.

154 *See id.* at 84–86 (plurality opinion). The two concurring Justices also agreed that the bankruptcy court was not sufficiently adjunct to the federal courts because Congress had not followed the *Crowell* agency model. They did not indicate under which circumstances non-Article III adjudication of the state law private claims may have been acceptable. *See id.* at 89–92 (Rehnquist, J., concurring in the judgment).

155 *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 854–56 (1986).

156 564 U.S. 462 (2011).

157 *Id.* at 493 (noting that the challenging party did not consent to bankruptcy court's adjudication and holding that bankruptcy courts could not adjudicate state law claims).

158 135 S. Ct. 1932 (2015).

159 *Id.* at 1939.

160 *See id.*

TABLE 2. ARTICLE III MATRIX

Type of Claims		Principles	Authority
Public Rights	Congressionally Created	Congress has broad discretion to preclude Article III adjudication	*Crowell*; *Robison*
	Not Congressionally Created	Article III adjudication required unless non-Article III tribunal is within significant control of Article III courts	*Raddatz*
Private Rights	Congressionally Created	Article III courts must have de novo and deferential review of non-Article III tribunal's legal and factual determinations, respectively	*Crowell*
	Not Congressionally Created	The presence or absence of the parties' consent likely influences the kind of relationship between non-Article III tribunal and Article III courts that Article III demands	*Schor*; *Stern*; *Sharif*

Table 2 summarizes the state of Article III deviations. The key takeaways are that (1) Congress has the most freedom to limit Article III adjudication when it creates public and private rights, and (2) it has the least freedom to limit Article III adjudication for public or private rights that it did not create, at least if the parties have not consented.

B. Chevron *in the Article III Quadrants*

Chevron exists largely within the Article III quadrants in which Congress has the most discretion—those concerning rights that Congress creates. Recall that *Chevron* applies to agency interpretation of only statutes that the agency administers because it is only with these statutes that agencies have greater expertise than Article III courts.[161] Accordingly, it does not apply to other legal interpretations—such as statutes that apply to numerous agencies (e.g., APA),[162] constitutional

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

162 *See, e.g.*, Pro. Reactor Operator Soc'y v. NRC, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (refusing to apply deference to agency's interpretation of section 555 of the APA); Air N. Am. v. Dep't of Transp., 937 F.2d 1427, 1436–37 (9th Cir. 1991) (refusing to apply *Chevron* deference to agency interpretation of the APA because the agency does not administer the APA).

interpretation, and law that only incidentally relates to agencies' congressional charge, including state statutes or common law.[163]

Because *Chevron* applies only to statutory provisions that agencies administer, *Chevron* largely does not apply in the two Article III quadrants concerning rights that Congress did not create. These quadrants would include public or private rights that arise from constitutional rights, federal common law, state common law, and state statutory rights. Recall, too, that these two quadrants gave Congress the least room to limit Article III courts. But *Chevron* almost never visits here.[164]

The important exception to the rule that *Chevron* does not apply within the quadrants concerning rights that Congress did not create concerns *Chevron*'s reach to interpretations that may lead to criminal liability. Traditionally, as *Raddatz* suggests, Article III treats criminal rights as sacrosanct as public rights that Congress has not created.[165] The Court has suggested that *Chevron* does not apply to the interpretation of criminal statutes.[166] This suggestion is consistent with courts' curt refusal to extend *Chevron* deference to the Department of Justice's ("DOJ") interpretations of criminal law.[167] Although the Su-

163 Because *Chevron* reaches only statutory interpretation of a statute that the agency administers, by definition, it does not reach constitutional claims, common law claims, or state statutes. Even when a statute that an agency administers incorporates a common law term, *Chevron* does not apply to the agency's interpretation of that term. *See, e.g.*, Aurora Packing Co. v. NLRB, 904 F.2d 73, 75–76 (D.C. Cir. 1990) ("[*Chevron*] [d]eference . . . does not apply here because [as Congress directed] courts apply the common law of agency to the issue."); *cf.* Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019) (noting that deference to an agency's interpretation of its own regulation is improper if the agency is interpreting a common law term).

164 I suppose that it is possible that some federal common law or state law claims look to an agency's statutory interpretation for one element of a claim. But even if so, what are likely extremely rare exceptions do not undermine my broader point. Moreover, the use of *Chevron* for a narrow element that the common law or state law intends to track federal law hardly seems a problematic application of *Chevron* where notice, uniformity, and agency expertise would likely serve as the basis for the incorporation of federal law.

165 United States v. Raddatz, 447 U.S. 667 (1980).

166 United States v. Apel, 571 U.S. 359, 369 (2014) (stating that the Court has "never held that the Government's reading of a criminal statute is entitled to any deference"). That said, debate surrounds whether courts should defer to agency statutory interpretations that are germane to both administrative and criminal liability. *See* Kristin E. Hickman, *Justice Gorsuch and Waiving* Chevron, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Mar. 3, 2020), https://www.yalejreg.com/nc/justice-gorsuch-and-waiving-chevron/ [https://perma.cc/3KR2-63J4] (discussing the issue of whether *Chevron* or the rule of lenity should apply to a statutory interpretation that may later apply in a criminal proceeding).

167 *See* Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment) ("The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to

preme Court has not explained why it refuses to extend *Chevron* to DOJ's interpretations of federal criminal law,[168] Justice Gorsuch has suggested that the refusal promotes liberty and notice to the public.[169] Nonetheless, courts do apply *Chevron* to administrative agency statutory interpretations that may lead to criminal liability.[170] For instance, the D.C. Circuit recently held that an agency's rule that included guns with bump stock devices as "machine guns" was *Chevron* eligible, even though an individual's possession of a "machine gun"—as defined by the regulation—was a criminal offense.[171] Breaking with the D.C. and Tenth Circuits, the Sixth Circuit has recently taken the contrary view.[172] The primary debate concerning these interpretations concerns whether *Chevron* or the rule of lenity should have primacy.[173]

Aside from *Chevron*'s reach to certain criminal matters, *Chevron* applies exclusively in the two quadrants in which Congress has the most power to limit Article III adjudication—when Congress has created the rights at issue. As Professor Nick Bagley said, based on the Supreme Court's capacious definition of public rights, "it's safe to say

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deference."); Gonzales v. Oregon, 546 U.S. 243, 264 (2006) ("[T]he Attorney General must as surely evaluate compliance with federal law in deciding whether to prosecute; but this does not entitle him to *Chevron* deference." (citing *Crandon*, 494 U.S. at 177)).

168 *See* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 490–92 (1996). As John Duffy has argued, the Supreme Court's refusal to apply *Chevron* is "based solely on *ipse dixit*." John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193 (1998).

169 *See* Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 790–91 (2020) (Statement of Gorsuch, J.) (respecting the denial of certiorari).

170 *See, e.g.*, Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1, 25 (D.C. Cir. 2019) (holding that *Chevron* applies to interpretations that concern criminal liability). In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703–04, 704 n.18 (1995), the Court applied *Chevron* deference to a statute whose violation could lead to criminal liability and, with the notice that the agency's interpretation provided, refused to apply the rule of lenity.

171 *See Guedes*, 920 F.3d at 25, 28–29.

172 *See* Gun Owners of Am., Inc. v. Garland, 992 F.3d 446, 453–68 (6th Cir. 2021); *id.* at 459–60 (refusing to apply *Chevron* to the statutory provision at issue, and discussing D.C. Circuit's and Tenth Circuit's contrary view).

