

Marbury v. Madison and the Concept of Judicial Deference

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The past several Supreme Court Terms have seen a judicial revitalization of sorts for Chief Justice Marshall’s famous directive in *Marbury v. Madison* that “it is emphatically the province and duty of the judicial department to say what the law is.”¹ In a series of dissenting and concurring opinions, Justices have juxtaposed that statement with the bedrock administrative law doctrines requiring reviewing courts to “defer” to an administrative agency’s reasonable interpretation of its own organic statute and regulations.² The question that these opinions raise can be summarized as follows: If deference is required, how can it be said that the reviewing court *is* declaring “what the law is,” rather than allowing some other body to make the declaration?³ Thus, to take one example, Justice Thomas has argued that judicial deference “wrests from Courts the ultimate interpretive authority to ‘say what the law is,’ and hands it over to the Executive,”⁴ because “[j]udges are at least as well suited as administrative agencies to engage in [the interpretive] task.”⁵

In some respects, this rediscovery of *Marbury* in the administrative law context should come as little surprise. For one thing, scholars have long recognized a seeming tension between the notion of judicial deference and *Marbury*, some going so far as to characterize the Court’s canonical decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* as the “counter-

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

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

3. See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting); *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1877–78 (2013) (Scalia, J., dissenting) (contending that the “purpose of interpretation is to determine the fair meaning of the rule – to ‘say what the law is,’” and “to determine what policy has been made and promulgated by the agency, to which the public owes obedience”). For a humorous approach to this issue, see Jeffrey Pojanowski, *A Socratic Dialogue Inspired by “Marbury and the Administrative State,”* YALE J. ON REG.: NOTICE & COMMENT (May 26, 2016), <http://www.yalejreg.com/blog/a-socratic-dialogue-inspired-by-marbury-and-the-administrative-state-by>.

4. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (citation omitted).

5. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1222 (2015) (Thomas, J., concurring) (citing *Marbury*, 5 U.S. at 177); see also *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

Marbury” of the administrative state,⁶ because it requires courts to accept any “permissible” interpretation proposed by the government rather than to adopt, even where possible, the best interpretation of a statute.⁷ The Court’s redis-

6. Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2074–75 (1990). For example, a leading casebook introduces the topic of *Chevron* by observing that “we typically think of the judiciary, rather than the executive, as having the authority to ‘say what the law is,’ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and judicial review is thought to be an important means for ensuring that agencies comply with congressional directives.” JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 792 (2010); see also *id.* at 824 (“A prominent objection to the *Chevron* framework is that it entails judicial abdication of the responsibility to interpret the law, a responsibility famously asserted by Chief Justice Marshall’s opinion in *Marbury v. Madison*.”).

7. *Chevron*, 467 U.S. at 843; see *id.* at 843 n.11 (reasoning that a reviewing “court does not simply impose its own construction on the statute” or “even the reading the court would have reached if the question initially had arisen in a judicial proceeding”). Broadly speaking, two viewpoints have arisen on the apparent tension between the *Marbury* and *Chevron* models of judicial review. Compare Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989), with Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983). On the first view, the two are thought to be irreconcilable. Cf. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1378–79 (1953) (reasoning that, at the point at which the Supreme Court “squarely h[o]ld[s] that, in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunity to have them determined by a court has been previously accorded,” it would be time to “go[] back to re-think *Marbury v. Madison*”). The issue can be cast in “*Marbury*” terms or broader separation-of-powers terms. See Farina, *supra*, at 456 (“[W]e cannot embrace *Chevron*’s vision of deference as the handmaid to separation of powers and legitimacy principles without substantially recasting those principles – a recasting in which some aspects of existing theory would have to be abandoned and others radically reformulated.”); 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, 110 (2000) (“By weakening the influence of our politically insulated judiciary over deliberation and drafting among lawmakers, these modern doctrines of deference arguably have undermined an important feature of our constitutional structure.”); see also Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 436 (1995) (noting “the *Marbury* view of administrative law,” under which “no deference in interpretation is called for: Interpretation is just lawfinding, and courts rather than bureaucrats are given the power to find federal law”); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 283 (1986) (noting the argument that “[a]ffording deference to an agency’s legal analysis . . . seems facially contrary to the fundamental principle, incorporated in Chief Justice John Marshall’s broad dictum in *Marbury v. Madison*, that ‘it is emphatically the duty of the judicial department to say what the law is’” (footnote omitted)). Indeed, a student note in the 1927 volume of the *Harvard Law Review* observed that “[a]t first blush, it would appear that mere administrative con-

covery of *Marbury* in this context, thus, lags behind the academic literature by several decades. For another thing, *Marbury* itself is a decision about *administrative* law, with Chief Justice Marshall devoting many more pages to what we would currently characterize as statutory interpretation and administrative law issues than to constitutional issues.⁸ That the Court would rediscover *Marbury* in this context, in other words, tends to place Chief Justice Marshall's canonical decision in its appropriate sphere.

