Constitutional *Chevron*: Domains of Congress and Courts in Remedies for Unconstitutional Administrative Structures

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Structure is back in style. Not as a throwback to fashions of the 1970s that preceded the soft-look unstructured clothes of the 1980s. Rather than embracing *Miami Vice*, the attention to structure lauded here means, first, recognizing constitutional vices. In particular, the concern here is with a lack of appreciation for the character and importance of structural features of the U.S. Constitution.

This essay moves from the recognition of conflicts with the Constitution's structural features to the next step. As courts more often recognize constitutional vices, the question of how to fix them—what remedies to adopt in cases that declare structures unconstitutional—becomes increasingly important. Confused responses from some recent court decisions underscore the importance of this task, which will be improved by understanding when judicial deference to another branch is and is not due. The answer to that question can be illuminated by considering an administrative law doctrine commonly known as *Chevron*, referring to a Supreme Court decision associated with one line of deference analysis.[1] As explained later, the version relevant here, "constitutional *Chevron*," is distinct from the administrative law version in being more clearly rooted in the

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

Constitution's separation of powers.[2] The starting point and ending point, thus, are in structure.

I. STRUCTURE AND CONSTITUTIONAL GOVERNANCE: PROMISE VERSUS PRACTICE

Justice Antonin Scalia was fond of telling law students, young lawyers, old lawyers—actually, pretty much anyone who would listen—that structure is the central aspect of and the key to understanding the U.S. Constitution. The Constitution's structural features protect our liberties and hold the key to our security and prosperity. In Scalia's words (more or less), any tin-horn dictator can adopt a bill of rights guaranteeing an expansive array of freedoms, but the only way actually to secure those freedoms is through durable government structures that inhibit the tyrant's desires, the demagogue's instincts, and the momentary inclinations of the populace.[3] Justice Scalia would hammer this point home by naming countries with governments almost universally recognized as oppressors of every important human freedom and then listing rights that are protected expressly by their constitutions in more detail and with greater enthusiasm than in our own. Except that in fact, none of these rights truly existed in the other nations.

The U.S. Constitution is devoted almost entirely to creating *structures* of government intended to provide the best incentives for protection of freedom and promotion of national welfare. The Constitution's Framers recognized that those mechanisms, rather than paper guarantees, constitute by far the best means of protecting freedom and promoting the national welfare. Hamilton and Madison made that point repeatedly in *The Federalist*—not always in terms as memorable as Scalia's, but with some notable phrases of their own.[4]

Concern over the Constitution's structural features was evident in debates over its drafting and in early judicial decisions interpreting it as well. That concern has never disappeared, as the courts, the professoriate, and politicians since the start of the Republic have focused attention on particular structural provisions when those were especially helpful to specific interests. This concern explains, for example, the Supreme Court's rejection of assignments of federal judicial power to decisionmakers who were not appointed and insulated in the manner specified in Article III.[5] It also explains the Court's invalidation of other efforts to assign

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2. *See* Cass & Beermann, *supra* note *, at 698–99. As explained below, and in other writings as well, *Chevron* is best understood as conforming both to constitutional assignments and to prior law derived from them.

3. The description of Justice Scalia's comments is not drawn from a specific publication or event, but from years of being together in travels, talks, presentations, collaborations, and co-teaching. He was a wonderful friend, colleague, and a man of singular importance to his family, his friends, and the law.

4. *See, e.g.*, THE FEDERALIST NOS. 10, 42, 45–51 (James Madison), NOS. 21–23, 73, 78–79, 84 (Alexander Hamilton). Madison's *Federalist 10* and *Federalist 51* in particular give Scalia a run for his money.

5. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (declaring unconstitutional the bankruptcy law's authorization of exercises of final adjudicative authority by non-Article III bankruptcy judges); Stern v. Marshall, 564 U.S. 462 (2011) (holding unconstitutional revised

decisional authority that it found violated specific—sometimes implicit—structural aspects of the Constitution.[6]

Observers of U.S. constitutional jurisprudence and associated commentary may be forgiven, however, for believing that much of the Constitution's structural architecture had been allowed to fall into a state of disrepair over most of the Twentieth Century.[7] Certainly, serious attention to constitutional structure is hard to reconcile with decisions permitting expansion of the national government's power over a range of matters originally deemed within the exclusive competence of the states[8] as well as the delegation to administrative agencies (some operating outside of any significant presidential or congressional control) of authority to make rules and take other actions respecting vast areas of private conduct.[9] While many of the authorizations for expansive administrative power date from the 1930s to the 1970s, agencies such as the Consumer Financial Protection Bureau (CFPB)—the apotheosis of control-free administrative power—are creatures of much more recent vintage.[10]

The plain lesson of these developments is that politicians' fidelity to constitutionally mandated structure is no more reliable now than it has been for the past eighty-plus years. Electoral advantage from sub silentio constitutional amendment still counts for more among many politicians than less personally advantageous

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version of bankruptcy law based on same objection to commitment of judicial authority to non-Article III bankruptcy judges).

6. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417 (1998) (rejecting line-item veto as contrary to Article I's requirements for law-making); INS v. Chadha, 462 U.S. 919 (1983) (invalidating one-house legislative veto of agency regulations as law-making in violation of Article I's requirements of bicameralism and presentment).

7. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2014); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035 (2007); Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J. L. & PUB. POL'Y 849 (2002); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J. L. & PUB. POL'Y 147 (2017); Christopher C. DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121 (2016); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J. L. & LIBERTY 475 (2016); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2010); Saikrishna Prakash, *Overcoming the Constitution*, 91 GEO. L.J. 407 (2003); David Schoenbrod, *Politics and the Principle that Elected Legislators Should Make the Law*, 26 HARV. J. L. & PUB. POL'Y 239 (2003).

8. *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971); Wickard v. Filburn, 317 U.S. 111 (1942); W. Coast Hotel v. Parrish, 300 U.S. 379 (1937).

9. *See, e.g.*, United States v. Sw. Cable Co., 392 U.S. 157 (1968); Yakus v. United States, 321 U.S. 414 (1944); Nat'l Broad. Co., Inc. v. United States, 319 U.S. 190 (1942).

10. The CFPB was created in 2011, and the acceptance of broad regulatory controls and financing of agency activity free from ordinary legislative and presidential superintendence has increased in the past 20 years. *See*, *e.g.*, DeMuth, *supra* note 7.

adherence to governance structures that advance liberty.[11] That is why protection against subversion of constitutional order depends today, as in the past, substantially on the courts.

II. THE FORCE AWAKENS: STANDING UP FOR STRUCTURE AND THE REMEDY PROBLEM

Despite continued pressure to increase the scope and independence of powers exercised by administrators, the Supreme Court and some circuits of the U.S. Court of Appeals have instead demonstrated greater willingness to declare structures adopted over the past few decades to be contrary to constitutional commands.

Several of these court decisions overturned commitments of authority to administrators on the ground that the administrators were not appointed in keeping with the Constitution's Article II Appointments Clause.[12] Another category of decisions has focused on the other end of official service: removal. A growing number of decisions found that officials exercising executive powers were not subject to sufficient control by the President due to limitations on his power to remove them from office, acting directly or through superior executive officers directly appointed by the President.[13]

Although most academic commentary has focused on the substantive questions in these cases respecting appointment and removal of federal officials, resolution of those questions does not complete the courts' tasks. If a court concludes that an official cannot exercise a particular power consistent with the Constitution's requirements because he or she has been improperly appointed or improperly is shielded against removal, the court also must decide what remedy is appropriate to cure the structural problem identified by the court.

In some instances, the remedy question has posed few difficulties. Look, for example, at *Buckley v. Valeo* (an appointments challenge) and *Bowsher v. Synar* (contesting assignment of the power to remove the Comptroller General to Congress rather than the President). In those cases, the Court decreed that officials who performed both executive and non-executive functions could continue to perform nonexecutive functions but not executive functions.[14]

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11. For explanations of the reasons for this observation, see generally R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION (1990); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1960); DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1954); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

12. U.S. CONST., Art. II, § 2, cl. 2. *See, e.g.*, Lucia v. Sec. & Exch. Comm'n, 138 S. Ct. 2044 (2018); Buckley v. Valeo, 424 U.S. 1, 127–28 (1976).