173 *See Guedes*, 920 F.3d at 27–28; *Guedes*, 140 S. Ct. at 789–90 (Statement of Gorsuch, J., respecting the denial of certiorari) (arguing that *Chevron* should not apply to agency interpretations that lead to criminal penalties); *see also* Whitman v. United States, 135 S. Ct. 352, 353–54 (2014) (Statement of Scalia, J., respecting the denial of certiorari); Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring) ("Case law thus makes clear that either the rule of lenity prevails across the board or the agency's interpretation does. But which one? The better approach, it seems to me, is that a court should not defer to an agency's anti-defendant interpretation of a law backed by criminal penalties.").

that nearly all challenges to agency action implicate public rights."[174] Recall that with congressionally created public rights, Congress can exclude Article III courts altogether over statutory matters and that these public rights can extend even to matters between two private parties.[175]

Chevron may also concern private rights that Congress has created. Congressionally created private rights, such as the workers' compensation claims in *Crowell*, are sometimes first adjudicated within an agency.[176] Other times, congressionally created private rights are adjudicated directly in court.[177] Agency legal interpretations can command *Chevron* deference when relevant even when the initial adjudication arises in judicial proceedings and the agency is not a party in interest.[178] Nonetheless, *Chevron* deference does not apply to some of the most prominent examples of congressionally created private rights, including employment discrimination claims under Title VII or civil rights claims under 42 U.S.C. §§ 1981–1983.[179] Recall that even for pri-

174 Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1313 (2014) (citing Stern v. Marshall, 131 S. Ct. 2594, 2613 (2011); and then citing Crowell v. Benson, 285 U.S. 22, 50 (1932)).

175 *See* Barnett, *supra* note 12, at 684–85, 689.

176 *See Crowell*, 285 U.S. at 36.

177 These private claims may be the most common in the context of consumer finance private rights of action. For instance, a borrower may assert that a lender violates the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601–1667f. *E.g.*, Gibson v. LTD, Inc., 434 F.3d 275, 285 (4th Cir. 2006) (holding a car dealership liable under TILA for erroneous and inadequate disclosures); Williams v. Chartwell Fin. Servs., Ltd., 204 F.3d 748, 755 (7th Cir. 2000) (holding that lenders violated TILA and its implementing regulations by failing to disclose the impact of a cash security on the loan's interest rates); *accord* Semar v. Platte Valley Fed. Sav. & Loan Ass'n, 791 F.2d 699 (9th Cir. 1986); Zamarippa v. Cy's Car Sales, Inc., 674 F.2d 877 (11th Cir. 1982).

178 *See, e.g.*, RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 384 (6th Cir. 2014) (applying *Chevron* deference, in a dispute between private parties, to the definition of "applicant" in the Equal Credit Opportunity Act's regulations); Cetto v. LaSalle Bank Nat'l Ass'n, 518 F.3d 263, 274 (4th Cir. 2008) (applying *Chevron* deference, in a dispute between two private parties, to the Federal Reserve Board's interpretation of "creditor" in TILA); Kruse v. Wells Fargo Home Mortg., Inc., 383 F.3d 49, 61 (2d Cir. 2004) (according *Chevron* deference to an agency policy statement interpreting a provision of the Real Estate Settlement Procedures Act, in suit between two private parties, and remanding for further proceedings).

179 *See* James J. Brudney, Chevron *and* Skidmore *in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497, 507 (2014) ("Congress has given the [Equal Employment Opportunity Commission (EEOC)] rule of law authority for the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) but not for Title VII, which has been the primary implementation focus for the Court when reviewing agency interpretations. As a result, the Court has at times applied *Chevron* when reviewing EEOC interpretive judgments outside of Title VII. More often, however, the Justices have invoked a *Skidmore* framework when reviewing EEOC determinations." (footnotes omitted)); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54

vate rights that it creates, Congress has significant discretion as long as it uses the traditional agency model that permits Article III judicial review.[180]

If one returns to our quadrant chart, we can clarify where *Chevron*'s domain extends:

TABLE 3. CHEVRON WITHIN THE ARTICLE III MATRIX

Type of Claims		Principles	Authority	*Chevron*?
Public Rights	Congressionally Created	Congress has broad discretion to preclude Article III adjudication	*Crowell*; *Robison*	Yes
	Not Congressionally Created	Article III adjudication required unless non-Article III tribunal is within significant control of Article III courts	*Raddatz*	No, except for regulations that lead to criminal liability
Private Rights	Congressionally Created	Article III courts must have de novo and deferential review of non-Article III tribunal's factual and legal determinations, respectively	*Crowell*	Yes
	Not Congressionally Created	The nature of the adjunct relationship between non-Article III tribunal and Article III courts likely depends on whether parties consented to non-Article III adjudication.	*Schor*; *Stern*; *Sharif*	No

Before moving on to consider other, related Article III doctrinal matters, one should linger on the conclusion from this section: *Chevron*—premised on inferred notions of congressional delegation—mostly applies in the areas where Congress's authority over adjudication and judicial review is at its apex. Conversely, the constitutional challenges to *Chevron* occur—with one exception for certain criminal

ADMIN. L. REV. 735, 750 n.71 (2002) ("The [EEOC], in particular, has routinely failed to receive *Chevron* deference for its interpretations of civil rights laws, even though the agency arguably has relevant experience and expertise in dealing with job discrimination that the federal courts do not possess.").

180 *See supra* Section II.A.2.

matters—within areas where Article III is more accepting of congressional control.

C. Congressional Control Over Article III Courts

Chevron's existence primarily in areas where Congress has comparative freedom does not, on its own, mean that Congress can limit how courts go about interpreting statutory provisions. Other strands of Article III doctrine consider Congress's ability to limit Article III adjudication—whether by stripping it of jurisdiction or remedial power, interfering with the merits of a claim before or after judgment, or limiting courts' plenary review of legal questions. By considering Congress's powers, one can further contextualize the question of *Chevron*'s constitutionality within the Article III quadrants that it inhabits.[181]

1. Jurisdictional and Remedial Stripping

Congress can limit the lower federal courts' jurisdiction. From as early as 1850 for both jurisdiction and remedies, the Court relied upon the now familiar greater-includes-the-lesser argument to conclude that Congress's greater power to create federal inferior courts bestows the lesser power of limiting what lower courts can decide.[182] In *Sheldon v. Sill*,[183] a case concerning jurisdiction over a claim related to an assigned mortgage, the Supreme Court rejected the argument that Congress could not limit by statute lower courts' potential jurisdiction under Article III: "Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers."[184] Relatedly, Congress has broad, although perhaps not un-

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181 I put aside federal courts' review of territorial or state law because, as Professor Will Baude has argued, territorial or state law is not law "of the United States," but instead law of the territory or state, respectively. *See* Baude, *supra* note 94, at 1523–33.

182 *See* Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132, 145 (1995) ("Congressional power over the very existence of [these] courts strongly implies complete power over their jurisdiction.").

183 49 U.S. (8 How.) 441 (1850).

184 *Id.* at 449; *see also* Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.").

limited,[185] power to limit the Supreme Court's appellate jurisdiction under the Exceptions Clause of Article III.[186]

Congress also has control over judicial remedies. When considering a statute that prohibited federal district courts from enjoining price regulations in *Lockerty v. Phillips*,[187] the Court once again invoked greater-includes-the-lesser reasoning:

> There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court. All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution.[188]

Indeed, Congress has stripped all courts, including the Supreme Court, of some remedial power. For example, Congress precludes federal courts from issuing certain injunctions, such as those to enjoin pending state-court litigation[189] or the collection of taxes.[190]

But perhaps the most important example for purposes of considering *Chevron* is the APA's preclusion-of-review provisions.[191] Section 701(a) provides, "This chapter [on judicial review, 5 U.S.C.

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185 *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128, 146–47 (1871) (holding that Congress's attempt to limit jurisdiction violated the separation of powers when assertions of loyalty to reclaim confiscated property were based on presidential pardons because it sought to impose a "rule of decision"). The Supreme Court has narrowly understood *Klein* and rejected calls to extend its reach. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1323–25 (2016) (discussing *Klein* and its limits).

186 U.S. CONST. art. III, § 2 ("[T]he [S]upreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."). The Supreme Court has held that Congress's prohibition on its hearing appeals from denials of writs of habeas corpus did not violate Article III. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868). The Court later clarified, however, that it could review denials of habeas on certiorari. *See Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 103 (1868).

187 319 U.S. 182 (1943).

188 *Id.* at 187.

189 28 U.S.C. § 2283; *see also* Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A., 551 F.3d 812, 819 (8th Cir. 2009) (noting that the limitation in the Anti-Injunction Act is remedial, not jurisdictional).

190 26 U.S.C. § 7421(a).