In an important respect, however, the recent opinions paint an incomplete picture of *Marbury* itself. *Marbury*'s "say what the law is" statement – upon which the various recent opinions have relied – was made in the context of interpreting the federal Constitution. Each of the opinions has neglected the lengthy statutory analysis portion of *Marbury*. Did *Marbury* have anything to say about interpretive technique in the many other pages that Chief Justice Marshall devoted to statutory interpretation?

The answer to that question is "yes." As I explain in this Article, *Marbury*'s lessons for the doctrine of judicial deference are richer and more nuanced than one might expect from the repeated invocations of Chief Justice Marshall's famous statement. As a close review of the Chief Justice's statu-

struction of a statute without more would not influence the Court" because "[i]t is for the judiciary, not the administrative, to interpret the law." Note, *The Supreme Court on Administrative Construction as a Guide in the Interpretation of Statutes*, 40 HARV. L. REV. 469, 469 (1927). On the second view, the doctrine of judicial deference and *Marbury* can be rationalized. In Professor Monaghan's words, a reviewing court "has discharged its duty to say what the law is" under *Marbury* once it has determined "what statutory authority has been conferred upon the administrative agency," with the court's role simply "to determine the boundaries of delegated authority." Monaghan, *supra*, at 6, 27. Congress, in other words, has the authority to delegate statutory authority to an agency, expressly or implicitly. *Id.* at 6. Statutory ambiguity, thus, is simply an indication that Congress *intended* interpretation to be conducted by agencies, not courts – although the theory presupposes a "fictional, presumed intent" on Congress's part. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–17. As a result, most have found it necessary to articulate some other principle to supplement the "implicit delegation" account. See *id.* at 516–17 (suggesting that the fictional intent can be justified on the ground that "[b]road delegation to the Executive is the hallmark of the modern administrative state"); Starr, *supra*, at 308–09 (reasoning that, because "administrative agencies are not subordinate to the federal courts in the organizational structure established by the Constitution[,] . . . Article III judges lack general supervisory authority over the agencies," and noting practical benefits of reliance on agency expertise).

8. See Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 481 n.4 (2004) (observing the relative imbalance between the pages that Chief Justice Marshall devoted to administrative law issues (approximately twenty-two) and constitutional law questions (approximately five)). Compare *Marbury*, 5 U.S. at 153–76 (addressing administrative law questions), with *id.* at 176–80 (addressing judicial review); see also Akhil R. Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 446–47 (1989) (noting in passing the administrative law dimension of *Marbury*).

tory analysis reflects, the *Marbury* Court could be said to consider three types of “deference” in the course of its opinion, through its (1) treatment of executive custom in statutory interpretation, (2) discussion of the “political question” doctrine, and (3) use of the ministerial/executive distinction under the writ of mandamus. To be sure, none of these three doctrines is the same as the “*Chevron*” doctrine of judicial deference familiar to us today. But they provided the framework for much nineteenth-century judicial review of executive action and later the kernels – or sparks – that established the modern doctrine of judicial deference to executive interpretation. Understanding the full picture of *Marbury*, thus, gives the modern reader a richer understanding of nineteenth-century interpretation and the development of judicial deference – as well as a way to understand and to critique the recent opinions relying on *Marbury*.

The Article proceeds as follows. Part I summarizes *Marbury*’s statutory analysis. Part II picks up that summary and analyzes each of the three types of “deference” discussed in the *Marbury* opinion. Part III provides some concluding thoughts.

I.

Marbury is such a foundational case of American public law that its summary may seem almost unnecessary. But the case is typically studied today for its role in the development of the doctrine of judicial review – the notion that the Constitution gives Article III courts the authority to deem unconstitutional congressional enactments.⁹ That very centrality as a constitutional decision in modern debates can obscure its other important holdings.

Through the lens of administrative law, *Marbury* is a case about whether and when the judiciary may compel an Executive Branch official to comply with his statutory duties.¹⁰ The executive actor was James Madison, the newly installed Secretary of State to President Thomas Jefferson, and the asserted statutory duty was Madison’s obligation to deliver a commission to William Marbury.¹¹ Marbury had been nominated by President Adams to a five-year term as Justice of the Peace to the District of Columbia.¹² He was confirmed by the lame-duck Federalist Senate, and his commission was signed – but not delivered – before Adams left office.¹³ Marbury asked the new Administration for his commission.¹⁴ He was refused.¹⁵ In an effort to compel Madison

9. See generally PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 8 (2008); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 887 (2003).