13. *See, e.g.*, Collins v. Yellen, 141 S. Ct. 1761 (2021); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020); Free Ent. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010); Bowsher v. Synar, 478 U.S. 714 (1986); Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau, 51 F.4th 616, 624 (5th Cir. 2022).

14. *See Bowsher*, 478 U.S. at 730–36; *Buckley*, 424 U.S. at 140–42. The analysis in both cases combines considerations respecting whether the assigned functions are *executive* (which relates to who does the appointing and removal) and whether a specific action was *effective* or *recommendatory* (a

A different (but analytically similar) remedy reflected the same sort of concern in *Lucia v. Securities and Exchange Commission*, which addressed a challenge to appointment of the SEC's administrative law judges (ALJs). The ALJs performed only executive functions, not functions such as making reports and recommendations to Congress that lie outside the scope of the Appointments Clause. The Court in *Lucia*, thus, declared that the SEC's ALJs could no longer exercise any decisional authority unless their appointments were made as constitutionally required.[15] These decisions also granted retroactive relief where requested, requiring a rehearing in *Lucia* and invalidating the challenged acts in *Bowsher*.[16]

The same remedial instinct applied in many cases where the Court held a removal restriction unconstitutional. In general, the Court simply prohibited the removal restriction's application. That was the course followed in the *Myers*,[17] *Free Enterprise Fund*,[18] *Seila Law*,[19] and *Collins*[20] decisions. As with the decisions addressing appointment questions, the removal decisions also granted retroactive relief.

On occasion, however, holding a structural feature unconstitutional leaves courts with no easy remedial option. In *Northern Pipeline*, the Court declared that using non-Article III bankruptcy judges to make decisions on issues that fall within the judicial power (subject only to a highly deferential standard of review) violates the Constitution.[21] But the entire edifice of bankruptcy adjudication at that time rested on using bankruptcy judges to oversee proceedings.[22] Rather than upending prior bankruptcy decisions and requiring that bankruptcy proceedings under then-current law cease at once, the Court stayed the prospective effect of its ruling for three months to allow time for Congress to revise the structure of bankruptcy decisions.[23] (The difference between then—when it seemed reasonable to expect Congress to enact significant legislation in a period of three months—and today doesn't need elaboration.)

In the Court's most recent, notable venture into selecting a remedy for a structural violation of the Constitution, *United States v. Arthrex*,[24] it took a different tack. The Court held that the statute in question in *Arthrex*—the America Invents

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matter relevant to whether it was a function that had to be committed to an Officer of the United States under the Appointments Clause).

15. *See Lucia*, 138 S. Ct. at 2055.

16. *See id.* at 2055; *Bowsher*, 478 U.S. at 734–36. Plaintiffs in *Buckley* did not request retroactive relief, only declaratory and injunctive relief. *See Buckley*, 424 U.S. at 8–9.

17. *See* Myers v. United States, 272 U.S. 52, 239 (1926).

18. *See Free Ent. Fund*, 561 U.S. at 513.

19. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2208–11 (2020).

20. *See* Collins v. Yellen, 141 S. Ct. 1761, 1783–84 (2021).

21. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83–87 (1982).

22. *See* Stephen A. Stripp, *An Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time*, 23 SETON HALL L. REV. 1329, 1331–35 (1993).

23. While staying the effect of its order with respect to other parties, the Court affirmed the lower court decision dismissing proceedings with respect to Marathon. *N. Pipeline*, 458 U.S. at 88.

24. United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021).

Act (AIA)[25]—created an unconstitutional structure for resolving a set of contests over patent validity. The officials hearing and deciding these contests were (almost entirely) Administrative Patent Judges (APJs),[26] who are appointed by the Secretary of Commerce. The AIA did not make their decisions reviewable by any higher-ranking official in the Department of Commerce.[27] The *Arthrex* Court deemed the absence of review authority conclusive that APJs were functioning as principal officers, unconstitutionally appointed.[28] The Court then decided that the best remedy was to permit the Director of the Patent and Trademark Office (PTO)—the immediate superior official who is appointed by the President and confirmed by the Senate—to review APJs' decisions.[29]

The decision to sever one feature of a statutory scheme while allowing the remainder to continue is not unusual. As noted already, the Supreme Court routinely takes this approach when it finds removal restrictions to be unconstitutional. The Court also takes this approach in other cases dealing with structural problems.[30] *Arthrex* was unusual, however, in *adding* a provision to the law, not excising a provision. Doubtless, the decision to read a provision *into* the law was grounded in the same instincts that have supported decisions to allow laws to operate after the Court has read a provision *out* of the law.[31] But is this statutory reconstruction the right role for the Court?