191 Preclusion of APA judicial review could be understood as either jurisdictional or remedial preclusion. On the one hand, it looks remedial because the APA itself does not provide jurisdiction, *see* Califano v. Sanders, 430 U.S. 99, 107 (1977) ("We thus conclude that the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action."), and the provision precludes, in effect, only injunctive-type relief under sections 705–706. But preclusion could be understood to be jurisdictional because section 706 does also give the court, in the process of deciding whether to compel or set aside agency action and considering temporary relief pending relief, the authority to decide questions of law and fact altogether. 5 U.S.C. §§ 705–706.

§§ 702–706] applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review . . . . "[192] Where section 701(a) applies, it prohibits courts from reviewing agency action, including agencies' interpretation of statutes that they administer.[193] Despite presumptions in favor of reviewability altogether[194] and particularly constitutional challenges,[195] courts have abided by both express[196] and implied[197] congressional preclusion of judicial review of statutory claims. To be sure, the Court has occasionally suggested that due process[198] or other unstated "constitutional constraints"[199] may

192 5 U.S.C. § 701(a)(1).

193 *See, e.g.*, 5 U.S.C. § 706 (permitting judicial review of legal matters, whether constitutional, statutory, or regulatory).

194 *See* Bagley, *supra* note 174, at 1289–91 (discussing the nature of the presumption for reviewability).

195 *See* Johnson v. Robison, 415 U.S. 361, 366 (1974); Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 681 n.12 (1986) (citing Weinberger v. Salfi, 422 U.S. 749 (1975)); *see also* Webster v. Doe, 486 U.S. 592, 603 (1988) (discussing heightened presumption against preclusion of constitutional claims).

196 *See, e.g.*, Ford v. United States, 230 F.2d 533, 533–34 (5th Cir. 1956) (per curiam) (concerning veterans' benefits); Blanc v. United States, 244 F.2d 708, 710 (2d Cir. 1957) (per curiam) (concerning Federal Employees' Compensation Act claims).

197 *See, e.g.*, Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345–47 (1984) (holding that Congress implicitly precluded consumers from challenging milk-market orders); United States v. Erika, Inc., 456 U.S. 201, 207–08 (1982) (holding that Congress implicitly precluded review of Medicare Part B claims). The DOJ, in U.S. DEP'T OF JUST., THE ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 94 (1947), noted that statutes at the time of the APA's enactment precluded review. It also concluded that the change from an earlier version of section 701 that called for express preclusion provided "strong support for the conclusion that the courts remain free to deduce from the statutory context of particular agency action that the Congress intended to preclude judicial review of such action." *Id.* at 94 n.4; *see also* Note, *Statutory Preclusion of Judicial Review Under the Administrative Procedure Act*, 1976 DUKE L.J. 431, 449 (arguing that the APA adopted a "common law" inquiry into deciphering when Congress had intended to preclude judicial review).

198 *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 692 (2001) ("The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious."); Superintendent v. Hill, 472 U.S. 445, 450 (1985) ("The extent to which legislatures may commit to an administrative body the unreviewable authority to make determinations implicating fundamental rights is a difficult question of constitutional law." (citing decisions that mentioned the issue)); Ng Fung Ho v. White, 259 U.S. 276, 284–85 (1922) ("Against the danger of [deporting a citizen] without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law."); *see also* Jonathan D. Sater, Note, Sackett v. EPA*: The Murky Confluence of Due Process and Administrative Compliance Orders Under the Clean Water Act*, 7 LIBERTY U. L. REV. 329, 334 (2013) ("Given the essence of due process, however, it is difficult to understand how courts have upheld [explicit or implicit preclusion] and even § 701(a) itself. By enacting § 701(a), Congress essentially created an autonomous agency that would be its own judge, jury, and executioner [violating separation of powers under the Constitution]." (footnote omitted)).

199 *Bowen*, 476 U.S. at 672.

limit precluded judicial review. But my research has uncovered no categorical concern with preclusion under section 701.[200]

Precluded judicial review of agency action predates the APA. For instance, the Supreme Court noted that Congress had expressly precluded review of veterans benefits claims more than a decade before the APA's enactment.[201] The Supreme Court, too, held before 1946 that Congress had implicitly intended to preclude review of certain Interstate Commerce Commission ("ICC") orders[202] and National Mediation Board collective bargaining decisions.[203] Going further back to the nineteenth century, judicial review of agency discretion, as opposed to ministerial duties, was "thought to be unconstitutional."[204] Even routine common law actions, when available, were often not effective in providing full judicial review of agency action.[205]

2. Interference with Judicial Decision Making

The still-skeptical reader may assert that although Congress can control courts' jurisdiction and remedies ex ante, it certainly could not interfere with how courts decide pending cases that Congress has bestowed jurisdiction. After all, Congress cannot vest courts with the

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200 The Article III courts' willingness to permit precluded review may seem surprising, yet it may simply reflect the courts' confidence in their constitutional standing. In a law review article, Justice Sandra Day O'Connor compared United States courts' readiness to accede to preclusion with British courts' near refusal to do so. She noted that the countries' different treatments may seem paradoxical because the former have positive constitutional status, while the latter do not. *See* Sandra Day O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 WM. & MARY L. REV. 643, 644–45 (1986). But she argued that U.S. courts have taken a less defensive posture than their British counterparts *because*, not in spite, of their constitutional position. *See id.* at 656. Moreover, U.S. courts may have come to the realization that "some executive or administrative decisions turn on so many imponderables, or are so inherently arbitrary, that judicial intervention would contribute little by way of more reasoned decisions." *Id.* at 654. U.S. notions of separation of powers, in her view, provide a measure of protection from executive abuse even in areas where judicial review may not appear useful because Congress would likely step in if, in the absence of judicial review, the executive were to abuse congressional commands. *See id.* at 658.

201 *See* Johnson v. Robison, 415 U.S. 361, 368 (1974) ("No-review clauses similar to [38 U.S.C.] § 211(a) have been a part of veterans' benefits legislation since 1933.").

202 *See* United States v. Griffin, 303 U.S. 226. 232–33 (1938) (determining that certain ICC orders were not reviewable).

203 *See* Switchmen's Union of N. Am. v. Nat'l Mediation Bd., 320 U.S. 297, 301 (1943) ("All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced.").

204 Bagley, *supra* note 174, at 1295. Bagley provides much more on the history of judicial review of executive discretionary decisions or its absence. *See generally id.* at 1295–1303.

205 *See id.* at 1299–1300.

ability to issue advisory opinions[206] or enact legislation to reopen final judgments.[207] Yet, Congress has significant room to affect judicial decision making as to current and future cases.

The Supreme Court has made clear that Congress can amend the law that applies to pending cases.[208] Examples abound. For instance, the Court held in *Robertson v. Seattle Audubon Society*[209] that Congress's statutory amendments, which altered circumstances that then-pending challenges to timber harvesting could proceed, complied with Article III.[210] The amending legislation did not "purport[] to direct any particular findings of fact or applications of law, old or new, to fact."[211] Likewise, in upholding a treaty's retroactive application to ships that had been captured but not "definitively condemned,"[212] Chief Justice Marshall stated, "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed."[213] Despite the fact that the lower court had correctly condemned the ship under the law as it existed at the time, the changed law at the time of appeal called for the lower court's decree to be reversed.[214] Finally, and most recently, the Court in *Bank Markazi v. Peterson*[215] upheld Congress's ability to enact a statute after prevailing parties received a judgment against Iran for terrorist activities—but before the execution of the judgment—that permitted the parties to execute against certain assets.[216]

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206 *See* Flast v. Cohen, 392 U.S. 83, 96–97 (1968) (discussing the long-standing prohibition on advisory opinions).

207 *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995) ("By retroactively commanding the federal courts to reopen final judgments, Congress has violated [Article III's principle that Article III courts decide and resolve cases].").

208 *Id.* at 218 (stating that Congress does not violate Article III when it "amend[s] applicable law." (alteration in original) (quoting Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992))).

209 503 U.S. 429 (1992).

210 *Id.* at 437.

211 *Id.* at 438.

212 United States. v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 108–09 (1801).

213 *Id.* at 110.

214 *See id.*

215 136 S. Ct. 1310 (2016).