10. See Merrill, *supra* note 8, at 484.

11. *Id.* at 483.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

to deliver his commission, Marbury sought a writ of mandamus directly in the Supreme Court.¹⁶

The case called for the Court to consider whether Marbury had a “right to the commission” because the existence of the signed but undelivered commission meant that he had “been appointed to the office.”¹⁷ The Act establishing his position provided simply that “there shall be appointed” justices of the peace as the President “shall, from time to time, think expedient.”¹⁸ A second Act relevant to the question authorized the Secretary of State to “affix the . . . seal” of the United States to the commission after “the same shall have been signed by the president of the United States.”¹⁹ The Court held that, under these provisions, Marbury had been appointed.²⁰

Chief Justice Marshall started from the proposition that, as with constitutional questions, the statutory question “whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority.”²¹ In light of the connection between delivery of Marbury’s commission and his appointment,²² the Court took what it believed to be an “obvious” step: Because appointment was the “sole act of the President,” it was accomplished “when it is shown that he has done every thing to be performed by him,” which in such a case, was the “open, unequivocal act” of the President’s “signature of the commission.”²³ At that point, as the Court bluntly put it, “[h]e has decided” – and “the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president.”²⁴ That course of conduct – discretionary presidential signature followed by mandatory Secretary of State affixing of the seal and delivery – was “not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible, but is a precise course accurately marked out by law, and is to be strictly pursued.”²⁵ The Secretary’s conduct was, in other words, a “ministerial act.”²⁶

16. *See id.*; *see also* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81 (1789) (authorizing the Supreme Court to issue writs of mandamus “in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States”).

17. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 154–55 (1803).

18. An Act Concerning the District of Columbia, ch. 15, § 11, 2 Stat. 103, 107 (1801).

19. *Marbury*, 5 U.S. at 158.

20. *Id.* at 167–68.

21. *Id.* at 167.

22. *Id.* at 157 (reasoning that, because an appointment was “evidenced by no act but the commission itself,” the “commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission”).

23. *Id.*

24. *Id.* at 157–58.

25. *Id.* at 158.

26. *Id.*

It is worth pausing here to remark just why this analysis of the relevant legal text is by no means “obvious.” The Act of Congress establishing the Secretary of State’s role in affixing the seal to commissions nowhere defined his duties as mandatory, nor did it make any mention of delivery.²⁷ It could have been plausibly read to allow the Secretary, in his discretion, as guided by the President, not to deliver the commission under appropriate circumstances. Indeed, it would have been a perfectly rational statutory scheme to allow the President, who undoubtedly would sign the commission in private, to change his mind, even after a seal had been affixed. Had Marshall interpreted the statute in this manner – had he concluded, in other words, that the decision whether to deliver was in some sense discretionary – his own analysis indicated that mandamus should have been “rejected without hesitation.”²⁸ And many legal documents were, in ordinary practice, not valid until delivered. It may thus have been prudent, in the case of statutory silence,²⁹ to adopt a default rule that presidential commissions should be, like these other legal documents, considered valid only once delivered. Marshall recognized as much when he cited the case of “a deed, to the validity of which, delivery is essential.”³⁰ But he brushed aside the objection on the ground that the statutory scheme contemplated delivery *by the President*, which was accomplished when the President delivered the commission to the Secretary of State.³¹

Marshall did have a significant, extra-textual point (not heretofore mentioned) to buttress his position. He claimed that his understanding of the Secretary of State’s authority was “the understanding of the government” itself and “apparent from the whole tenor of its conduct” – or, to put the point in

27. My analysis assumes that the text of Congress’s enactments controls when an appointment vests and, hence, Chief Justice Marshall’s legal analysis with respect to Marbury’s appointment. Compare Saikrishna Bangalore Prakash, *The Appointment and Removal of William J. Marbury and When an Office Vests*, 89 NOTRE DAME L. REV. 199 (2013) (arguing that an appointment vests whenever the President determines that it shall).

28. *Marbury*, 5 U.S. at 171; see also *id.* at 170–71 (observing that a writ could reach only actions where the officer was “directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President,” and could not reach questions that were “in their nature political” or that required the exercise of “executive discretion”).

29. In discussing whether mandamus was an appropriate remedy, Marshall recognized that Marbury did not request the “performance of an act expressly enjoined by statute,” but rather delivery of a commission, “on which subjects the acts of congress are silent.” *Id.* at 172. He viewed that distinction as not “affecting the case.” *Id.*

30. *Id.* at 159. Many years later, Jefferson remarked to an acquaintance that Marshall’s reasoning on this point was a “perversion of law,” because, “if there is any principle of law never yet contradicted, it is that delivery is one of the essentials to the validity of a deed.” Letter from Thomas Jefferson to William Johnson (June 12, 1823), in SAUL K. PADOVER, *GENIUS OF AMERICA* 130 (1961).