III. JUDICIAL POWER, SEPARATION OF POWERS, AND REMEDIES: LOOKING THROUGH CONSTITUTIONAL *CHEVRON*'S LENS

Answering that question again turns on matters of structure. It is obvious, given the original accepted meaning of "the judicial power" and the assignment of different government powers to other branches (especially Congress), that courts are supposed to interpret laws, not write them.[32] Well, at least, obvious to some.[33] It also should be obvious that the Court's role is to decide cases, to resolve legal

25. Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, 125 Stat. 284 (2011).

26. For more detailed description of the AIA's provisions and the *Arthrex* litigation, see Cass & Beermann, *supra* note *.

27. *See id*., at 659–65 (discussing the legal provisions at issue in *Arthrex* along with relevant background case law).

28. *See Arthrex*, 141 S. Ct. at 1977–87 (plurality opinion); *id*. at 1997 (Breyer, J., concurring).

29. *See id*. at 1987 (plurality opinion); *id*. at 1997 (Breyer, J., concurring).

30. *See, e.g*., INS v. Chadha, 462 U.S. 919 (1983) (holding invalid a provision allowing one house of Congress to veto a decision of the Department of Justice declining deportation of a deportable noncitizen; the Court otherwise allowed continued operation of the law respecting deportation rulings).

31. *See* Cass & Beermann, *supra* note *, at 672–81.

32. *See, e.g*., Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959). *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Guttman ed., 1997) [hereinafter SCALIA, A MATTER OF INTERPRETATION].

33. For arguments favoring other approaches to interpretation that give greater scope to judicial creativity, *see, e.g*., RONALD DWORKIN, LAW'S EMPIRE 52–62, 228–38 (1986); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 455 (1989).

issues necessary to a decision rather than opining on abstract questions, especially those integrally related to political disputes.[34]

Two lessons follow from those observations. First, courts should try to accomplish their assigned judicial task without intruding on the political branches' domains. Second, courts should not endeavor to achieve that result by means that are inconsistent with the courts' own assignment under Article III.[35] Put differently, even when trying to support the work of other branches, courts must attend to what constitutes a proper exercise of judicial power—that is, what determination resolves a legal dispute without either requiring skills beyond the judges' remit or failing to adopt a meaningful remedy for the parties' claims.[36]

The relationship between the first and second lessons mirrors the understanding of when courts defer to decisions of other branches—an understanding loosely associated with *Chevron* jurisprudence. Under *Chevron*, courts reviewing actions taken by administrative officials initially determine what a disputed legal provision means—what the outer bounds are of its possible meaning, whether broad or narrow—"employing traditional tools of statutory construction."[37] When the law's meaning is clear, the court's declaration of the law's meaning controls. When the law is silent or ambiguous on a precise issue, courts generally read the law as giving a measure of discretion to the agency officials charged with implementing the law.[38]

The essential point is that courts declare the law but defer to a reasonable administrative decision implementing the law as if the law expressly stated that administrators have discretion to make policy choices within the limits of statutory directives.[39] Despite the long, complex, and intense academic and judicial debates

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34. *See, e.g.*, Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 97–98.

35. *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2207–11 (2020); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 24–25 (1964).

36. *See infra* notes 37–49 and accompanying text.

37. Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

38. *See, e.g.*, Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 513–14 (2009); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981, 989 (2005); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996); Young v. Cmty. Nutrition Inst., 476 U.S. 974, 979–81 (1986). This general inclination to read ambiguity as consistent with implied discretionary authority of some degree does not extend to matters of such importance that they must be spelled out with clarity. *See, e.g.*, West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587 (2022); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001); Brown & Williamson Tobacco Corp. v. FDA, 529 U.S. 120, 159–61 (2000); MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994). *See also* Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L. REV. 191 (2023).