216 *Id.* at 1324–26. In upholding Congress's ability to render additional assets available for execution, the Court rejected a broader reading of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). In *Klein*, Klein was the executor of an estate for a southerner named Wilson and sought to recover the proceeds of Wilson's property that the Union had seized and sold. *Id.* at 136. Congress provided that parties could receive the proceeds if they had not given aid to the Confederacy. *Id.* at 139. Wilson had received a presidential pardon, and the Supreme Court in a different case had held that the pardon demonstrated that one had not given aid to the Confed-

Based on these decisions, the Court's dicta in *Plaut v. Spendthrift Farm, Inc.*[217] comes as little surprise: "Congress can eliminate . . . a particular element of a cause of action that plaintiffs have found it difficult to establish; or an evidentiary rule that has often excluded essential testimony; or a rule of offsetting wrong (such as contributory negligence) that has often prevented recovery."[218] Congress can also alter "[r]ules of pleading and proof" and have them apply to pending cases.[219] And of course, Congress can enact rules of evidence[220] and statutes that provide definitions and interpretive guidance that govern future cases.[221] Significantly, the Supreme Court has noted that Congress can alter the law even when no facts were in dispute and the altered law "effectively permit[s] only one possible outcome."[222]

3. Interference with Plenary Review

As a last sally, the perhaps less gentle, more incredulous reader may argue that Congress's powers to limit judicial jurisdiction or remedies and to change legal standards that apply to pending cases do not allow Congress to circumscribe a court's plenary review of a matter that it has permitted courts to consider. But Congress can. And does.

First, Congress can limit judicial review of factual findings. Congress has expressly done just that under the APA, whereby courts re-

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eracy. *Id.* at 141–42. Klein prevailed at trial. *Id.* at 143. But, while *Klein* was on appeal, Congress enacted a statute to render the pardon, in most instances, as conclusively demonstrating *disloyalty*, contrary to the Supreme Court's earlier decision. *Id.* at 143–44. In *Klein*, the Supreme Court held that Congress could not do so, but its reasoning was not clear. *See id.* at 146–47. A broader reading suggested that Congress could not alter legal standards in pending matters. But the narrower reading, which the *Bank Markazi* Court accepted, only prohibited Congress from attempting to have the courts serve as the means for an end that Congress could not achieve—altering the effect of the executive's constitutional pardon power. *See Bank Markazi*, 136 S. Ct. at 1323–24 (describing and interpreting *Klein*).

217 514 U.S. 211 (1995).

218 *Id.* at 228–29.

219 *Id.* at 229 (citing Landgraf v. USI Film Prods., 511 U.S. 244, 275 (1994) ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.")).

220 *See* 28 U.S.C. § 2074 (requiring the Supreme Court to transmit new or revised rules of civil procedure or evidence to Congress before they take effect, and providing that rules concerning evidentiary privileges must receive approval via statute).

221 *See, e.g.*, 1 U.S.C. §§ 1–8 (providing rules of construction for ascertaining the meaning of federal statutes).

222 Bank Markazi v. Peterson, 136 S. Ct. 1310, 1326 (2016) (discussing *Schooner Peggy*); *id.* at 1325 ("In any event, a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts.").

view factual findings for either substantial evidence or arbitrariness.[223] Congress has explicitly adopted the substantial evidence test for more than a century,[224] and the Supreme Court has "often [called for the standard to apply] when a statute did not explicitly incorporate the test."[225] The Supreme Court in *Crowell v. Benson* approved of Congress's ability to limit de novo review of factual matters for private rights that Congress created.[226] Likewise, the Court permitted limited review of factual matters as part of the statutory scheme in *Schor* concerning state law counterclaims—noncongressionally created private rights.[227] Despite occasional scholarly concern over deferential review's constitutionality,[228] deferential factual review has a significant statutory and judicial pedigree. If one accepts limited judicial review of facts, then the sphere of "independent judgment" that Article III requires narrows considerably by excluding factual questions concerning the merits of a case. At most, it can extend only to de novo interpretation of legal matters.

Yet, Congress also limits Article III judicial review of legal interpretations. It does so in three prominent contexts: habeas, qualified immunity, and arbitration. Because these examples do not consider an agency's statutory interpretation, they are distinguishable from *Chevron* in some way. Nonetheless, they are fundamentally similar to *Chevron* because all demonstrate that federal courts either can or must decide a matter without basing that decision on courts' preferred legal interpretations.

Start with federal habeas petitions concerning state-court criminal convictions. Section 104(3) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[229] allows federal courts to grant habeas relief based on state-court adjudications only when the

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223 5 U.S.C. § 706(2). The APA accounts for the fact that Congress may occasionally, such as under 7 U.S.C. § 2023(a)(15), call for de novo review. *See* 5 U.S.C. § 706(2)(F).

224 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 978 (5th ed. 2010) (discussing review of FTC orders in 1913). The Supreme Court first used the phrase in 1912, *see* ICC v. Union Pac. R.R. Co., 222 U.S. 541, 548 (1912), and again in 1913, *see* ICC v. Louisville & Nashville R.R. Co., 227 U.S. 88, 94 (1913).

225 PIERCE, *supra* note 224, at 978.

226 Crowell v. Benson, 285 U.S. 22, 50–51 (1932).

227 Commodity Trading Futures Comm'n v. Schor, 478 U.S. 833, 853 (1986).

228 *See* Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL'Y 27, 30 (2018) (arguing that deferential review of facts is unconstitutional as to "core private rights to life, liberty, and property" (emphasis omitted)); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 318–20 (2014) (arguing that courts must exercise "independent judgment").

229 Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of the U.S. Code).

state-court decision, as relevant here, "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[230] Note the limitations within this standard. First, according to the Supreme Court, the standard requires a similar, if not more deferential, reasonableness review as under *Chevron*: "the state court's ruling on the claim [must be] so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[231] As for a party challenging an agency's interpretation under *Chevron*, too, the more general a legal principle or language is, the harder it will be for habeas petitioners to obtain relief.[232] Second, Congress limited what constitutes clearly established law for section 2254(d) to Supreme Court decisions, excluding both Supreme Court dicta and lower court decisions.[233] Accordingly, not only does the rule restrict courts from deciding the petition based on their best interpretation of federal law, but it also requires them to limit their review to one court's prior decisions—or lower court precedent interpreting those decisions[234]—in their analysis.

One may propose distinguishing these habeas cases from *Chevron* based on the federalism concerns that federal review of state-court decisions implicates. But whatever relevance federalism has to Article III questions, federal habeas for state-court judgments indicates that Article III courts do not have to have the ability to give their preferred reading of federal law in all instances. Congress can apparently privilege other values, like federalism, over Article III "independent judgment."[235] And if structural values like federalism are privileged, it is difficult to see why Congress could not privilege another structural value—separation of powers—especially when Congress is regulating the relationship of the other two branches. After all, the plurality in *Northern Pipeline* recognized the separation of powers as a reason to permit Congress room to limit Article III adju-

230 28 U.S.C. § 2254(d)(1). Similar to APA review of agency factfinding, the statute permits habeas relief for only "unreasonable" factfinding, not what the courts perceive to be incorrect factfinding. *See id.* § 2254(d)(2). The fact that habeas relief has been more limited before the twentieth century does not tell us about Article III limits. AEDPA allows only limited review, and courts have not suggested that limited review offends Article III.

231 White v. Woodall, 572 U.S. 415, 419–20 (2014) (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)).

232 *See* Lockyer v. Andrade, 538 U.S. 63, 76 (2003).

233 28 U.S.C. § 2254(d)(1); *White*, 572 U.S. at 419 (citing Howes v. Fields, 565 U.S. 499, 505 (2012)).

234 Bowling v. Parker, 882 F. Supp. 2d 891, 897–98 (E.D. Ky. 2012).

235 *See* HAMBURGER, *supra* note 228, at 320.

dication, and *Chevron* itself is grounded, in part, on a separation-of-powers rationale.

One may suggest, too, that the impartial judicial consideration of federal habeas claims, as opposed to agencies' interested resolution of federal statutory claims, mitigates any Article III concerns over state-court habeas petitions.[236] But if non-Article III, state-court adjudication is sufficient to limit Article III review of legal questions, the objection to *Chevron*—that is, that non-Article III adjudication or rulemaking provides no basis for limited Article III review of legal questions—loses force. The same due process standard—whether via the Fifth or Fourteenth Amendment—governs the impartiality of state-court and agency adjudicators.[237] And even agency officials must not have an "unalterably closed mind" when rulemaking.[238] Both scenarios ultimately present an initial decision by a non-Article III decisionmaker from whom due process demands impartiality before Article III judicial deferential review. The fact that one is judicial and the other is administrative would likely not matter for purposes of Article III. Nothing in Article III requires state courts to mirror federal separation of powers.