31. See *Marbury*, 5 U.S. at 159.

other words, that his interpretation was consistent with the government's customary practice.³²

In reaching the conclusion that Marbury had a right to his appointment, Marshall acknowledged that there were certain "mere political act[s] belonging to the Executive department alone, for the performance of which entire confidence is placed by our Constitution in the Supreme Executive, and for any misconduct respecting which the injured individual has no remedy."³³ While recognizing the "difficulty" in distinguishing between executive actions that were "examinable" and those that were "not," he reasoned that the President possessed "certain important powers" that he could use in "his own discretion" and for which he "is accountable only to his country in his political character and to his own conscience."³⁴ When acting pursuant to such authority (even if through subordinates), the President's actions were unreviewable: Because the "subjects are political," "whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion."³⁵ One exam-

32. *Id.* at 161 (reasoning that the salary of the office commenced from the date of the commission, rather than the date of the transmission or acceptance of the commission and that, if a commission were declined, the successor would be nominated in place of the person who had declined to accept, rather than the prior occupant of the office). Similarly, Marshall rejected the possibility that the President could recover the commission from the Secretary of State and deliver it to the "grantee of the office" because such direct delivery "never is so made." *Id.* at 159. Because no attorney entered an appearance to argue the government's position in the case, these factual assertions went uncontested. See Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1276 (2003). In the absence of a government appearance, one may question how Marshall knew about these practices. As Professor Merrill notes, it is likely "[b]ecause, of course, he served as Secretary of State during the period of time when Marbury's commission was signed by the President and sealed by the Secretary of State." Merrill, *supra* note 8, at 500 (speculating that Marshall was "testifying from personal knowledge about the practical construction of the law"). Professor Merrill further speculates that "Marshall was playing games" in relating the practice, because the "telling question would be whether the government would feel compelled to pay any salary in the case of an appointee who rejected the office after the commission was delivered." *Id.* at 500 n.81. When that happened in the early days of the Republic (due, for example, to the poor state of communications), it seems unlikely, as Professor Merrill observes, that any salary would have been due to the candidate from the date of the signing of the commission to the date of its rejection. *Id.* (citing JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 266-67, 399-400 (1996)); see also *United States v. Smith*, 286 U.S. 6, 47 (1932) (observing, over a century later, that "the Executive Department has not always treated an appointment as complete upon the mere signing of a commission") (footnote omitted). Here, I express no view on whether Marshall was "playing games" in invoking the Executive Branch's customary practice. My focus is on the interpretive methodology that Marshall used, rather than the specifics of its application.

33. *Marbury*, 5 U.S. at 164.

34. *Id.* at 165-66.

35. *Id.* at 166.

ple of such a “political question,” according to Marshall, occurred under “the act of Congress for establishing the Department of Foreign Affairs,” which prescribed “duties [that] . . . can never be examinable by the Courts.”³⁶ Thus, where the “[e]xecutive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that [its] acts are only politically examinable.”³⁷

II.

As the preceding discussion suggests, there is more to Chief Justice Marshall’s opinion than the simple statement that courts must “say what the law is.” Indeed, notwithstanding that statement, in interpreting the statute that gave Marbury his “right” to office, Marshall found occasion to refer to “the understanding of the government” itself, which was “apparent from the whole tenor of its conduct.”³⁸ He also made clear that there were certain “mere political act[s] belonging to the Executive department alone, for the performance of which entire confidence is placed by our Constitution in the Supreme Executive, and for any misconduct respecting which the injured individual has no remedy.”³⁹ And he alluded to a distinction between “discretionary” and “ministerial” acts for purposes of issuing the legal relief that Marbury requested – a writ of mandamus.⁴⁰ In this Part, I address these three issues.

A.

Marshall’s invocation of “the understanding of the government . . . apparent from the whole tenor of its conduct” may sound like the modern *Chevron* doctrine,⁴¹ under which the government’s “understanding” often controls the meaning of ambiguous statutory text. But the legal principle upon which Marshall was relying differs from *Chevron*, both in spirit and in application. The critical distinction between Chief Justice Marshall’s opinion in *Marbury* and Justice Stevens’ opinion in *Chevron* lies in the treatment that the two opinions give to the customary interpretations of the statutes at stake in each case.⁴² Marshall relied on the preexisting “understanding of the govern-

36. *Id.*

37. *Id.*

38. *Marbury*, 5 U.S. at 161.

39. *Id.* at 164.

40. *Id.* at 168–69.

41. *Id.* at 161.

42. *Cf.* Merrill, *supra* note 8, at 500–01 (“[T]he longstanding practice of considering executive interpretation of statutes shows that courts have always regarded the views of a coordinate branch as being at least as relevant data. We find such use of executive interpretation even in *Marbury v. Madison*, the supposed standard bearer for independent judicial determination of questions of law.”).

ment,” “apparent from the whole tenor of its conduct” *in practice*.⁴³ By contrast, *Chevron* declared it to be “basic legal error . . . to adopt a static judicial definition” of a statutory term when “Congress itself had not commanded that definition.”⁴⁴ Deference was thus warranted even if the agency’s interpretation “represent[ed] a sharp break with prior interpretations of the Act.”⁴⁵

Put another way, *Marbury* does involve a form of “deference” to executive interpretation of statutory text, but the executive interpretation mattered *because* it was evidence of a customary practice under the statutory scheme. Implicit in the opinion is the notion that a *departure* from that customary practice was impermissible – because Marshall used the custom to reject the Jefferson Administration’s attempt to change the practice. The “whole tenor” of the government’s conduct would matter more, in other words, than the government’s then-current legal position.