39. *See Fox Television Stations*, 556 U.S. at 513–14; *Brand X*, 545 U.S. at 981, 989; Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996); *The* Chevron *Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. (2016) (statement of George Shepherd, Professor, Emory University School of Law); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512–14 (1989).

over the correct rules for reviewing administrative decisions implementing laws,[40] this is the essential rule of *Chevron*, of the Administrative Procedure Act (APA), and of similar laws respecting judicial review.[41] This approach also coheres with the structure of the Constitution. Courts are doing the job of interpreting the law in cases before them—exercising the judicial power of the United States—but also respect the law when it is best read as saying that another official has discretion to make choices within a particular sphere to implement the law.

"Constitutional *Chevron*" takes the same approach. It reflects the understanding that courts have responsibility for interpretating laws, including the Constitution, in cases presenting interpretive issues. But constitutional *Chevron* also recognizes that the judicial power doesn't extend into the domain of the political branches to make choices respecting the creation of law. Understood this way, constitutional *Chevron* means that courts should be careful not to take on the role of rewriting law governing administrative authority, even when that task is performed with an eye to supporting what was intended by those who first wrote the law.

Laudable as the goal is of trying to make judicial determinations fit together with, rather than be at cross-purposes with, legislative enactments, looking to the underlying, unenacted *purpose* of the law, more often leads away from that goal than toward it. The problems with basing decisions on purpose rather than text, as required in any effort to tie remedies to the lawmakers' intentions, are well-known.[42] Understanding purpose is difficult. Finding a single, overarching

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40. *See, e.g.*, Aditya Bamzai, *Judicial Deference and Doctrinal Clarity*, 82 OHIO ST. L.J. 585 (2021); 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 (2010); Ronald A. Cass, *Is* Chevron*'s Game Worth the Candle? Burning Interpretation at Both Ends*, *in* LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 57 (Dean Reuter & John Yoo eds., 2016); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008); Kristin E. Hickman & David Hahn, *Categorizing* Chevron, 81 OHIO ST. L.J. 611 (2020); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1144 n.1 (2012); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y 103 (2018). *See generally* THOMAS W. MERRILL, THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE (2022).

41. *See* 5 U.S.C. §§ 701, 706. This does not indicate that the meaning of *Chevron* or its relation to the APA is clear. *See, e.g.*, Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006); 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 (2020).

42. *See, e.g.*, United States v. Morgan (*Morgan IV*), 313 U.S. 409, 416–21 (1941); United States v. Morgan, 307 U.S. 183, 198 (1939); SCALIA, A MATTER OF INTERPRETATION, *supra* note 32, at 17–18; Ronald A. Cass, *Motive and Opportunity: Courts' Intrusion into Discretionary Decisions of Other Branches—A Comment on* Department of Commerce v. New York, 27 GEO. MASON L. REV. 401 (2020) [hereinafter Cass, *Motive*]; Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 61 (1994) [hereinafter Easterbrook, *Text, History*]; John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747 (2017).

purpose for action taken by a combination of multiple individuals with different goals and interests—each of whom plays a less than clear role in adopting legislation with multiple provisions and murky effects—is especially difficult, if not impossible.[43] Attempting to discover the unknowable places judges in the position of taking on roles assigned to other government officials whose purposes need not be stated in order to justify their constitutional authority to enact law.[44] Purpose-based judging also risks appearing to rest decisions on grounds commonly associated with political decisionmaking rather than legal interpretation. It asks, "what would the politicians have wanted?" rather than, "what did they do?" Although text-based judging is not always immune from similar criticism, it generally is more defensible on neutral grounds. That is the reason most often and most forcefully given in favor of textualist approaches.[45]

Reasons for favoring textualist approaches go hand-in-glove with judicial reticence respecting remedies. Careful construction of a process for making law—designed to reflect broad national consensus, with checks on the power of each participating group—places *discretion* over the choices that go into law in the hands of the Congress and the President. When a court finds lawmakers have overstepped their bounds, judges are authorized to prevent the unconstitutional part of a statute from operating to the detriment of the party challenging it in court. This is the explanation given by Hamilton's *Federalist 78* and by John Marshall in *Marbury* for judicial review.[46] This focus requires a court to stick to its constitutional knitting both by limiting its exercise of other branches' discretion and by making certain that the power it does exercise is required for disposition of the legal dispute before it. The remedy chosen must actually provide a remedy to the problem presented to the court. (More of this in a moment.)