One may also contend that Article III permits limits on federal judicial review under § 2254 because the federal courts may ultimately provide in a future case a de novo answer to the question of federal law at issue in the pending case. After all, the Supreme Court, the court whose decisions matter under § 2254, may resolve the underlying issues of federal law relevant to the habeas proceeding in other cases—such as those on direct review.[239] But the Court's ability to choose its limited docket means that it can answer only a small number of relevant underlying issues.[240] For those concerned about *Chevron*'s effect on the parties in a pending action, the future possibility that the Supreme Court—not just any federal court—will answer the underlying federal issue in cases concerning other parties is of cold

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236 *Cf.* Hamburger, *supra* note 9, at 1217 (suggesting that *Pullman* abstention of federal courts to state-court proceedings involving an area of state law that raises constitutional concerns does not create bias problems because abstention acts as "deference to other judges, who at least have the office of independent judgment").

237 *See, e.g.*, Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876–77 (2009) (concerning state judges); Schweiker v. McClure, 456 U.S. 188, 195 (1982) (concerning hearing examiners who decide Medicare Part B claims).

238 *See* Ass'n of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1170–71 (D.C. Cir. 1979).

239 28 U.S.C. § 2254(d)(1).

240 *See* Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. COLO. L. REV. 887, 946 (2020) ("[The] Supreme Court . . . controls its own docket and decides an average of seventy-five cases a year.").

comfort. Moreover, as Part III will consider, courts may be able to review some statutory interpretations de novo even if *Chevron* would apply in other scenarios. If so, a not-so-compelling distinction between habeas and *Chevron* disappears.

Indeed, despite some scholarly arguments to the contrary,[241] Article III challenges to § 2254(d) have failed. Then–District Judge Amul Thapar—now sitting on the Sixth Circuit and critic of *Chevron*[242]—held that the section did not violate Article III for familiar sounding reasons.[243] Congress can limit remedial relief even when a court determines that a constitutional violation occurred,[244] limit information that informs decision making, as it does under the Rules of Evidence,[245] and set deferential standards of review, as under the APA.[246] Limiting relief as § 2254 instructs does not implicate the few limitations on Congress's authority, such as reopening final judgments or attempting to overturn the Court's interpretation of a constitutional executive power.[247] The Seventh Circuit, in an opinion by Judge Frank Easterbrook, directly connected *Chevron* to AEDPA in rejecting an Article III challenge to § 2254(d):

> If . . . federal courts must give judgment without regard to the legal views of other public actors, and without regard to the resolution of contested issues in state litigation, then [the] argument reaches far beyond § 2254(d). It would mean that deference in administrative law under *Chevron* is unconstitutional . . . .[248]

In short, the Seventh Circuit's view appears to be that § 2254 and *Chevron* stand or fall together, and it has allowed § 2254 to stand. To

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241 *See, e.g.*, James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 704 (1998) (arguing that broad understandings of § 2254, as adopted by circuit courts, violates Article III).

242 *See* Arangure v. Whitaker, 911 F.3d 333, 338 (6th Cir. 2018) (referring to the "already-questionable *Chevron* doctrine" and citing Supreme Court Justices' pragmatic and constitutional challenges to *Chevron*).

243 *See* Bowling v. Parker, 882 F. Supp. 2d 891, 897–900 (E.D. Ky. 2012). Notably, Judge Thapar did not rely upon any kind of "federalism exception" to Article III.

244 *See id.* at 899–900 (discussing ability of Congress to limit judicial remedies).

245 *See id.* at 898.

246 *See id.* ("Congress also frequently mandates a particular legal standard to federal courts. The Administrative Procedure Act, for instance, requires a deferential standard of review for appeals from administrative agencies' decisions.").

247 *See id.* at 898–99 (discussing United States v. Klein, 80 U.S. (13 Wall.) 128 (1871)).

248 Lindh v. Murphy, 96 F.3d 856, 871 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997).

my knowledge, all other courts that have considered the Article III challenges to § 2254 have rejected them.[249]

After considering habeas review, turn to qualified immunity for federal statutory civil rights violations. In extremely brief summary, when an individual sues executive officials for violating federal law, those officials escape liability for damages if they can establish entitlement to qualified immunity from liability.[250] That immunity applies to "conduct [that] does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[251] With a rationale that echoes *Chevron*'s delegation theory, the Court has grounded qualified immunity in the common law that existed at the enactment of 42 U.S.C. § 1983 and in the presumption that Congress intended implicitly to codify qualified immunity as a defense.[252] Courts do not need to decide constitutional or statutory issues when denying relief. Instead, courts can choose in their "sound discretion" whether the conduct violated "clearly established" rights without deciding whether the conduct actually did so.[253] Like habeas petitions from state-court proceedings, Article III courts can resolve federal civil rights claims without providing their best interpretation of the implicated federal law.

The inquiry into qualified immunity differs from *Chevron* deference in an important way. Although federal courts in both qualified immunity and *Chevron* cases can announce their best reading of federal law, the effect of those readings will vary. Courts' best readings in a qualified immunity case can help create "clearly established" law for

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249 *See, e.g.*, Cobb v. Thaler, 682 F.3d 364, 373–75 (5th Cir. 2012) ("Four circuits [the First, Fourth, Seventh, and Ninth Circuits] have addressed constitutional challenges to AEDPA similar to Cobb's, and each has rejected that challenge."); Rodriguez v. Zavaras, 42 F. Supp. 2d 1059, 1077–78 (D. Colo. 1999) (adopting reasoning of Seventh Circuit in *Lindh*, 96 F.3d at 872–73); Perez v. Marshall, 946 F. Supp. 1521, 1531 (S.D. Cal. 1996) ("Under the Act, federal habeas courts are not required to 'rubber stamp' state court legal decisions. If a state court's application of clearly established federal law is unreasonable, then a federal habeas court has the power to grant the writ.").

250 *See* Harlow v. Fitzgerald, 457 U.S. 800, 807–09 (1982).

251 *Id.* at 818.

252 *See* Kalina v. Fletcher, 522 U.S. 118, 123 (1997) (discussing longstanding reliance on common law principles for the cause of action and defenses to 42 U.S.C. § 1983); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 510–12 (4th ed. 2003) (discussing and criticizing historical basis for immunity). The matter is more complicated for qualified immunity to a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)—that is, a cause of action existing directly under the Federal Constitution—as opposed to a federal statute.

253 *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009).

future cases.[254] Courts' best readings in a *Chevron* case, in contrast, would not have force-of-law effect if the administering agency had, or later adopts, a contrary interpretation that is reasonable and *Chevron* eligible.[255] Despite this difference, qualified immunity provides another example, along with habeas, in which Article III does not mandate that courts provide their preferred interpretations of federal law when deciding whether to award judicial remedies—even when dealing with legal, monetary remedies for disputes between private individuals.[256]

The fact that judicial consideration in qualified immunity cases is limited to whether it offends clearly established law is not meaningfully different than how courts can proceed under *Chevron*. For instance, under the D.C. Circuit's approach, the agency must recognize that its reasonable interpretation arises under *Chevron*'s step two because of statutory ambiguity.[257] In other words, the agency must understand itself as proceeding in a reasonable way, not providing a definitive legal interpretation of the statute. Courts owe no deference to agencies as to the best reading of the statute or as to whether the statute is ambiguous. Instead, courts under *Chevron*, as with qualified immunity, need only decide whether the agency's position supports a sought-after remedy.

Consider, finally, federal courts' review of arbitration awards. Federal courts must confirm orders of domestic or international arbitration awards except in extremely limited circumstances.[258] Confirmation is not required when arbitrators are biased or engaged in

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254 Federal circuit courts agree that Supreme Court, and their individual circuit, precedent influences "clearly established law," but they take inconsistent approaches as to the effect of other judicial decisions, including those from other circuits. *See* Tyler Finn, Note, *Qualified Immunity Formalism: "Clearly Established Law" and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 454–56 (2019) (discussing divergent approaches that federal circuit courts take in deciding when law is "clearly established").