Marshall’s reliance on executive custom, while certainly debatable as applied in *Marbury* itself,⁴⁶ grew out of the concern of nineteenth-century lawyers that ambiguity in legal text was a problem to be avoided through the settling of meaning as rapidly as possible. The specific canon of construction was invoked in a variety of settings under the rubric that “custom” or “usage” was the “best interpreter of laws.”⁴⁷ A number of cases applied the same legal principle. In *Stuart v. Laird* (which was decided the same year as *Marbury*),⁴⁸ for example, the Court addressed the constitutionality of the practice of Supreme Court Justices “riding circuit” without distinct commissions as circuit judges.⁴⁹ The Court explained that, because the “objection” to circuit riding was of “recent date,” it was “sufficient to observe, that practice and acquiescence under [the Constitution] for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.”⁵⁰

43. *Marbury*, 5 U.S. at 161.

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

45. *Id.* at 862–63. See also *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005) (collecting cases and observing that *Chevron* “deferred to an agency interpretation that was a recent reversal of agency policy”).

46. See Merrill, *supra* note 8, at 520.

47. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 *YALE L.J.* (forthcoming 2017), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2649445.

48. *Stuart v. Laird*, 5 U.S. 299 (1803).

49. *Id.* at 309.

50. *Id.*; see also *Marshall Field & Co. v. Clark*, 143 U.S. 649, 691 (1892) (reasoning that “the practical construction of the constitution, as given by so many acts of congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land”); *Boyd v. United States*, 116 U.S. 616, 622 (1886) (observing that “long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for [an interpretation] in the law”).

B.

So much for Marshall's use of custom to fill in statutory ambiguities. What of Marshall's argument that there existed "mere political act[s] belonging to the Executive department alone, for the performance of which entire confidence is placed by our Constitution in the Supreme Executive, and for any misconduct respecting which the injured individual has no remedy"?⁵¹

This aspect of *Marbury* has rightly been viewed as the source for the "political question" doctrine,⁵² under which courts will treat "some constitutional questions as outside the scope of judicial review."⁵³ But it is worth considering the context – specifically, the *part* of the *Marbury* opinion – in which Marshall invokes this doctrine: the Court's treatment of whether *Marbury* had a *statutory* right to his position. Thus, *Marbury* reasons, one example of a political question would exist under "the act of Congress for establishing the Department of Foreign Affairs," which prescribed "duties [that] . . . can never be examinable by the Courts."⁵⁴ The "act of Congress," not necessarily the Constitution, would create the "political question."⁵⁵

Here's another way to understand Marshall's point: In this passage, Marshall is discussing what we might today call a "delegation" of authority.⁵⁶ In contrast to certain kinds of ambiguities – which would be resolved over time through customary practice (or, alternatively, filled by evidence of a

51. *Marbury v. Madison*, 5 U.S. 137, 164 (1803).

52. See, e.g., Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 239–40 (2002). See *Baker v. Carr*, 369 U.S. 186, 210–11 (1962). In the modern era, the doctrine has been given a jurisdictional spin, which has been the subject of substantial criticism. HERBERT WECHSLER, *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 11–12 (1961). As early as 1961, for example, Professor Wechsler argued that "all the [political question] doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation." *Id.*

53. Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1910 (2015).

54. *Marbury*, 5 U.S. at 166.

55. See Chris Michel, *There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of Zivotofsky v. Clinton*, 123 YALE L.J. 253, 253–54 (2013) (noting that "[c]ourts increasingly dismiss claims as political questions, especially in sensitive fields like foreign affairs and national security," and arguing that "a claim to a federal statutory right can never present a political question") (emphasis omitted); see also *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012).

56. Cf. Grove, *supra* note 53, at 1938 n.159 (noting that the "modern-day equivalent" of the political question doctrine "would likely be the administrative law principle that courts may not review actions that are 'committed to agency discretion by law'") (quoting 5 U.S.C. § 701(a)(2) (2012)); see also *Webster v. Doe*, 486 U.S. 592, 608–09 (1988) (Scalia, J., dissenting).

contemporaneous understanding) – other kinds of ambiguities were intended to “delegate” authority to the Executive Branch. In such situations, custom would *not* restrain executive flexibility over time, but rather the President could (within the scope of the statute) act in “his own discretion” in a way that was “accountable only to his country in his political character and to his own conscience” and with the courts having “no power to control that discretion.”⁵⁷ Thus, where the “[e]xecutive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that [its] acts are only politically examinable.”⁵⁸ In a similar vein, one of the Court’s leading modern cases on political questions generally appears to understand the doctrine in these terms:

A controversy is nonjusticiable – *i.e.*, involves a political question – where there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it” But the courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed. . . . [T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.⁵⁹

As *Marbury* acknowledged, distinguishing between the two kinds of ambiguities – those settled by custom and those delegating authority – poses a “difficulty.”⁶⁰ Marshall’s example of the statute authorizing the Department of Foreign Affairs suggests that he may have been considering some sort of domestic/foreign distinction, which gave great leeway to the Executive Branch in matters of foreign affairs but resolved issues through custom in matters of domestic affairs. And indeed, the Supreme Court tended to treat as conclusive the Executive Branch’s foreign affairs determinations in the nineteenth century – for example, its judgment that a given country controlled a foreign territory.⁶¹

57. *Marbury*, 5 U.S. at 166.