The corollary of the judicial power to declare some aspect of an act of Congress unconstitutional—and, therefore, inoperative to control a particular

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43. *See* Cass & Beermann, *supra* note *, at 686 n.163 ("Although many scholars have made this point over the past sixty years, Kenneth Shepsle has the pithiest and most noted exposition."); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992). It is possible that in an extraordinary setting all participants are agreed not only on the action to be taken but on the reason as well, or that it is useful to treat a collective action as if it were the product of a single individual with a specific purpose. *See also*, Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 999–1000 (2017); Brian D. Feinstein, *Congress Is an It*, EMORY L.J. (forthcoming 2023). Professor Shepsle and those who join him in the understanding of the theoretical and practical impediments to making this a meaningful alternative, however, have the better of the argument.

44. *See* Cass & Beermann, *supra* note *, at 685–89; Cass, *Motive*, *supra* note 42; Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983).

45. *See, e.g.*, SCALIA, A MATTER OF INTERPRETATION, *supra* note 32, at vii–viii, 16–17, 25–47; Easterbrook, *Text, History*, *supra* note 42; Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005) (For related but more reserved versions of this proposition, see Tara Leigh Grove, Comment—*Which Textualism?*, 134 HARV. L. REV. 265 (2020).).

46. Marbury v. Madison, 5 U.S. 137, 177 (1803); THE FEDERALIST No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

litigant's fortunes—is that, for remaining questions of statutory design, *Congress* retains *discretion* over the shape of the law. Revision of the law to make it conform to the court's constitutional requirement almost always lies in Congress's domain. That understanding supports a court exercising its authority only so far as needed to resolve the case before it and leaving to the lawmaking process any further corrective with respect to the remainder of the law.[47] This is the reason that the *Arthrex* decision grates against a sense of constitutional structure—not because the Court was wrong on the issue of constitutional law, but because it was wrong on the remedy.

Imagine if a federal court, after holding that a challenged agency rule exceeded the agency's authority, wrote out the court's version of what a better rule would be. This would take the court beyond its own dominion into the domain reserved for Congress and the agency. In just the same way, a court goes beyond its province when it adopts a remedy that revises the terms of a law beyond holding a provision unconstitutional and invalidating actions taken under it. As with judicial review of agency action, the concern with structure—embodied in recognition of which entity enjoys discretion over a particular judgment—should govern.

The other part of sticking to the court's constitutional knitting is not just limiting the remedy it gives but actually *giving* a remedy to the prevailing party in the case it is deciding. This is an integral part of *Marbury*'s and Hamilton's formulation of the defense for judicial review. Without that tie, the courts become announcers of what they think Congress should have done rather than deciders of legal disputes in which their pronouncements are necessary adjuncts of their exercise of *judicial* power.[48] The *Arthrex* decision fails on this score as well.[49]

CONCLUSION

Structure needs attention, whether it's getting someone who's aging to stand up straight (good for your breathing and walking and sleeping—especially if you don't try the last two at the same time) or keeping buildings from sliding into disrepair. It works the same way with public entities, government most of all. The good news is that structure is again getting attention. The decline of the *Chevron* doctrine in administrative law is due in large part to rising concern that it was being interpreted and implemented in ways that run counter to constitutional structure. So, it may seem odd to for a *Chevron* critic to pen a plea to recognize

47. *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2207–11 (2020); Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 510 (2010); 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 100–06 (Henry Reeve trans., 1961); Cass & Beermann, *supra* note *, at 672–704; Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 72–77 (2019).

48. *See, e.g.*, Gunther, *supra* note 35; Schauer, *supra* note 34. *See also* DE TOCQUEVILLE, *supra* note 47, at 103–05.

49. *See* Cass & Beermann, *supra* note *, at 660.

the basic instincts that first gave rise to "Ad. Law *Chevron*" and embrace them in a new "Constitutional *Chevron*." But that is necessary if our courts are to appreciate fully the importance of remedies that are focused on the litigants before the courts and sensitive to the assignment of law-making discretion to Congress. Message to our courts: give remedies that remedy, and then leave the law writing to the pros. Our law-makers may not always be very good at law-making, but they're the ones the Constitution picked. May the force be with them!