255 *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

256 In fact, Judge Thapar, in upholding AEDPA in the face of an Article III challenge, identified qualified immunity as a limit on judicial remedies, whereby an individual may suffer a constitutional violation yet receive no remedy because of the limited nature of judicial review. *See* Bowling v. Parker, 882 F. Supp. 2d 891, 899–900 (E.D. Ky. 2012).

257 *See* Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 760–61 (2017) (discussing so-called *"Prill* doctrine," derived from *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985)).

258 *See* 9 U.S.C. §§ 9–11 (concerning confirmation, vacation, and modification of arbitral awards under the Federal Arbitration Act); United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, §§ 1–2, June 10, 1958, 21 U.S.T. 2517, 2520, 330 U.N.T.S. 3, 40–42.

misconduct, exceed their powers, or provide material numerical miscalculations.[259] Most importantly for purposes of this Article, courts cannot refuse to confirm an award based on their disagreement with the arbitrator's legal interpretations.[260] At best, some courts continue to consider whether the arbitrator demonstrated a "manifest disregard for the law," but even this extremely limited ground for refusing enforcement of the award is questionable under Supreme Court precedent.[261] Regardless of whether the "manifest disregard" review is permitted by statute, Article III does not appear to care that federal judges must confirm awards by private party arbitrators, despite not agreeing with the arbitrator's legal interpretations.

Perhaps the most evident distinction between arbitration and *Chevron* is that parties usually agree to arbitrate. But not always. The Court has even upheld limited review of an arbitral award from an Article III challenge when the parties had no meaningful choice but to consent to arbitration once they sought to participate in pesticide registration. In *Union Carbide*, the Court rejected an Article III challenge to a statutory scheme over pesticide registrations.[262] Under that scheme, follow-on registrants could use data that other manufacturers had earlier used to secure registrations for their products.[263] The follow-on registrants, however, had to compensate the submitting manufacturer for use of the data.[264] If the parties could not agree on compensation, either party could invoke binding arbitration.[265] *Union Carbide*, as mentioned in Section II.A.1, is perhaps most famous for the Court's expansion of public rights to include even disputes between private rights as long as they were part of a "complex regulatory scheme."[266] Yet it also spoke to limits on judicial review. In upholding the scheme from an Article III challenge, the Court noted that Article III courts still had "appropriate exercise of the judicial

259 *See* 9 U.S.C. §§ 9–11.

260 *See* Paul Green Sch. of Rock Music Franchising, LLC v. Smith, 389 F. App'x 172, 176 (3d Cir. 2010).

261 *See, e.g.*, *id.* at 176 & n.6 (indicating that Second and Ninth Circuits continue to use "manifest disregard," while Fifth and Eleventh Circuits do not, and noting concerns over the standard's consistency with *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008), holding that grounds for vacation or modification are exclusive under the Federal Arbitration Act).

262 Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 568 (1985).

263 *Id.*

264 *Id.* at 573–75.

265 *Id.* at 571–75.

266 *Id.* at 589.

function"[267] because they could review the "arbitrator's 'findings and determination' for fraud, misconduct, or misrepresentation. This provision protects against arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under the governing law."[268] Although the Court noted that federal courts could continue to review arbitration awards for constitutional error or as due process may require,[269] *Union Carbide* is yet another example in which courts could not use their own independent judgment to interpret federal statutory law to decide a case—except perhaps as due process, not Article III, required.

To be sure, these examples of courts deciding cases without using their independent judgement all concern adjudications. *Chevron*, however, often applies to not only adjudications, but also rules.[270] Yet, given the judiciary's preference for agency rulemaking over adjudication[271] and the lack of any distinction in the review of orders or rules under the APA,[272] the method of the agency's interpretation has no doctrinal bearing on deference. If anything, the existence of adjudication examples is more important. *Chevron*'s applicability to adjudication is more controversial than rulemaking,[273] and adjudications—unlike rulemakings—much more frequently implicate due process.[274]

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267 *Id.* at 592 (quoting Crowell v. Benson, 285 U.S. 22, 54 (1932)).

268 *Id.* (citation omitted) (quoting Federal Pesticide Act of 1978, Pub. L. No. 95-396, sec. 2(a)(1), § 3(c)(1)(D)(ii), 92 Stat. 819, 820–22 (1978)).

269 *See id.* at 592–93. The use of an arbitrator could be problematic here if the arbitrator constitutes an "officer of the United States" and has not been appointed as required under the Appointments Clause. *Cf.* Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 821 F.3d 19, 38–39 (D.C. Cir. 2016) (holding that arbitrator for certain matters under Passenger Rail Investment and Improvement Act of 2008 was "officer of the United States" and appointed in violation of Appointments Clause). But that challenge would be an Appointments Clause challenge, not one under Article III.

270 Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 936–37 (2021) ("Courts, therefore, generally use the *Chevron* standard in evaluating interpretations of ambiguous statutes offered by agencies in notice-and-comment rulemakings and in formal adjudications.").

271 *See* SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) ("The function of filling in the interstices of the [statute at issue] should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.").

272 *Cf.* 5 U.S.C. § 706 (speaking only of review of "agency action").

273 *See generally* Hickman & Nielson, *supra* note 270 (arguing that *Chevron* should not apply to adjudications).

274 *See* Paul R. Verkuil, *Crosscurrents in Anglo-American Administrative Law*, 27 WM. & MARY L. REV. 685, 699 (1986) ("In the United States, a line is drawn for due process purposes between administrative adjudication and administrative rulemaking, with the latter category being outside the ambit of protection."). That said, due process may prohibit certain bias in

III. *CHEVRON* WITHIN THE ARTICLE III MATRIX

Having considered the relevant Article III doctrinal landscape, one can better appreciate the Article III challenges to *Chevron*. One key insight from our study is that Congress's power to limit Article III courts depends on the nature of the rights at issue. Accordingly, this Part considers *Chevron*'s use in the three quadrants where it can apply—public rights that Congress has created, public rights that Congress has not created (including criminal matters), and private rights that Congress has created. *Chevron* is on extremely firm footing within the first quadrant, but its use in the other two is more problematic. It is within these two quadrants—notably, the two where *Chevron* appears with less frequency—in which the constitutional debates should continue. Invalidating *Chevron* in all applications would substantially undermine, or at least require careful distinction from, other Article III doctrines.

A. Public Rights Congress Creates

Chevron almost certainly does not offend Article III when applied to public rights that Congress creates. Congress's (near) absolute discretion to avoid Article III adjudication altogether for public rights that it creates rests on the greater-includes-the-lesser argument: Congress's greater power to create the rights at issue includes the lesser power of deciding whether to permit Article III adjudication. Using this same reasoning for *Chevron* leads to the conclusion that Congress's greater power of deciding to bestow Article III judicial review includes the lesser power of limiting the nature of that review. To make the point plainer: if Article III permits Congress to preclude review of questions of statutory law, as the Court has confirmed and as Congress currently does under the APA, then it is extremely difficult to see why Article III would take offense at its courts having the comparatively robust power of reviewing agency statutory interpretations for reasonableness. Indeed, the Court in *Johnson v. Robison* blessed precluded judicial review of statutory claims in 1974[275] even

rulemakings, *see Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1165–66 (D.C. Cir. 1979), and certain rulemakings under the APA may qualify as adjudications under due process. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 542 (1978) ("In prior opinions we have intimated that even in a rulemaking proceeding when an agency is making a 'quasi-judicial' determination by which a very small number of persons are 'exceptionally affected, in each case upon individual grounds,' in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process." (quoting United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 242, 245 (1973))).

275 *See* Johnson v. Robison, 415 U.S. 361, 367 (1974).

after establishing in *Goldberg v. Kelly*[276] in 1970 that benefits claims, as legitimate claims of entitlement, trigger due process.[277]

Without specifically referring to the greater-includes-the-lesser argument, *Union Carbide* lends further support. Recall that the Court held that the right to data sharing payments as between two pesticide manufacturers were public rights.[278] Recall, too, that the Article III courts had jurisdiction to review the award, but for only limited purposes, such as fraud and misconduct.[279] A court, despite its ability to review, could not set aside the arbitration award based on its mere disagreement with the arbitrator's legal interpretations, much less any reasonable interpretation that conflicted with that court's preferred interpretation. *Chevron*, in other words, permits more Article III judicial oversight—and thus more "independent judgment"—of the interpretation of federal law than the review provisions that the Supreme Court expressly shielded from an Article III challenge in *Union Carbide*.