58. *Id.*; see Merrill, *supra* note 8, at 499, 513 (arguing that this generally unacknowledged two-tier structure in Chief Justice Marshall’s reasoning allows for a “much greater continuity between *Marbury* and *Chevron*,” yet noting that “*Marbury* historically has not been read this way” but rather “as endorsing a single standard of independent judicial judgment in all matters of law”).

59. *Nixon v. United States*, 506 U.S. 224, 228–29 (1993) (citations omitted).

60. *Marbury*, 5 U.S. at 165–66.

61. *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420 (1839). The same principles were applied in a number of other circumstances, however, such as cases that, although domestic, turned on questions of sovereignty. See *Luther v. Borden*, 48 U.S. 1,

Although *Marbury* itself does not use the terminology, the political question doctrine was reframed as a distinction between legal issues (which were for courts to decide) and factual issues (which were for the Executive Branch). Political questions, in Professor Grove's words, were traditionally "factual determinations made by the political branches that courts treated as conclusive in the course of resolving cases."⁶² An illustration of the use of this kind of terminology in a political question case is Justice Story's opinion in *Martin v. Mott*.⁶³ That case arose out of President Madison's decision to call the militia into service during the War of 1812 between the United States and the United Kingdom.⁶⁴ A law enacted in 1795, which Madison invoked, authorized the President "whenever the United States shall be invaded, or be in imminent danger of invasion[,] . . . to call forth" the militia "as he may judge necessary to repel such invasion."⁶⁵ Jacob Mott, a private in the New York militia, failed to comply with Madison's calling of the militia.⁶⁶ Mott was court martialed and subjected to a fine and forfeiture, which the government enforced by seizing his belongings.⁶⁷ Mott then sued in state court to recover his property.⁶⁸ As the Supreme Court put it, the question presented by the lawsuit was "by whom is the exigency" – in other words, whether the Nation was "in imminent danger of invasion" – "to be judged of and decided?"⁶⁹ Or put another way:

39 (1849) (political branches have authority to identify the lawful government of a State); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912) (political branches have authority to determine whether initiative process is consistent with republican form of government); *cf. Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2118 (2015) (Scalia, J., dissenting) ("Recognition is a sovereign's official acceptance of a status under international law. A sovereign might recognize a foreign entity as a state, a regime as the other state's government, a place as part of the other state's territory, rebel forces in the other state as a belligerent power, and so on." (citing 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 1 (1963))); *Georgia v. Stanton*, 73 U.S. 50, 77 (1867). For internal congressional procedure, see *Marshall Field & Co. v. Clark*, 143 U.S. 649, 670 (1892) (court will not look behind bill certified as enrolled to see whether it matches bill voted on by Congress); *Coleman v. Miller*, 307 U.S. 433, 454 (1939).

62. *Grove*, *supra* note 53, at 1916.

63. *Martin v. Mott*, 25 U.S. 19, 33 (1827). For opinions relying on *Martin v. Mott* in this context, see *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1433 n.1 (2012) (Sotomayor, J., concurring in part and concurring in the judgment); *Baker v. Carr*, 369 U.S. 186, 213–14 (1962). See also Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1380–81 (2009).

64. *Martin*, 25 U.S. at 28.

65. Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424, 424 (1795).

66. *Martin*, 25 U.S. at 22, 28.

67. *Id.* at 28.

68. *Id.*

69. *Id.* at 29.

[Was] the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President?⁷⁰

The Court held that the President's decision to call the militia was not reviewable by court.⁷¹ The Court rested its decision on "the nature of the power itself, and from the manifest object contemplated by the act of Congress."⁷² As for the "nature of the power," the Court noted that it was "to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union," during which a "prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object."⁷³ A decision that a militia member could challenge the President's decision "would be subversive of all discipline."⁷⁴ This was, in short, an argument premised on the expertise of the Executive Branch in matters of national security, the need for speed and efficiency in military matters, and the relative inability of courts to review decisions in this context.

As for the Congress's "manifest object," the Court reasoned that the "language of the act of 1795" "strongly fortified" its conclusion.⁷⁵ The Act "confided" the decision to the President without "any appeal from [his] judgment."⁷⁶ In reaching that conclusion, the Court repeatedly characterized the President's determination as a "factual" one in language that echoed the *Marbury* Court's political question passage.⁷⁷ As the Court put it, "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that

70. *Id.* at 29–30.

71. *Id.* at 30 ("We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons."); *see also* *Vanderheyden v. Young*, 11 Johns. 150, 150 (N.Y. Sup. Ct. 1814).