The historical limitations on mandamus and congressional control over remedies like mandamus also support *Chevron*'s permissibility. The *Attorney General's Manual on the Administrative Procedure Act* asserted that Congress had intended to codify longstanding mandamus practice in the APA's judicial review provision by permitting courts to "compel agency action unlawfully withheld or unreasonably delayed."[280] Courts grant mandamus to compel the executive to execute ministerial duties, but not discretionary actions.[281] *Chevron* operates similarly to mandamus—enforcing Congress's clear intent, where the executive lacks discretion, and deferring to reasonable interpretations within the delegated discretion. Because mandamus almost always concerns public rights in which an individual seeks to have the government perform a particular action, mandamus practice fits comfortably within the public rights quadrant. To be sure, most challenges to public rights that Congress creates ask a court to set aside an agency action under the APA, or other statute, not compel agency

276 397 U.S. 254 (1970).

277 *See id.* at 264; *see also* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) ("Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.").

278 *See supra* notes 265–69 and accompanying text.

279 *Id.*

280 U.S. DEP'T OF JUST., *supra* note 197, at 108 (quoting 5 U.S.C. § 706(1)).

281 *See* DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 112 (1973).

action. Yet, for legal questions that arise as part of these challenges, applying *Chevron* will continue to operate in an analogous way to mandamus, despite the formal difference in remedy—whereby courts set aside agency action that offends Congress's clear intent or, in the absence of such offense, allows agencies to use their discretion to act reasonably. The set aside remedy is, in fact, less disruptive to the relationship between the executive and judicial branches because it only limits, not compels, action.

For those who appear to approve of mandamus practice but not *Chevron*, such as Justice Thomas, they must come up with an argument for why Congress lacks the authority to create a form of deferential review in deciding whether to set aside agency action when that review looks similar to a longstanding common law practice that operates much like *Chevron*.[282] Moreover, even if the APA's set aside remedy is meaningfully distinct from mandamus, it would be similar to injunctive relief.[283] And of course, Congress has uncontroverted authority to limit judicial remedies, impose limiting standards of review—such as in the habeas context—and create causes of action altogether. A successful full-throated *Chevron* challenge would call into question, if not destabilize, these bedrock Article III principles.

It is no response to say, as Justice Thomas has, that *Chevron* goes well beyond mandamus because courts applied de novo review for legal interpretations when deciding cases concerning private rights.[284] Whether or not one agrees that courts historically applied de novo review in the private rights context in a consistent manner,[285] the focus here is on *Chevron* within the quadrant for public rights that Congress created. At most, Justice Thomas's response calls *Chevron* into question in some applications. But it cannot demonstrate that *Chevron* is unconstitutional in all applications. Indeed, even Justice Gorsuch should have no quarrel with *Chevron* within this quadrant because he appears most concerned with courts being unable to announce the law concerning private rights.[286]

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282 *See* Green, *supra* note 81, at 679 n.365.

283 *See* DOBBS, *supra* note 281, at 112.

284 *See* Baldwin v. United States, 140 S. Ct. 690, 693 (2020) (Thomas, J., dissenting from the denial of certiorari).

285 *See supra* notes 77–80 and accompanying text.

286 *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring) ("And there's good reason to think that legislative assignments [for de novo review of statutory interpretation] are often constitutionally compelled. After all, the question whether Congress has or hasn't vested a private legal right in an individual 'is, in its nature, judicial, and must be tried by the judicial authority.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 167 (1803))).

Likewise, attempting to distinguish *Chevron* from other areas of limited judicial review, such as qualified immunity or habeas, based on its force-of-law character does not get one very far within the public rights quadrant. Recall that courts, even if they rule for a particular party in the qualified immunity or habeas contexts based on something other than their best readings of federal law, have the ability in future cases to provide their best rulings, which may have the force of law.[287] But *Chevron* is no different. Courts may, as discussed in Sections III.B–.C, still provide de novo interpretations in other contexts, perhaps with private rights or public rights that Congress did not create. The fact that opportunities may arise infrequently or that numerous provisions would not be relevant in those other challenges is of no moment. Nothing guaranteed that provisions at issue in nineteenth-century mandamus cases would arise in litigation between private parties or that modern courts will necessarily have the opportunity to apply their best readings to federal law that arises in habeas or immunity contexts.

As an aside, permitting *Chevron* free rein in this quadrant would grossly offend Hamburger's due process bias theory.[288] After all, *Chevron* would apply when the government is a party—aside from the instances in which the right arises between private parties in the context of a complicated scheme, per *Union Carbide*. But the problem for the due-process-based bias argument is that, with deep irony, Article III has proven least concerned about having independent Article III judges adjudicate public rights where, of course, the government is traditionally a party. Instead, Article III has proven most concerned about having independent Article III judges participate in private right adjudications, contexts in which the government's interests would often be less significant.[289] In fact, in *Murray's Lessee*, aside from dismissing an Article III challenge and enshrining the public/private rights dichotomy, the Court rejected a due process argument to the executive's issuance of a distress warrant because of, not despite, the government's significant interest in federal revenue.[290] In other words, Article III has largely dismissed due process concerns for public rights, and any bias based challenge within this quadrant faces significant doctrinal headwinds.

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287 *See supra* Section II.A.

288 *See* Hamburger, *supra* note 9, at 1211.

289 *See* Barnett, *supra* note 12, at 691–92.

290 *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 278–80 (1856).

B. Interpretations that May Lead to Criminal Liability

Unlike *Chevron*'s application to public rights that Congress created, *Chevron*'s application to criminal law is presumptively problematic because courts are perhaps most self-protective here. Recall, for instance, that the Court in *Raddatz* blessed the federal magistrate judge model based on the Article III court's near-total control over the magistrate judges, including de novo review of constitutional legal questions in criminal matters.[291] *Chevron*, of course, forgoes de novo judicial review, and courts do not control agencies like they do federal magistrate judges. Although Congress in fact creates federal criminal law via statute, the Court has not treated criminal law like other congressional creations for Article III purposes.[292] Accordingly, the greater-includes-the-lesser argument—that the greater power to create the right at issue includes the lesser right to provide judicial review—cannot bolster *Chevron* review.

That said, *Chevron* may find some support with the Article III matrix even within a quadrant that is highly skeptical of limits on Article III courts. First, Congress's accepted ability to limit federal habeas review of state-court judgments concerning federal law provides indirect support. Habeas is a civil action, not criminal, but it almost always arises within the context of a criminal conviction. Moreover, habeas matters from state-court proceedings usually concern underlying constitutional claims—importantly, claims that Congress did not create. Recall that the Seventh Circuit has expressly noted that if the deferential federal judicial review under AEDPA were unconstitutional, it would bring *Chevron* into question with it. Thus, because all courts that have considered the issue have upheld AEDPA's deferential judicial review on legal issues, then *Chevron* looks to have a foothold within this Article III stronghold.

Chevron may also have another lifeline within this quadrant by considering the initial convention that signified when agency action was to have the force of law, the trigger for the *Chevron* framework's application under *United States v. Mead Corp*.[293] Professors Thomas Merrill and Kathryn Watts argued that the convention that Congress used throughout the Progressive and New Deal Eras to signal that agencies' rules would have the force of law was to couple rulemaking authority with a provision on criminal or civil sanctions for those who

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291 United States v. Raddatz, 447 U.S. 667, 681–82 (1980).

292 *See supra* notes 165–72 and accompanying text.

293 533 U.S. 218, 226–27 (2001).

violated the promulgated rules.[294] To be sure, this historical convention, which has fallen into desuetude, concerns whether Congress intended to delegate force-of-law authority to agencies, not whether the delegation offended Article III. To be sure, too, one may be able to decouple whether Congress delegates force-of-law authority from judicial deference to agency's statutory interpretation,[295] contrary to *Mead*'s holding.[296] But those challenging *Chevron*'s application to criminal law are left with the awkwardness that the very characteristic that they argue renders *Chevron* unconstitutional—criminal liability—was also one of the triggers for the antecedents of *Chevron* deference or arbitrary and capricious review—and a trigger that did not appear to cause Article III to blink.