72. *Martin*, 25 U.S. at 30.

73. *Id.*

74. *Id.* at 30–31; *see also id.* at 31 ("[I]n many instances, the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.").

75. *Id.* at 31.

76. *Id.*

77. *See id.* at 32 (noting that "the delegation and exercise of this power intrusted to the Executive of the nation for great political purposes," and distinguishing it from "the humblest officer in the government, acting upon the most narrow and special authority").

the statute constitutes him the sole and exclusive judge of the existence of those facts.”⁷⁸

Although the introduction of *Chevron* in domestic statutory cases has tended to eliminate the domestic/foreign distinction envisioned by *Marbury* and *Martin v. Mott*, the principle still endures in modern law. In *United States v. Curtiss-Wright Export Corp.*,⁷⁹ for example, the Court explained that “congressional legislation . . . within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved” – a principle that the Court has repeatedly invoked to defer to Executive Branch foreign affairs and national security determinations.⁸⁰

Precisely where to draw the line between “political” and “legal” questions remains a vexed issue in constitutional law to this day.⁸¹ But there are three more salient takeaways for purposes of *Marbury*’s relationship to judicial deference. First, the Court made its point about political questions in the context of its discussion of statutory interpretation – and this point can be analogized to our modern conceptions of “delegated” authority through am-

78. *Id.* at 31–32; *see also id.* at 30 (“[E]vidence of the facts upon which the commander in chief exercises the right”); *id.* at 31 (noting that the President “is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts”); *id.* at 32 (characterizing *Mott*’s argument as being “that the power confided to the President is a limited power . . . and therefore it is necessary to aver the facts which bring the exercise within the purview of the statute”); *id.* at 33 (referring to the “fact of the existence of the exigency” and observing that if this factual question could be challenged, then “the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury”); *cf. id.* at 32–33 (“When the President exercises an authority confided to him by law, the presumption is, that it is exercised in pursuance of law.”).

79. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

80. *Id.* at 320; *see also Dep’t of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (“[U]nless Congress specifically has provided otherwise, courts traditionally [should be] . . . reluctant to intrude upon the authority of the Executive in military and national security affairs.”); *Dames & Moore v. Regan*, 453 U.S. 654, 680–83 (1981); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (invoking President’s foreign affairs power as a reason to defer to interpretation of immigration law); *CIA v. Sims*, 471 U.S. 159, 169–71 (1985) (invoking executive national security authority as reason to defer); *cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 623 (2006) (assuming that “complete deference” was due to President’s determination that it was impracticable to apply the rules that govern criminal trials to military commissions); *see also id.* at 680, 682 (Thomas, J., dissenting) (arguing that “the President’s decision to try *Hamdan* before a military commission for his involvement with al Qaeda is entitled to a heavy measure of deference” and remarking that, in this context, the Court’s “duty to defer to the Executive’s military and foreign policy judgment is at its zenith”); *id.* at 719 (“[W]here, as here, an ambiguous treaty provision . . . is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive’s interpretation.”).

81. *Grove, supra* note 53, at 1970–73.

biguous statutes.⁸² Second, some measure of deference in the foreign affairs and national security context has long been an established part of the Court's interpretive framework – and has long been understood as consistent with *Marbury*'s directive that the courts must “say what the law is.”⁸³

And third, the distinction between law and fact later proved to be integral to the development of modern notions of judicial deference to executive statutory interpretation. In a 1927 book, John Dickinson argued that, as a descriptive matter, the scope of judicial review over administrative decisionmaking “focus[ed] ultimately upon the distinction which the courts draw between ‘questions of law’ and ‘questions of fact,’” with courts “review[ing] for error of law, but not findings of fact, at least where, on the evidence, the findings are within the bounds of reason.”⁸⁴ But, Dickinson argued: “[A]ny factual state or relation which the courts . . . regard as sufficiently important to be made decisive for all subsequent cases of similar character becomes thereby a matter of law,” thus rendering it impossible “to establish a clear line between so-called ‘questions of law’ and ‘questions of fact.’”⁸⁵ And the Supreme Court embraced this legal-realist perspective on the law/fact distinction, thereby providing the analytical basis for the building block cases upon which *Chevron* was later constructed.⁸⁶

C.

One final aspect of *Marbury* merits discussion: Chief Justice Marshall's treatment of *Marbury*'s use of the writ of mandamus to seek relief for James Madison's alleged wrong. That treatment was, in an important respect, so cursory that it was quite possible to miss it. The Secretary of State's conduct

82. In this respect, it is peculiar how the “political question” doctrine, as conceived in the mid-twentieth century, became identified with constitutional interpretation alone. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7 (1959) (“[T]he courts themselves regard some questions as ‘political,’ meaning thereby that they are not to be resolved judicially, although they involve constitutional interpretation and arise in the course of litigation.”).

83. See, e.g., 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); Barkow, *supra* note 52, at 267 n.158.

84. JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* viii, 50 (1927).

85. *Id.* at 312.