I do not resolve here whether *Chevron* is permissible within the quadrant concerning public rights that Congress did not create. It may be that the original understanding of the "specification" power, theory of "interpretation," or concern for interpretive consistency and administrative expertise across civil and criminal matters permit *Chevron*. After all, it may be difficult to administer a legal system in which the meaning of a statute varies depending on whether it arises in a civil or criminal context. Or it may be that courts will steadfastly defend Article III interests within one of Article III's strongest bastions.

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294 *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 472, 493 (2002). Merrill and Watts note that the Court expressly upheld Congress's ability to delegate rulemaking authority to agencies and to have violation of those rules lead to criminal liability. *See id.* at 500–03 (discussing *United States v. Grimaud*, 220 U.S. 506 (1911)). The convention arose from two of the Supreme Court's decisions, *United States v. Eaton*, 144 U.S. 677 (1892), and *Grimaud*. In *Eaton*, the Court held that the government could not prosecute an individual for violating a regulation under the Oleomargarine Act because of Congress's failure to indicate "distinctly" that the regulatory violations could lead to criminal liability. *See* Merrill & Watts, *supra*, at 499–500 (quoting *Eaton*, 144 U.S. at 688). In *Grimaud*, however, the Court permitted a prosecution to proceed based on a regulatory violation under the Forest Reserve Act because "[t]he very thing which was omitted in the Oleomargarine Act ha[d] been distinctly done in the Forest Reserve Act, which, in terms, provides that 'any violation of the provisions of this act or such rules and regulations of the Secretary shall be punished.'" *Id.* at 501 (quoting *Grimaud*, 220 U.S. at 519).

295 *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 219 ("Congress might desire the converse: to give interpretive authority to an agency separate and apart from the power to issue rules or orders with independent legal effect on parties."); Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2648 (2003) ("*Mead*'s safe harbor is not necessarily an accurate proxy for congressional delegation to agencies, although perhaps it is a tighter fit than the broader *Chevron* rule because it affects a smaller subset of agency decisions and considers one factor that is surely relevant to discovering actual intent."); *see also* Kent Barnett, *Codifying* Chevmore, 90 N.Y.U. L. REV. 1, 41–42 (2015) (discussing how Congress divorced interpretive primacy and formality in Dodd-Frank for certain Office of the Comptroller of the Currency's preemption rulings).

296 *See Mead*, 533 U.S. at 226–27.

The point simply is that the issue over *Chevron*'s relationship with Article III is meaningfully at issue within this quadrant, not in all Article III spaces.

C. Private Rights Congress Creates

The quadrant for congressionally created private rights also proves problematic for *Chevron*. In upholding the agency adjudication of congressionally created private rights in *Crowell v. Benson*, the Court noted that the Article III admiralty courts had the power to decide legal issues de novo.[297] Although the Supreme Court did not hold in *Crowell* that Article III required de novo judicial review of statutory interpretation, it strongly suggested as much.[298]

The greater-power-includes-the-lesser argument supporting *Chevron* in the quadrant for congressionally created public rights would not likely be as significant of an aid to *Chevron* in this quadrant. To be sure, Congress has the greater power to decide whether to create private rights at all. Yet, unlike with public rights, the Court has never stated that Congress can deny Article III adjudication for those claims altogether. Recall that the matters for which Congress has precluded review—as would be relevant under section 701 of the APA—largely, if not entirely, concern public rights, such as veterans' benefits or Medicaid benefits.[299]

Proscribing *Chevron* deference for these private rights claims would largely be consistent with Hessick's call to treat *Chevron* as a remedial doctrine. Recall that Hessick's view permits *Chevron* to apply when a party directly challenges an agency action but not when a statutory interpretation is part of a dispute that does not challenge the agency action.[300] An example of private party suits would be when one party argues the other has violated a federal regulation interpreting a federal statute,[301] such as the Equal Credit Opportunity Act ("ECOA"),[302] the Real Estate Settlement Procedures Act

297 *See* Crowell v. Benson, 285 U.S. 22, 49 (1932) ("The question in the instant case, in this aspect, can be deemed to relate only to determinations of fact. The reservation of legal questions is to the same court that has jurisdiction in admiralty, and the mere fact that the court is not described as such is unimportant.").

298 *See id.*

299 *See supra* Section II.C.I.

300 *See* Hessick, *supra* note 88.

301 *See id.*

302 15 U.S.C. §§ 1691–1691f. For cases illustrating application of the ECOA, see *Tyson v. Sterling Rental, Inc.*, 836 F.3d 571, 578 (6th Cir. 2016) (affirming district court's grant of summary judgement to the plaintiff buyer on the claim that the defendant car retailer, a "creditor" under Regulation B, failed to comply with the ECOA), and *Anderson v. United Finance Co.*, 666 F.2d

("RESPA"),[303] or the Truth in Lending Act ("TILA").[304] Perhaps most disputes concerning congressionally created private rights would not directly challenge agency action, such as in the Title VII employment discrimination context or numerous federal consumer protection statutes that provide private rights of action—such as the ECOA, RESPA and TILA. But some private rights challenges would directly challenge an agency action, such as the workers' compensation order in *Crowell* or the futures related reparations order from the CFTC in *Schor*.[305] These claims, although perhaps rarer than those that do not present a direct challenge, would fall within the private rights quadrant, yet be entitled to remedial *Chevron* under Hessick's proposal. Actions that challenge agency action would, whether under the APA or not, follow the set aside remedial practice that looks much like mandamus or injunctive relief. The key question would be, then, whether Article III would permit *Chevron* to apply to this small class of private rights that would call into question an existing agency order or rule.

But even with these private rights, those challenging *Chevron* under Article III need to explain why Congress can limit courts to reasonableness review when considering certain remedies but not others. For instance, as indicated in Section III.C, *supra*, Congress can limit de novo judicial review for habeas remedies or money damages in qualified immunity cases. Why would Congress be able to limit judicial review for significant remedies either with grand provenance or for constitutional violations, respectively, but not money damages for violations of agency statutory interpretation? Did Article III enshrine limits on Congress's power to circumscribe judicial review based on the kind of remedy at issue? If so, how so, and on what basis?

As with challenges to *Chevron* within the quadrant for public rights that Congress did not create, my purpose here is not to say whether *Chevron* violates Article III within this quadrant. Perhaps Article III's self-protection and history suggest *Chevron* cannot take shelter here. Or maybe concerns over consistency between interpretations that could apply to both public and private rights are sufficient

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1274, 1276 (9th Cir. 1982) (holding that a finance company violated regulations under the ECOA by requiring a spouse's signature on a loan for which his spouse individually qualified).

303 12 U.S.C. §§ 2601–2617.

304 15 U.S.C. §§ 1601–1667f. For a list of cases in which courts imposed liability for violating regulations concerning TILA, see *supra* note 177.

305 In both cases, the government was a nominal party to the lawsuit, but the government was not the real party at interest.

to overcome Article III challenges. Regardless, the analysis here indicates the turf on which the Article III challenge should be fought.

Conclusion

As with one of my other recent works,[306] my discussion here should lower the temperature over the *Chevron* debates, if not other even larger debates over the place and power of the administrative state. *Chevron* is not the Article III usurper that its challengers have recently deemed it. At most, it is a trespasser of certain Article III ground with faded boundaries. The merits or demerits of *Chevron* should principally proceed on other grounds—whether on normative policy, statutory delegation, or very limited Article III grounds. The Article III challenges, however, should continue with an understanding of their limited reach and potentially disruptive effects on Article III jurisprudence.

306 *See* Kent Barnett & Lindsey Vinson, Chevron *Abroad*, 96 Notre Dame L. Rev. 621, 674 (2020) ("Whether one agrees with our recommendations, supports *Chevron*, or awaits *Chevron*'s fall from grace, our [comparative study of five other countries' judicial review of agency statutory interpretation] should confirm that *Chevron*'s continued existence or downfall is unlikely to be as important as the American administrative law cognoscenti—both scholars and bar—may think.").