86. See, e.g., *Gray v. Powell*, 314 U.S. 402 (1941); *NLRB v. Hearst Publ'ns*, 322 U.S. 111 (1944); see also Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 CARDOZO L. REV. 2241, 2243 (2011) (“The *Chevron* opinion's explicit merger of issues of policy with statutory interpretation is of a piece with the *Hearst* Court's fictional treatment of legal conclusions as questions of fact.”).

was so clearly in violation of statute, Marshall argued in a single sentence, that it was a “ministerial act.”⁸⁷

Marshall had to establish that the act was “ministerial” because the writ of mandamus issued only upon the failure to perform such a kind of act. Quoting Blackstone, Marshall acknowledged that mandamus was “a command issuing in the King’s name from the Court of King’s Bench, and directed to any person, corporation, or inferior court of judicature within the King’s dominions requiring them to do some particular thing therein specified which appertains to their office and duty.”⁸⁸ He did not, however, elaborate on the circumstances under which mandamus could issue. In the words of Louis Jaffe, a “series of [English] cases in the years 1700-1740 developed the principle that mandamus would not lie when the respondent’s function was ‘judicial’ but only when it was ‘ministerial,’” resulting in a distinction conferring “an area of ‘discretion’ free from control by the King’s Bench.”⁸⁹ Marbury’s request for a writ of mandamus had to fit within this analytical framework.

Marbury therefore takes pains to distinguish occasions where an executive officer “acts in a case in which Executive discretion is to be exercised” from occasions where an executive officer “is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid.”⁹⁰ Only the latter (ministerial) act could be subject to mandamus, whereas the former, “executive” or “discretionary” act could not.

Could it not be said that every statutory ambiguity created a “discretionary” duty to interpret the statute, thereby rendering the very act of interpretation as non-ministerial? *Marbury* appeared to reject this view. While *Marbury* recognized that “there may be such cases” in “which the injured individual has no remedy” (because the statutory duty called for the exercise of discretion),⁹¹ the Court concluded that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury.”⁹² Ambiguous statutory language given a customary interpretation, in other words, established a statutory right that rendered an executive officer’s task “ministerial.”

The Court took a different turn under Marshall’s replacement, Chief Justice Taney. In *Decatur v. Paulding*,⁹³ Taney held that mandamus was inappropriate because the Secretary’s interpretation of statutory provisions was an “executive duty” requiring the exercise of judgment and discretion, not a

87. *Marbury v. Madison*, 5 U.S. 137, 158 (1803).

88. *Id.* at 168 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *110).

89. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 332 (1965).

90. *Marbury*, 5 U.S. at 170–71.

91. *Id.* at 164.

92. *Id.* at 163.

93. *Decatur v. Paulding*, 39 U.S. 497 (1840).

mere “ministerial act.”⁹⁴ He argued that executive officials are “continually required to exercise judgment and discretion,” including “in expounding the laws and resolutions of Congress.”⁹⁵ Such interpretive decisions, according to Taney, were “[i]n general, . . . not mere ministerial duties.”⁹⁶ Interpretation, from this perspective, *generally* involved discretion not subject to mandamus.

It was not until the advent of general federal question jurisdiction and the expansion of equitable remedies in the late nineteenth century that this perspective on the mandamus standard and interpretation began to lose its influence.⁹⁷ And even once it did, the echoes of the mandamus standard were heard in the modern era. As Justice Douglas put the point, the “principle at stake” in judicial deference cases “is no different than if mandamus were sought – a remedy long restricted, in the main, to situations where ministerial duties of a nondiscretionary nature are involved.”⁹⁸ *Chevron*, as Justice Scalia argued in his dissent in *United States v. Mead Corp.*, can be understood as “in accord with the origins of federal-court judicial review,” because “[j]udicial control of federal executive officers was principally exercised through the prerogative writ of mandamus,” which “generally would not issue unless the executive officer was acting plainly beyond the scope of his authority.”⁹⁹

III.

The preceding discussion of *Marbury* may seem like so much ancient history, were it not for the recent Supreme Court opinions addressing the proper relationship between Chief Justice Marshall’s opinion, on the one hand, and *Chevron* and deference to executive interpretation, on the other. Viewing *Marbury* through the lens that I have just described gives us a new set of tools to analyze, and to critique, those recent opinions. But even apart from the recent opinions, *Marbury*’s treatment of “deference” – and, by extension, of semantic ambiguity – has implications for modern legal systems. That is because contrasting our modern approaches to legal questions with past approaches to those same questions is a form of comparative analysis, which can inform us how others approached the same legal issues that we face today – and possibly tell us how better to design our own legal institutions – even when those approaches do not necessarily bind us.

94. *Id.* at 508, 514–15.

95. *Id.* at 515.

96. *Id.*

97. See Bamzai, *supra* note 47.

98. *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318 (1958).

99. *United States v. Mead Corp.*, 533 U.S. 218, 241–42 (2001) (Scalia, J., dissenting).

